Who's the Boss? The Judiciary, the Executive, the Parliament and the Protection of Human Rights

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SENATOR EVANS: The Australian executive government fully respects the international human rights treaties. We've gone out of our way to give Australian citizens the right of access to international tribunals and forums .... We think that these matters ought to, however, be determined primarily by the parliament and by the executive government, rather than, in some instances, by what the courts have been doing — introducing sort of overriding obligations that have not been made part of the law by the Australian parliament. And we've got a quarrel about that. But we have no quarrel at all about international human rights standards being recognised and being given full effect.

SUSANNA LOBEZ: But the government has quite recently overruled or enacted legislation to override the effect of High Court decisions.

SENATOR EVANS: Well that's the way the world works. We are a democracy, and if a parliamentary majority is of the view that some particular matter needs legislative attention in order to make government work properly and effectively and practically and not be made unworkable, then from time immemorial the parliaments have been correcting things that judges have done in that respect.

***Extract from* The Law Report, *ABC Radio National*.**[1]

In the recent survey 'The Australian Rights Project'... 61.1 per cent of respondents considered that the courts, not parliament, should have the final say in deciding upon issues of basic rights and freedoms. Only 38.9 per cent favoured parliament.... The protection of fundamental rights is essential to the preservation of the dignity of the individual and to the modern concept of democracy. Once that is accepted, it is inescapable that the courts have a central role in enforcing fundamental rights, whether those rights have a constitutional or statutory source or look to the general law for protection. ***Sir Anthony Mason*.**[2]

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1. 12 Sept 1995.
2. A Mason 'The State of the Judicature' (1994) 68 Aust L Journ 125, 131, 133. The Australian Rights Project was conducted by Prof JF Fletcher of the University of Toronto and Prof B Galligan, then of the Australian National University.

Over the last 10 years, the Australian judiciary has placed an increasing emphasis on the protection of individual rights and freedoms, drawing on a variety of sources: legislation, the common law, international law and the constitution. In addition, there are now a variety of quasi-judicial tribunals at both state and commonwealth level established to deal with discrimination issues. Recently, however, a disturbing trend has emerged in the response of the executive and the parliament at the commonwealth level to judicial and quasi-judicial decisions which protect human rights. That trend is to seek to override (or even forestall) such decisions through legislation or, where possible, executive action. This article suggests that, while in relation to non-constitutional decisions the parliament clearly has the power to override judicial decisions through legislative action, such a response is often inappropriate and demonstrates the government's lack of commitment to protecting the human rights of all Australians, particularly those most disadvantaged by the Australian democratic system.

In Part I, I shall outline a series of decisions emanating from Australian federal courts and tribunals in recent times which have been based on respect for fundamental human rights and explain the governmental response to those decisions (and here I include the executive and the parliament, as the two seem to work in tandem in overturning rights-based decisions, with dissent only from the minor parties in the Senate). In Part II, I shall demonstrate that, on the whole, the overriding of judicial decisions has occurred in areas where there is perceived to be minimal electoral risk — that is, in relation to the human rights of those already disadvantaged by our political and legal system. I shall also examine the perceptions of the various branches of government as to the role that each branch should play in the protection of individual rights. I shall conclude that the view that democracy is to be equated with simple majoritarianism should be rejected and that this then requires a check on the powers of the parliament and the executive, a role which can currently be played only by the courts.

PART I: DECISIONS AND RESPONSES

1. Teoh: the effect of international human rights treaties

The most recent, and perhaps the most obvious, illustration of the government's knee-jerk response to judicial decisions is the aftermath of the *Teoh* case.[3] In that case, the High Court took a new step in the area of

3. *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353. For more detailed analyses of the High Court's decision in *Teoh*: see K Walker 'Treaties and the Internationalisation of Australian Law' in C Saunders (ed) *The Mason Court and Beyond* (Melbourne: Federation Press, 1996); K Walker & P Mathew '*Minister for Immigration and Ethnic Affairs v Ah Hin Teoh*' (1995) 20 Melb Uni L Rev 236 (case-

the relationship between international law and domestic law and found that ratification of a treaty by the executive could give rise to a legitimate expectation that the commonwealth executive would apply the terms of the treaty in making administrative decisions, even if the treaty had not been implemented by the parliament.[4] The result of the legitimate expectation was that, if a decision-maker intended to depart from the terms of the treaty, she was required to accord a person affected by her decision rights of natural justice — that is, to inform the person of her intention and to permit the person to make submissions on this course of action. This right to natural justice is, it must be emphasised, a weak right; there is no question of requiring the decision-maker to comply with the treaty and no question of enforcing the terms of an unincorporated treaty in domestic law. All that can be done by the courts to enforce this right is to remit the decision to the decision-maker to be re-made after having accorded natural justice to the person affected. It remains possible for the decision-maker to make a decision that breaches the treaty in question.

The High Court decision was greeted with horror by the government, primarily on the basis that it would be impracticable and lead to uncertainty in administration. It was pointed out by the Minister for Foreign Affairs and Trade, Senator Evans, and the Attorney-General, Mr Lavarch, in a Joint Ministerial Statement, that Australia is a party to some 920 treaties and that decision-makers would not know which treaty provisions might be relevant to a decision.[5] In addition, it was claimed that the High Court had effectively made an unincorporated treaty 'part' of domestic law without the requisite act of parliament and had thus permitted the executive to amend the law of Australia contrary to the doctrine of separation of powers.[6] On the other hand, academic commentators, human rights groups and environmental groups treated the decision as a step forward for increased accountability and greater 'integrity in government'[7] which did not involve the court in a radical re-writing of Australian law and did not involve any impermissible

note); M Allars 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh's* Case and the Internationalisation of Administrative Law' (1995) 17 Syd L Rev 204.

4. The general rule with respect to the operation of treaties in domestic law is that a treaty is not part of domestic law until implemented by legislation: see *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; Gibbs CJ, 193; Stephen J, 212; Mason J, 224; *Kioa v West* (1985) 159 CLR 550; Gibbs CJ, 570; *Mabo v Queensland [No 2]* (1992) 175 CLR 1; Brennan J (Mason CJ and McHugh JJ concurring) 55; Deane and Gaudron JJ, 79; *Chu Kheng Lim v Cth* (1992) 176 CLR 1; McHugh J, 74; *R v Dietrich* (1992) 177 CLR 292; Mason CJ and McHugh J, 305; Toohey J, 359-60.

5. Joint Statement by the Minister for Foreign Affairs and the Attorney-General *International Treaties and the High Court Decision in Teoh* (Canberra, 10 May 1995) ('the Joint Ministerial Statement').

6. Joint Ministerial Statement supra n 5, 2.

7. Allars supra n 3, 204.

use of international conventions.[8]

The government's objections to the decision can be divided into practical and legal. The legal objections can be dismissed briefly, as they are based on a misreading of the High Court's decision and a failure to acknowledge the crucial difference between a substantive legal right and a legitimate expectation (which is, by nature, not a substantive legal right but gives rise to a procedural right to natural justice[9] — that is, a right to be treated fairly). The High Court's decision permits treaties to give rise to the latter, but not the former, and so does not permit treaties to be enforced in Australian law. Nor does the decision permit the executive to amend the law of Australia, any more than a statement of government policy which generates a legitimate expectation involves amending the law of Australia.[10] The practical objections, on the other hand, are somewhat more accurate. As decision-making procedures currently stand, *Teoh* has introduced some uncertainty into the process. If *Teoh* was not to be overridden, this would be inevitable for a time, while decision-makers adjusted to the impact of the High Court's decision. It would be necessary to undertake training of decision-makers, to amend departmental manuals and to undertake a general review of decision-making procedures to ensure compliance with the requirements of *Teoh*.[11] Undeniably, this would involve expenditure of time, money and effort within the executive branch, and until these steps were completed there would be some uncertainty in decision-making. However, this expenditure and uncertainty would be temporary. Thus, what the government has said, essentially, is that protection of human rights, even at the minimal level guaranteed by T*eoh*, is too expensive.

In terms of action, the government's response to *Teoh* was twofold. First, the Joint Ministerial Statement fixed upon the fact that a legitimate expectation may be negated by executive statement to the contrary, a feature

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8. Id; Walker supra n 3; Walker and Mathew supra n 3; Submissions to the Senate Legal and Constitutional Legislation Committee by the Victorian Council for Civil Liberties, Defence of Children (International), Sir Ronald Wilson (President of the Human Rights and Equal Opportunity Commission), Justice Elizabeth Evatt, Amnesty International, Public Interest Law Centre, Greenpeace: see Senate Legal and Constitutional Legislation Committee *Report: Administrative Decisions (Effect of International Instruments) Bill* (Canberra, 1995).

9. See generally P Tate 'The Coherence of "Legitimate Expectations" and the Foundations of Natural Justice' (1988) 14 Monash L Rev 15; M Paterson 'Legitimate Expectations and Fairness: New Directions in Australian Law' (1992) 18 Monash L Rev 70.

10. Eg *Haoucher v Minister for Immigration* (1990) 169 CLR 648.

11. Following *Teoh* the government has announced its intention to review decision-making procedures for compliance with international human rights obligations. In addition, Australia has already made a commitment to training decision-makers in human rights issues in its National Action Plan tabled in Geneva at the 50th session of the UN Commission on Human Rights: see Senate Legal and Constitutional Legislation Committee Report supra n 8, 27.

of the doctrine mentioned by a number of the judges in *Teoh*.[12] The ministers stated, on behalf of the government, that:

> Entering into an international treaty is no reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic law. It is not legitimate, for the purpose of applying Australian law, to expect that the provisions of a treaty not incorporated by legislation should be applied by decision-makers. Any expectation that may arise does not provide a ground for review of a decision. This is so, both for existing treaties and for future treaties that Australia may join.[13]

The efficacy of the Joint Ministerial Statement in achieving its aim is not beyond doubt.[14] However, to place the issue beyond doubt, the government has introduced legislation into the parliament specifically to override *Teoh*. This is the Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth) ('the anti-*Teoh* bill'). In the preamble to the bill, the government reaffirms Australia's commitment to the protection of human rights, but the substantive parts of the bill override *Teoh* so that this commitment cannot be monitored by the courts and cannot lead to any expectations in the Australian people that the government will in fact implement international human rights commitments. While the High Court was concerned to ensure that treaty ratification was not merely a platitudinous and ineffectual step,[15] the government has affirmed that treaty obligations are, from a domestic point of view, indeed window-dressing.

The anti-*Teoh* bill is quite limited in scope. It does not purport to alter any other ways in which the courts might use international treaties, in areas such as statutory interpretation or development of the common law. Nor does it render treaties irrelevant to administrative decision-makers.[16] Rather, it attempts to retain maximum discretion for individual decision-makers to decide whether to consider a treaty or not, excluding judicial review for consideration or refusal to consider such instruments. Certainty and practicality in decision-making, it seems, are equated with maximum flexibility for the decision-maker.

After introduction into the Senate, the *Teoh* bill was considered by the Senate Legal and Constitutional Legislation Committee. That committee recommended that the bill be passed without amendment, despite the overwhelming number of submissions critical of the bill and of the government's response to *Teoh*. This outcome was not surprising, given the Opposition's traditional hostility to international law generally and, more

12. Supra n 3; Mason CJ and Deane J, 365; Toohey J, 374.
13. Joint Ministerial Statement supra n 5, 2.
14. Allars supra n 3, 237-241; Walker supra n 3.
15. *Teoh* supra n 3; Mason CJ and Deane J, 365; Toohey J, 373.
16. Cl 7.

particularly, international human rights treaties.[17] The Greens (WA) filed a dissenting report, but this will have little impact on the outcome of the vote in the Senate. Where the government and the Opposition combine to support legislation there is clearly little chance of its defeat. Thus, it seems likely that the *Teoh* bill will be passed, and there is little room to doubt its constitutionality or effectiveness.

Teoh and its aftermath have focused attention on the government's implementation of international human rights treaties. However, while the governmental response to *Teoh* is in part based on the Court's surprising use of international conventions in the area of administrative law, the anti-*Teoh* bill also needs to be seen in a broader context as one of a number of recent examples of governmental action to override judicial decisions based on rights.

2. The defence forces and HIV positive status

In July 1995, the Human Rights and Equal Opportunity Commission, the body charged by legislation with overseeing Australia's implementation and protection of human rights,[18] ruled that the army had acted unlawfully in dismissing a man who was HIV positive.[19] Commissioner Carter found that the man in question had no present physical incapacity which prevented him from carrying out his duties satisfactorily and was in excellent health. The only reason for his dismissal was his HIV status. This constituted impermissible discrimination, in breach of section 15(2) of the Disability Discrimination Act 1992 (Cth). The commissioner held that section 51(4) of the Act, which permits discrimination where the effect of the disability is such as to prevent the person from carrying out the inherent requirements of the particular employment, was not applicable to the facts in this case. Following the decision, Senator Ray, Minister for Defence, announced that he intended to legislate to override the decision and exclude all HIV positive people from the defence forces,[20] and in December 1995, federal cabinet approved regulations to ban HIV positive recruits from joining the Australian

17. As revealed, for example, by the debate concerning the introduction of the Human Rights (Sexual Conduct) Act 1994 (Cth) which gave effect to part of the International Covenant on Civil and Political Rights: see Senate Legal and Constitutional Legislation Committee *Dissenting Report on the Human Rights (Sexual Conduct) Bill 1994* (Senators Abetz, Ellison and O'Chee) 8.

18. Human Rights and Equal Opportunity Commission Act 1981 (Cth); Sex Discrimination Act 1984 (Cth); Racial Discrimination Act 1975 (Cth); Disability Discrimination Act 1992 (Cth).

19. *X v Dept of Defence* Human Rights and Equal Opportunity Commission (JW Carter QC) no H94/1998 29 Jun 1995.

20. T O'Connor 'Ray Says Government Considering Legislation Over Military HIV Case' AAP (7 Jul 1995); M Blenkin 'Government to Legislate to Keep HIV Out of Defence' AAP (1 Aug 1995).

Defence Force.[21]

It should be emphasised that the Disability Discrimination Act already includes specific exemptions directed at permitting the defence forces to discriminate against a person on the ground of disability where the employment involves performance of combat or combat-related duties.[22] Counsel for the Defence Department did not rely on that provision, and the commissioner found that it was inapplicable to the facts of this case. Thus the commonwealth, having established a regime to protect people with disabilities from discrimination that already contains express, broad exemptions for the military is nonetheless not prepared to accept the application of the regime when an individual seeks to rely on it.

3. Minister for Immigration v A: China's one-child policy

China has a governmental policy limiting families to one child only. This policy is, on occasion, enforced through coercive measures such as abortion and forced sterilisations.[23] A number of Chinese asylum-seekers have attempted to rely on the one-child policy as a ground for their claim of refugee status under the Convention Relating to the Status of Refugees, which is in part implemented by the Migration Act 1958 (Cth). In *Minister for Immigration and Ethnic Affairs v A*,[24] Sackville J upheld the claims on the basis that the asylum-seekers had a well-founded fear of persecution because of their membership of a particular social group.[25] In reaching that conclusion, Sackville J defined the social group of which the applicants were members by reference to the persecution they suffered. The government, on the other hand, contended that this way of defining a social group was circular, and that a social group had to be defined independently of the persecution suffered. As Mathew acknowledges, the government's construction of the argument is 'not lacking in logic';[26] nor, however, is the decision of Sackville J, which acknowledged that in some instances the question of persecution and social groups may be intertwined, so that a social group may indeed be defined by the persecution it suffers at the hands of the government.[27]

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21. C Stewart 'Cabinet Bans HIV Positive Applicants from Defence Force' *The Australian* 6 Dec 1995.
22. S 53.
23. *Minister for Immigration v A* (1995) 127 ALR 383, 384, 386.
24. Ibid. For a detailed discussion of the case and the governmental response: see P Mathew 'Retreating From the Refugee Convention' in P Alston & M Chiam (eds) *Treaty-Making and Australia* (Melbourne. Federation Press).
25. This is part of the definition of 'refugee' within the 1951 Refugee Convention and is incorporated into Australian law by the Migration Act 1958 (Cth) s 4.
26. Mathew supra n 24, 7.
27. *Minister for Immigration v A* supra n 23, 403; see also *Morato v Minister for Immigration* (1992) 39 FCR 401; Black CJ, 406.

The purpose of this piece is not to argue for one interpretation or the other, but simply to point out the government's response to yet another decision of which it did not approve. The government introduced legislation into the parliament to override Sackville J's decision: the Migration Amendment Legislation Bill (No 4) 1995 (Cth) would have precluded asylum-seekers from relying on the one-child policy as a basis for a claim for refugee status. Ultimately, the legislation was not needed, as the Full Federal Court reversed Sackville J's decision.[28]

4. The Lim case: protection of asylum-seekers[29]

In 1992, the Federal Court set aside executive decisions refusing a group of Cambodian asylum-seekers refugee status.[30] The asylum-seekers then sought release from detention on the basis that their initial detention was not authorised by legislation; but two days before the hearing was due to commence the parliament passed amendments to the Migration Act 1958 requiring mandatory detention of 'designated persons' in certain circumstances and prohibiting a court from ordering the release of a designated person.[31] The legality of the initial detention of the asylum-seekers and the validity of the legislation passed to prevent their release found its way to the High Court, culminating in *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs*.[32] The *Lim* case and its aftermath provide yet another example of the government's response to judicial decisions designed to protect human rights.

The High Court's decision in *Lim* has been described as a pyrrhic victory for the Cambodian asylum-seekers.[33] Although the Court held that the initial detention of the Cambodian asylum-seekers was illegal because it amounted to executive detention not justified by legislation,[34] it found that the amendments to the Migration Act requiring mandatory detention were valid, with the exception of section 54R which attempted to exclude judicial powers to order a person's release from detention. This meant that the asylum-

28. *Minister for Immigration v A & B* (1995) 130 ALR 48.
29. For detailed discussions of *Lim* and the events surrounding it: see P Mathew 'Sovereignty and the Right to Seek Asylum: The Case of the Cambodian Asylum-Seekers in Australia' (1994) 15 *Aust Year Book of Int'l Law* 35; M Crock 'Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum-Seekers in Australia' (1993) 15 Syd L Rev 338.
30. The order of O'Loughlin J (15 Apr 1992) is unreported, but was made after the Minister for Immigration conceded that the decisions were fundamentally flawed: see Crock supra n 29, 339-340. Cf *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 39, 60.
31. Migration Act, Pt 2, Div 6.
32. *Lim* supra n 29.
33. Crock supra n 29, 338.
34. *Lim* supra n 29; Brennan, Deane and Dawson JJ, 107-110; Toohey J, 126-127; Gaudron J, 134; McHugh J, 143.

seekers validly remained in detention. However, it also raised the possibility of claims for compensation in relation to the earlier, illegal period of detention.

The governmental response to *Lim* was to introduce legislation limiting compensation claims for illegal detention to the sum of $1 per day ('the *Lim* amendment').[35] Although this did not directly override the High Court's decision, the legislation in effect overrode the decision as it attempted to deprive the asylum-seekers of their legal rights which flowed from the decision. Shortly afterwards, the High Court decided in *Georgiadis v Australian and Overseas Telecommunications Corporation*[36] that removal of a cause of action against the state may amount to an acquisition of property on other than just terms within the meaning of section 51(xxxi) of the constitution, which cast doubt on the validity of the *Lim* amendment. This prompted a further bill attempting to avoid invalidity,[37] but this legislation has been held up in the Senate.

The entire process surrounding the Cambodian asylum-seekers' claims for refugee status illustrates that the government's preferred mode of dealing with refugee and immigration issues is to legislate in a piecemeal and reactive fashion. At every turn, the government attempted to pre-empt or reverse judicial decisions which were of benefit to the asylum-seekers. Rather than accepting that the executive should be bound by the legislative regime established to deal with claims for refugee status and other migration issues, the government preferred to continually attempt to adjust the legislation to bring it into line with decisions the executive had already made on these issues. Because of the sensitive nature of immigration issues in the Australian context, the main Opposition parties (namely, the Liberal and National parties) were generally supportive of the government's approach and so executive will was translated into legislative action, regardless of the consequences for human rights.

6. ACTV and Nationwide News: Constitutional freedom of expression

The High Court's decisions in *ACTV v The Commonwealth*[38] and *Nationwide News v The Industrial Relations Commission*[39] are well-known and do not require detailed elaboration. Essentially the Court decided that the Australian constitution includes, by implication, a guarantee of freedom

35. Migration Act 1958, s 184.
36. (1994) 179 CLR 297.
37. The Migration Amendment Legislation Bill (Nos 2 and 3) 1994 (Cth).
38. (1992) 177 CLR 106.
39. (1992) 177 CLR 1.

of political expression. The rationale for this conclusion was that such a freedom is necessary in order for representative government, as provided for by the constitution, to function effectively. The Court struck down commonwealth legislation which violated the guarantee. To some extent, these cases may seem out of place here, as the government was unable to override them due to their constitutional foundation. However, debate following the decisions was illustrative of the government's views on human rights protection and the judicial role. There was considerable governmental anger about the Court's perceived activism, particularly in relation to the *ACTV* case which prevented the parliament from restricting political advertising. The free speech cases were seen by some members of parliament as a gross usurpation of the parliamentary function and as a move by the Court out of the proper judicial sphere.[40]

PART II: ANALYSIS

I want to emphasise that I am not suggesting that the government never acts to protect human rights, or that it always intervenes to override rights-based judicial or quasi-judicial decisions. The governmental response to *Mabo [No 2]* is an example of a case where the parliament legislated to put into effect a judicial decision which recognised the rights of Aboriginal people, rather than overriding the decision.[41] Nor am I suggesting that the High Court, or other courts, always decide cases in a way that furthers the protection of human rights. For example, in *Brandy v Human Rights and Equal Opportunity Commission*,[42] the High Court adopted a narrow construction of the doctrine of separation of powers which made prevention of discrimination on the grounds of race (or sex) more difficult.[43] However, I am suggesting that the cases discussed above indicate a disturbing trend of governmental attempts to nullify judicial decisions in the human rights area, particularly where they are directed at protecting individuals from abuses of rights by the state. This leads me to two important issues. First, whose rights are being overridden? And, secondly, what are the perceptions of the various branches of government as to which branch is properly charged with the protection of rights?

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40. F Devine 'Judging the Judges' *The Australian* 9-10 Oct 1993, p 4, quoting Senator Shacht; P Wilson 'Tate Slams High Court Judge — Parliament's Role Will Be Usurped, Warns Minister' *The Australian* 8 Oct 1992, pp 1, 4.
41. That is not to discount criticisms of the High Court's decision in *Mabo [No 2]* (1992) 175 CLR 1 or of the working of the Native Title Act; but such criticisms do not impact on the point being made.
42. (1995) 127 ALR 1.
43. By invalidating provisions of the Racial Discrimination Act 1975 (Cth) which permitted enforcement of a HREOC decision as if it was an order of the Federal Court.

1. Whose rights?

On the whole, Australia has a good human rights record, particularly in contrast to totalitarian states. But that does not justify complacency about human rights. And it also ignores the fact that those of us who enjoy human rights are those already privileged by Australian society and the democratic system. Human rights are at their most necessary when it comes to those not privileged by the existing political and legal structures — and it is the rights of these groups which are so often being overridden by the government.

The primary group which may be identified from the cases discussed above consists of refugees and asylum-seekers, although this group could be extended more generally to include non-citizens. Notwithstanding the relatively small numbers of asylum-seekers who arrive on Australian shores and the physical difficulties they face in doing so, asylum-seekers are perceived as such a threat to Australia's integrity that they deserve minimal rights protection. Politically, it is possible for the government to take this approach to the rights of non-citizens because of the continuing racism of Australian society and the fear of Asian immigration which has permeated Australian culture since before federation. No votes will be lost in denying asylum-seekers rights; indeed, it will not even be a major election issue, as the Opposition has, on the whole, supported the government's legislative regime in this area, leaving only the minor parties to object.[44] It must also be noted, however, that the High Court itself has denied full human rights protection to non-citizens. In *Lim*, the High Court held that the parliament may authorise executive detention of non-citizens seeking to enter Australia without violating the constitutional separation of powers. And in *Cunliffe v The Commonwealth*,[45] a majority of the Court (Mason CJ dissenting) held that non-citizens are not entitled to the protection afforded by the constitutional guarantee of freedom of political expression. Citizenship, therefore, marks a boundary around rights protection recognised by the courts.

Secondly, as illustrated by the HIV dismissal case, people with disabilities, particularly when HIV and AIDS related, are more vulnerable to rights violation by the state than others in our community. Notwithstanding the enactment of legislation to protect people with HIV from discrimination, the government is unwilling to permit this legislative regime to extend to preventing discrimination by an arm of the state, the defence forces. Once again, a group already facing hostility and exclusion from many of society's structures and institutions is an easy target for reduction of rights, with minimal electoral risk for the government.

44. Eg the debates surrounding the passage of the Migration Amendment Act (No 4) 1992 (Cth), following *Lim*: Hansard (HR) 16 Dec 1992, 3949.

45. (1994) 182 CLR 272.

Paralleling this is the government's response to the *Toonen* case and the United Nations Human Rights Committee's conclusion that Australia was in breach of international human rights obligations as a result of Tasmania's criminalisation of gay male sex. At first glance, it might be thought that the passing of the Human Rights (Sexual Conduct) Act 1994 (Cth), which provided that consensual sexual conduct conducted in private is not to be subject to any arbitrary interference with privacy within the meaning of Article 17 of the ICCPR,[46] was a victory for the protection of individual rights in Australia. However, the legislation is not viewed in this light by the Tasmanian Gay and Lesbian Rights Group, those most affected by the Tasmanian laws. First, the legislation is not expressly inconsistent with the provisions of the Tasmanian Criminal Code criminalising gay male sex; the act precludes arbitrary interference with sexual activity conducted in private, but there is no authoritative definition of 'arbitrary interference' in Australian law and the Tasmanian government continues to claim that its laws are not affected by the Commonwealth legislation because they are not arbitrary.[47] While this argument has little chance of success before the courts, it nonetheless requires the gay community to take legal action in the High Court to resolve the issue, as the Tasmanian government continues to rely on the Tasmanian Criminal Code to justify discrimination against and harassment of gay men and lesbians in Tasmania.[48] Secondly, the commonwealth legislation is based only on the notion of privacy, a concept that has little to offer gay men and lesbians apart from the right to have sex in their own bedrooms.[49] It will not prevent discrimination by the wider community, nor will it prevent discriminatory policing practices concerning crimes such as 'offensive behaviour' which can be used to prosecute gay men and lesbians for activities such as kissing in public. The Human Rights Committee made it clear that gay men and lesbians are protected from discrimination by the ICCPR,[50] so the commonwealth's refusal to enact legislation based on the right to equality was not based on legal restrictions but on political will. Rather than being a triumph for the protection of human rights in Australia, the Human Rights (Sexual Conduct) Act was a triumph

46. S 4(1).

47. R Croome 'The High Court and Gay Law Reform in Tasmania' Alternative L Journ (Dec 1995); W Morgan & K Walker 'Privacy Bill Leaves Gay Rights in Limbo' *The Australian* 22 Sept 1994, p 13. See also W Morgan 'Protecting Rights or Just Passing the Buck? The Human Rights (Sexual Conduct) Bill 1994' (1994) 1 Aust Journ of Human Rights 1.

48. Croome, ibid.

49. W Morgan 'Identifying Evil for What it Is: Tasmania, Sexual Perversity and the UN' (1994) 19 Melb Uni L Rev 740, 753-754.

50. On the basis that 'sex' in Arts 2 and 26 of the ICCPR includes 'sexual orientation': see IA Shearer 'The Communication of Nicholas Toonen concerning Australia: Communication No 488/1992 — Explanatory Note' (1995) 69 Aust L Journ 600, 608.

of political cunning.[51]

It is my contention that the cases discussed in Part I demonstrate that the executive and the parliament are willing to override (or fail to protect) basic human rights where it is electorally safe to do so. The area of immigration is the clearest example of this, but the denial of rights to persons with HIV positive status illustrates that this approach to rights goes beyond non-citizens. What is particularly significant about this willingness is not just that disadvantaged and marginalised groups are being excluded from rights protection, but that notwithstanding its commitment to non-discrimination and protection of rights through various legislative measures such as the Racial Discrimination Act 1975 (Cth), the Sex Discrimination Act 1984 (Cth) and the Disability Discrimination Act 1992 (Cth), the government is not willing to have certain rights enforced against itself. This subverts one of the fundamental purposes of human rights law: the protection of individuals from violations of their rights by the state.[52] Thus, while willing to proclaim to the world Australia's commitment to human rights and to ratify human rights instruments, the government is not prepared for the Australian people to hold any expectation that the government will actually adhere to such treaties. And, while willing to enact legislation preventing discrimination on the ground of disability, the government is not prepared to have that legislation enforced against its own arm, the defence forces.

2. Democracy and the role of the courts

> Some principles are fundamental and it is the role of an independent judiciary to give effect to those principles, within the rule of law, as best it can. Although the relationship in our society between the authority of the legislature and the rule of law fluctuates over the course of time, the rule of law is the dominant factor in the relationship. This explains the efficacy of the rule of law as a means both of protection against the misuse of legislative and executive power and of promotion of fundamental rights and principle. Justice Toohey.[53]

The debate about rights protection has led also to a debate within and between the branches of government as to which branch should be the

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51. For a detailed analysis of the commonwealth's response to the *Toonen* case: see Croome supra n 47; Morgan supra n 47.

52. The limitation of rights to protection of individuals from the state has been criticised by critical legal scholars and by feminists, who point out the limitations of this conception of rights: see H Charlesworth 'The Australian Reluctance About Rights' in P Alston (ed) *Towards an Australian Bill of Rights* (Canberra: Human Rights and Equal Opportunity Commission and Centre for International and Public Law, 1994) 21, 45 et seq. However, such criticisms do not, in my view, mean that rights should not involve protection of individuals from the state.

53. J Toohey 'A Government of Laws and Not of Men?' (1993) 4 Pub L Rev 158, 174.

guardian of fundamental human rights. This is related to the more general debate about the role of the courts vis-a-vis the parliament and the executive and, in particular, whether judges do and should 'make law'. It is not possible to do justice to that debate in this article, but I will touch upon some aspects of it. In any event, it is a debate which has been dealt with in a variety of other places.[54]

I am certainly not the first commentator to observe that the High Court, in particular, has recently adopted the view that the courts are better protectors of human rights than the parliament or the executive and, indeed, that the people of Australia require protection from these two institutions of government.[55] As Geoffrey Kennett points out, the High Court now 'appears to approach the other arms of government with a high degree of scepticism about their motives'.[56] Express statements have been made extra-curially by Sir Anthony Mason while Chief Justice[57] and by Justice Toohey, who has commented that:

> Today there is an increasing recognition of the tension between deference to the will of parliaments as expressed in legislation and maintenance of the rule of law, as parliaments are increasingly seen to be the de facto agents or facilitators of executive power rather than bulwarks against it.[58]

On another occasion, Justice Brennan had this to say:

> As the wind of political expediency now chills parliament's willingness to impose checks on the executive and the executive now has a large measure of control over legislation, the courts alone retain their original function of standing between government and the governed.[59]

The Court's increasing emphasis on the protection of individual rights, which has ranged from the implication of a constitutional right of freedom of political expression[60] and perhaps of equality,[61] to re-vitalising or changing

54. Eg M McHugh 'The Law-Making Function of the Judicial Process' (1988) 62 Aust L Journ 15-31, 116-127; J Toohey ibid; P Finn 'Of Power and the People: Ends and Methods in Australian Judge-Made Law' (NSW, 1994); G Kennett 'A Risky Kind of Law-Making' *Aust Lawyer* (Dec 1993) 35; G Barwick 'Parliamentary Democracy in Australia' (1995) 25 UWAL Rev 21; B Lane 'The Rights Fight' *The Australian* 23 Oct 1995, p 11; Wilson supra n 40.

55. Eg J Doyle 'Constitutional Law: At the Eye of the Storm' (1993) 23 UWAL Rev 15, 29; G Kennett 'A Risky Kind of Law-Making' *Aust Lawyer* (Dec 1993) 35, 36; P Mathew 'International Law and the Protection of Human Rights in Australia: Recent Trends' (1995) 17 Syd L Rev 177.

56. Kennett, ibid.

57. Eg A Mason 'Changing the Law in a Changing Society' (1993) 67 Aust L Journ 568, 573; Mason supra n 2, 133.

58. Toohey supra n 53, 163.

59. G Brennan 'Courts, Democracy and the Law' (1991) 65 Aust L Journ 32, 35.

60. *ACTV* supra n 38 and *Nationwide News* supra n 39.

61. See *Leeth v Cth* (1992) 174 CLR 455.

the common law,[62] to a presumption of statutory interpretation that the parliament does not intend to override fundamental common law rights in the absence of a clear, perhaps express, indication to the contrary,[63] can be taken as an indication that the Court sees its role, at least in part, as the protector of the individual against abuses of rights by both the parliament and the executive.

Coupled with this view of the parliament and the executive is an understanding of democracy going beyond simple majoritarianism. This involves a recognition that in large, multicultural societies such as our own, it is no longer accurate to consider the parliament as necessarily representing the will of the majority on every issue[64] and, more importantly, a recognition that democracy may, in some circumstances, require limitations on the ability of even a true majority to violate the rights of a minority. In other words, democracy requires some protection of the weak from the strong, and can no longer be equated with simple majoritarianism.[65] Thus, the courts' activism in the area of human rights is seen as enhancing democracy, rather than as undemocratic.[66] This view of democracy underpins the location of a guarantee of freedom of political expression in the constitution: it is not permissible, in a society based on representative democracy, for the majority to silence a minority's freedom of expression except in limited circumstances.

The reaction of the government to recent judicial and quasi-judicial decisions has, to some extent, borne out the High Court's rather jaundiced view of executive and parliamentary motives and legitimacy. The cases discussed in Part I demonstrate that, in many instances, the government will override human rights where that course is constitutionally permitted. No longer can it be said to be unnecessary to protect the people from abuses of rights by their elected representatives[67] (if this was ever the case). However, various members of the parliament and the executive have expressed the view that the Court, in its recent concern with human rights, has stepped

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62. Eg *R v L* (1992) 174 CLR 379, where the Court changed the common law to recognise that a man could be convicted of rape in marriage; *Mabo v Qld [No 2]* supra n 4, where the Court relied in part on international law to justify changing the common law to recognise native title.
63. Eg *R v Coco* (1993) 179 CLR 427, where the Court affirmed, in dealing with authorisation of phone-tapping, the proposition that a statute would not be taken to authorise trespass to property unless there is a clear manifestation of parliamentary intention to authorise such trespass; cf *Re Bolton; ex parte Beane* (1987) 162 CLR 514.
64. Toohey supra n 53, 172; G Brennan 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response' in Alston supra n 52, 177, 179-180; McHugh supra n 54, 123-124.
65. Eg Brennan, ibid; McHugh supra n 54, 123-4; Charlesworth supra n 52. Cf Barwick supra n 54, 21-22, 24, 28-29.
66. McHugh supra n 54, 123-4.
67. *Convention Debates* Vol IV (Melb, 1898) 686-689.

outside the proper judicial role and into the legislative arena. This is the case both in relation to the Court's occasional changing of the common law and, more vocally, in the realm of implied constitutional rights. Thus, after Justice Toohey's extra-curial speech in October 1992 emphasising the importance of the rule of law for the protection of individual rights and discussing the possibility of a judicially implied constitutional bill of rights, Senator Tate, then Minister for Justice 'warned the High Court that it would not be allowed to usurp parliament's role in protecting human rights';[68] and Senator Evans has, more recently, indicated his views on the Court's recent activism to protect human rights.[69] At bottom, the debate is, as Bernard Lane has aptly put it, 'a simple enough struggle for power' — not, however, a grab for power by the courts, but rather a fear on the part of the government that its power over Australian citizens is being undermined by judges placing limits on that power, notwithstanding that such limits are imposed as a result of the application of legal principles and, on occasion, as a result of the government's own legislative regimes.

CONCLUSION

The role of the courts in a democracy is an issue on which views can and do differ. However, it is my contention that the courts' increased emphasis on protection of individual rights reflects the fact that it is inadequate to equate democracy with simple majoritarianism. Very often minority groups need protection from the oppressive whim of the majority, as the Tasmanian gay rights issue so clearly demonstrates. Some check on naked majoritarian power is necessary for a truly democratic society based on the encouragement of diversity, rather than its negation. Currently, the courts seem to be the only institution capable of providing that check, but that is not to say that the courts are the ideal institution for such a role (particularly given the homogeneity of their composition in Australia), or that rights are a panacea to solve all issues of oppression and marginalisation.[70] The experience of constitutional rights in Canada and the United States indicates that, in some cases, rights may do more harm than good;[71] but equally there have been some notable steps towards equality

68. Wilson supra n 40.

69. Interview broadcast on Radio National supra n 1; 'The Impact of Internationalisation on Australian Law: A Commentary' *The Mason Court and Beyond* (Melb, 8-10 Sept 1995) (conference).

70. Indeed, the liberal concept of rights has been critiqued significantly in recent years: see J Morgan, 'Equality Rights in the Australian Context: A Feminist Assessment' in Alston supra n 52, 123, 123-131; Charlesworth supra n 52. However, a discussion of the theoretical shortcomings of liberal rights discourse is beyond the scope of this paper.

71. Eg *R v Seaboyer and Gayme* (1991) 48 OAC 81 (SCC), discussed in E Sheehy 'Feminist

based on the invocation of rights by marginalised groups.[72] On occasion, rights may provide a useful strategic tool for those previously denied protection by the legal and political institutions of the state and a site of intervention where dominant cultural norms may be challenged.[73]

The debate about the role of the courts and the role of the parliament and the executive is, in effect, a debate about whether the government should have the power to override the rights of individuals. This leads squarely into the bill of rights debate, a debate which is beyond the scope of this article.[74] However, the government's current record of overriding or forestalling judicial decisions which impact on the government's own behaviour supports those who argue that there is a need for an entrenched bill of rights in Australia which would provide a clear mandate to the courts to act as a check on the abuse of legislative and executive powers.

Argumentation before the Supreme Court of Canada in *R v Seaboyer*; *R v Gayme*: The Sound of One Hand Clapping' (1992) 18 Melb Uni L Rev 450; *Bowers v Hardwick* (1986) 478 US 186, discussed in K Walker 'The Participation of the Law in the Construction of (Homo)Sexuality' (1994) 12 Law in Context 52.

72. Eg *Egan v Canada* (1995) 124 DLR (4th) 609, where the Canadian Supreme Court held that the equality provision of the Canadian Charter of Rights and Freedoms prohibited discrimination on the basis of sexual orientation (although a majority considered the legislation under challenge valid, partly on the basis that it constituted reasonable regulation under s 1 of the Charter — an indication of the ability of rights discourse to uphold and deny rights simultaneously).

73. P Williams *The Alchemy of Race and Rights* (Cambridge: Harvard UP, 1991) 159; Morgan supra n 49, 156-157.

74. For a comprehensive starting point on the bill of rights debate in Australia: see P Alston (ed) *A Bill of Rights For Australia?* (Canberra: Human Rights and Equal Opportunity Commission and Centre for International and Public Law, 1994).