EXTRA-CONSTITUTIONAL NOTIONS IN AUSTRALIAN CONSTITUTIONAL LAW

GEORGE WINTERTON*

INTRODUCTION

Australia has, mercifully, been spared from revolutionary changes of *grundnorm* or "rules of recognition", with their consequential appeals to "necessity", of the sort which have plagued courts in Pakistan, Uganda, Ghana, Nigeria, Zimbabwe, the Seychelles and Grenada, among others. But that has not meant that arguments based upon extra-constitutional powers and prohibitions have been absent from Australian constitutional jurisprudence. Human ingenuity being what it is, commentators and even judges, undaunted by the absence of a tenable constitutional argument, have occasionally resorted to extra-constitutional notions.

This paper explores the boundary between *constitutional* rules and principles and *extra-constitutional* political notions. That boundary is, of course, indistinct because the constitution includes implied powers and prohibitions. Hence, opinions will inevitably differ as to whether a particular power or prohibition is implied in the Constitution and, thus, is *constitutionally* conferred or imposed, or alternatively arises (if at all) *extra-constitutionally*. The absence of a constitutional Bill of Rights probably enables the boundary to be discovered more readily in Australia than in the United States, where vague constitutional concepts such as "due process of law" and "the equal protection of the laws" have allowed "non-interpretivists"[1] to claim, with some plausibility, that they are merely "interpreting" and "applying" the constitutional language, or at least its "emanations" and "penumbras".[2] As Justice Murphy's "implied Bill of Rights"[3] demonstrates, Australian non-interpretivists have a harder task because they simply lack any constitutional text whatever upon which to base what their American counterparts supposedly derive from theirs. Nevertheless, since a claim that rights or powers are conferred by the Constitution is far more compelling than one recognizing that they are not and must be derived extra-constitutionally (if at all), assertions of extra-constitutional rights or powers are rare, and usually masquerade as constitutional implications.

Although doctrinally this topic concerns the periphery of constitutional law, it is certainly not "peripheral" in importance. Questions such as whether courts can invalidate otherwise-valid Commonwealth and State laws on the ground that they infringe fundamental civil liberties,[4] or whether the execu-

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*LLB (Hons), LLM (W Aust); JSD (Columbia). Associate Professor of Law, University of New South Wales. An earlier version of this paper was originally presented as a National Report on "The Limits of Constitutional Law" at the Twelfth International Congress of Comparative Law, Sydney-Melbourne, August 1986.

[1] For the meaning of this term, see J H Ely, *Democracy and Distrust* (1980), Ch 1.

[2] *Griswold* v *Connecticut* (1965) 381 US 479; *Roe* v *Wade* (1973) 410 US 113, 152-53; T C Grey, "Do We Have an Unwritten Constitution?" (1975) 27 Stan L Rev 703, 709-713.

[3] *Infra* Part 2A.

[4] *Ibid.*

tive can exercise powers, especially in an emergency, beyond those conferred by the Constitution[5] are hardly issues of minor or merely "peripheral" significance.

1. CONSTITUTIONAL AND EXTRA-CONSTITUTIONAL PRINCIPLES

Questions concerning the use of extra-constitutional notions frequently raise two issues. It will first be necessary to determine whether the relevant rule or principle can reasonably be implied from the constitutional language. Resolution of this question is rarely easy because opinions will inevitably differ regarding the unstated presuppositions and implications which inhere in particular constitutional provisions – in other words, what can reasonably be implied therefrom. It can, for example, be inferred from the constitutional provisions establishing a national Parliament with two chambers "directly chosen by the people"[6] that Australia is a representative democracy.[7] But can one also imply from those provisions that each vote must have equal value,[8] and that freedom of speech, movement and communication throughout the Commonwealth are constitutionally guaranteed, as Justice Murphy has held?[9] (Justice Murphy indeed, argued that "the union of the people in an indissoluble Commonwealth" itself implies freedom of movement throughout Australia.[10])

Second, and at least as important, is the question of the use to which the relevant principle is put. Employing a principle as an aid to constitutional interpretation, for example, is entirely different from invalidating legislation on the ground that it conflicts with some fundamental limitation.

It is seldom expressly acknowledged that a principle is extra-constitutional, such occasions usually being confined to emergency situations, such as revolutions, coups d'etat, and martial rule. Judges and commentators invariably (and understandably) prefer to claim that the applicable rule or principle is implied in the Constitution; if not in a specific provision, then at least in the constitutional structure[11] or the "emanations" and "penumbras" of specific provisions,[12] or that the rule or principle entered the constitutional

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[5] G Winterton, "The Concept of Extra-Constitutional Executive Power in Domestic Affairs" (1979) 7 Hast Const LQ 1.

[6] Commonwealth Constitution ss 1, 7, 24.

[7] *Western Australia* v *Commonwealth* (1975) 134 CLR 201, 283-284 per Murphy J. See also *Federal Commissioner of Taxation* v *Munro* (1926) 38 CLR 153, 178 per Isaacs J: "the Constitution is for the advancement of representative government. . . ."

[8] *A-G of Commonwealth (ex rel McKinlay)* v *Commonwealth* (1975) 135 CLR 1, 70-71 per Murphy J, dissenting.

[9] *Miller* v *TCN Channel Nine Pty Ltd* (1986) 67 ALR 321, 336-337; *Uebergang* v *Australian Wheat Board* (1980) 145 CLR 266, 311-312; *McGraw-Hinds (Aust) Pty Ltd* v *Smith* (1979) 144 CLR 633, 670; *Ansett Transport Industries (Operations) Pty Ltd* v *Commonwealth* (1977) 139 CLR 54, 87-88.

[10] *Buck* v *Bavone* (1976) 135 CLR 110, 137; *Miller* v *TCN Channel Nine Pty Ltd* (1986) 67 ALR 321, 337.

[11] eg *A-G for Australia* v *R* [1957] AC 288, 311 (PC) (the *Boilermakers* case); G Winterton, *Parliament, the Executive and the Governor-General* (1983) 56-57 (separation of powers).

[12] *Griswold* v *Connecticut* (1965) 381 US 479, 484-486 (right of marital privacy).

matrix via the common law.[13] However, as will be seen, some claims of constitutional implication are really too tenuous to be sustained, so that the relevant precept must be regarded as extra-constitutional. Moreover, an admittedly constitutional principle may be employed for extra-constitutional purposes.

Judges engaged in *statutory* interpretation regularly refer to non-constitutional considerations, such as the rules and doctrines of the common law,[14] and widely-held ethical principles, such as fundamental notions of liberty, fairness and natural justice.[15] In a provocative essay arguing that judges, when construing legislation, should not be reticent in according substantive ethical content to the rule of law,[16] Trevor Allan recently remarked:

> A statute cannot be understood or interpreted except in its context, which of course includes the moral and social values prevalent in the community. It does not exist as an independent entity isolated from the values and preconceptions of the people, reflected at least broadly in those of the judges. Nor can it be understood in isolation from the existing legal framework into which it is projected.
> . . . [The rule of law] requires the judges to draw on their perceptions of the most fundamental moral and social values of the community in order that their application of legislation conforms, so far as possible, with common standards of justice and reasonableness.[17]

Judges engaged in *constitutional* interpretation have routinely implied principles, such as federalism,[18] responsible government,[19] the separation of powers,[20] democratic representative government,[21] and Commonwealth-State inter-governmental co-operation[22] from the constitutional text and/or

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[13] eg Sir Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 ALJ 240, reprinted in O Dixon, *Jesting Pilate* (1965) 203 (parliamentary supremacy).

[14] eg *Kingswell* v *R* (1985) 159 CLR 264, 280 per Gibbs CJ, Wilson and Dawson JJ, referring to "fundamental principle".

[15] eg *Sillery* v *R* (1981) 35 ALR 227, 230 (Gibbs CJ, Aickin J concurring) 232, 233-234 (Murphy J); *McInnis* v *R* (1979) 143 CLR 575, 586-589 (Murphy J, dissenting); *R* v *Bolton; ex parte Beane* (1987) 70 ALR 225, 231-232 per Brennan J. See generally D C Pearce, *Statutory Interpretation in Australia* (2nd ed 1981) paras 111, 113-116; D L Keir and F H Lawson, *Cases in Constitutional Law* (6th ed by F H Lawson and D J Bentley 1979) 12, 16-19; F A R Bennion, *Statutory Interpretation* (1984) 285-316; *Building Construction Employees and Builders' Labourers Federation* v *Minister for Industrial Relations* (1986) 7 NSWLR 372, 405-406 per Kirby P, 413 per Mahoney J A.

[16] T R S Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" [1985] CLJ 111, especially 119-122, 124-125, 129-130, 133 *ff.*

[17] *Ibid* 122, 124-125. See also T R S Allan, "The Limits of Parliamentary Sovereignty" [1985] PL 614, 616; *infra* n 55.

[18] L Zines, "The State of Constitutional Interpretation" (1984) 14 F L Rev 277, 279-286.

[19] Winterton, *supra* n 11, 76.

[20] *Ibid* Ch 4.

[21] eg *Western Australia* v *Commonwealth* (1975) 134 CLR 201, 270-271, 283-286 per Mason J and Murphy J respectively (Constitution s 122 prevails over s 7); 275-277 per Jacobs J (s 57, especially the dissolution of both Houses of Parliament, does not raise justiciable issues); *A-G of Commonwealth (ex rel McKinlay)* v *Commonwealth* (1975) 135 CLR 1, 71-72 per Murphy J, dissenting (Constitution s 24 embodies the principle of equality of voting power).

[22] *R* v *Duncan, ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 589 per Deane J.

structure, and employed them in the interpretation of constitutional provisions. But guidance in constitutional interpretation is not confined to principles implied in the Constitution. As with statutes, judges have interpreted the Constitution (which is, after all, a British statute – though much more besides) against the background of the common law – such as the doctrine of implied incidental powers, and the prerogative or common law powers of the Crown[23] – and wider fundamental principles of liberty and justice.[24] As the late Julius Stone noted more than a decade ago,

> ...wherever the text of an instrument or a doctrine of the common law or its underlying assumptions do not provide an absolute bar, then an appellate court in disputed questions of law, and the High Court in constitutional questions, must make choices open to them in the deliberate light of whatever relevant considerations can be made available to the court. These considerations must certainly include the actual demands and conditions in contemporary society and current convictions as to justice, values and policies current in it. Nor can I doubt, rationally speaking, that the fact that legislation has been duly passed by the parliament must be regarded as important (even if not conclusive) evidence of what these actual demands, conditions and convictions are.[25]

As already noted, employing a principle, whether it be constitutionally-implied or even extra-constitutional, to assist in constitutional interpretation is quite uncontroversial, provided that the principle is both appropriate and well established. But applying such a principle, even one derived by constitutional implication, to contradict the effect of constitutional provisions – for example, by striking down otherwise-valid legislation – is far more questionable.

Judicial qualms about invalidating legislation on the basis of implied constitutional limitations are demonstrated by the changes in direction, especially in the United States, regarding the validity of implying a prohibition, based upon federalism, limiting the Federal Government's power to bind the States:[26] a doctrine of immunity of State instrumentalities was adopted in 1871, reversed about 1936, partly restored in 1976, and reversed again in

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[23] *D'Emden* v *Pedder* (1904) 1 CLR 91, 109-110; *Le Mesurier* v *Connor* (1929) 42 CLR 481, 497; *Grannall* v *Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77; Winterton, *supra* n 11, Ch 3. See generally C J Antieau, *Constitutional Construction* (1982), Ch 4.

[24] eg *R* v *Federal Court of Bankruptcy, ex parte Lowenstein* (1938) 59 CLR 556, 588-589 per Dixon and Evatt JJ dissenting (no-one should be a judge in his own cause); *Kingswell* v *R* (1985) 159 CLR 264, 298-303 per Deane J dissenting, and *Li Chia Hsing* v *Rankin* (1978) 141 CLR 182, 198-200 per Murphy J (trial by jury); G Sawer, *Federation Under Strain* (1977) 148; Winterton, *supra* n 11, 127-139 (natural justice etc). See generally C J Antieau, *Adjudicating Constitutional Issues* (1985) paras 10.17, 10.19.

[25] J Stone, "Some Reflections on the Seminar", in D Hambly & J Goldring (eds), *Australian Lawyers and Social Change* (1976) 376, 378. See also Antieau, *supra* n 24, paras 6.04 ("Policy considerations in characterization"), 7.01 ("Judicial balancing of societal interests in constitutional cases in Australia").

[26] Discussing an aspect of this subject (State and federal immunity from the other's taxation laws) in 1951, former Justice Roberts of the United States Supreme Court remarked that "[i]n no field of federal jurisprudence has there been greater variation or uncertainty. About one quarter of these decisions have been expressly or tacitly overruled, modified or ignored in later cases. Doubtless the explanation is that *the Court has been called upon to exercise statesmanship in an uncharted region rather than interpretation of the text of the instrument; to implement policy rather than law.*" (Owen J Roberts, *The Court and the Constitution* (1951, rep 1969), 9 (italics added).

1985.[27] The High Court of Australia has also wavered from immunity in 1906 to federal power in 1920, and back to partial immunity since 1947.[28]

If courts exhibit such uncertainty over implying a prohibition based upon so obvious a constitutional principle as federalism, which is even expressly referred to in the preamble, it is hardly surprising that it is the only implied limitation the Court has adopted.[29]

Some judges have, nevertheless, been prepared to employ constitutional or extra-constitutional principles for purposes beyond "mere" constitutional interpretation:

1. While judges have long sought, if possible, to construe legislation so as not to contravene fundamental notions of civil liberty,[30] Justice Murphy has expressed willingness — implemented on two occasions[31] — to invalidate legislation on the ground of its incompatibility with such liberties.[32]
2. While all judges, in construing British legislation in the pre-Australia Acts 1986 (Cth and UK) era, took into account the convention that the British Parliament would not legislate for an Australian State without its consent,[33] Justice Murphy went further, holding that British power to legislate on Australian matters terminated upon federation in 1901.[34]
3. While the High Court and the Privy Council in the *Boilermakers* case[35] construed the separation of the judiciary from the political branches of government against the background of the principle of judicial independence,[36] Justice Murphy was prepared to invalidate "deeming" legislation on the ground that it was incompatible with that principle to require a judge to make a finding contrary to the facts.[37]

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[27] *Collector* v *Day* (1871) 78 US (11 Wall) 113, overruled by *Graves* v *New York, ex rel O'Keefe* (1939) 306 US 466; *United States* v *California* (1936) 297 US 175; *New York* v *United States* (1946) 326 US 572; *Maryland* v *Wirtz* (1968) 392 US 183, overruled by *National League of Cities* v *Usery* (1976) 426 US 833, overruled by *Garcia* v *San Antonio Metropolitan Transit Authority* (1985) 469 US 528.

[28] *Federal Amalgamated Government Railway and Tramway Service Association* v *New South Wales Railway Traffic Employees Association* (the *Railway Servants* case) (1906) 4 CLR 488, overruled by *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (the *Engineers* case) (1920) 28 CLR 129; *Melbourne Corporation* v *Commonwealth* (the *State Banking* case) (1947) 74 CLR 31; *Queensland Electricity Commission* v *Commonwealth* (1985) 159 CLR 192; *Re Lee, ex parte Minister for Justice and A-G for Queensland* (1986) 65 ALR 577. See also Winterton, *supra* n 11, 53, 246-247 n 2.

[29] The High Court has held that the separation of powers is implied in the Commonwealth Constitution, especially its structure, but in reality has confined this to the separation of judicial power, which is virtually explicit in ch III of the Constitution. See Winterton, *supra* n 11, Ch 4.

[30] *Supra* n 15.

[31] *McGraw-Hinds (Australia) Pty Ltd* v *Smith* (1979) 144 CLR 633, 670; *Miller* v *TCN Channel Nine Pty Ltd* (1986) 67 ALR 321, 339.

[32] Infra Part 2A.

[33] eg *Ukley* v *Ukley* [1977] VR 121, 129 (FC).

[34] *Bistricic* v *Rokov* (1976) 135 CLR 552, 565-567; *China Ocean Shipping Co* v *South Australia* (1979) 145 CLR 172, 236-239; *Kirmani* v *Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351, 382-384.

[35] *R* v *Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, affirmed *sub nom A-G for Australia* v *R* [1957] AC 288.

[36] Winterton, *supra* n 11, 61-62.

[37] *Actors and Announcers Equity Association of Australia* v *Fontana Films Pty Ltd* (1982) 150 CLR 169, 213-215.

4. While judges have employed the Rule of Law in statutory interpretation,[38] and have derived support from it in requiring a factual connection between a Commonwealth legislative power and legislation based upon it — Parliament cannot recite itself into power[39] — the Supreme Court of Canada recently relied upon that principle to hold that provincial legislation, enacted over ninety-five years, which was invalid because it had been enacted, printed and published only in English should be deemed temporarily valid for the minimum period necessary for its translation, re-enactment, printing and publication in both English and French.[40]

Attention must now be directed to judicial exercises of power of this kind.

2. EXTRA-CONSTITUTIONAL NOTIONS

Justice Murphy of the High Court of Australia was responsible for the principal extra-constitutional notions accorded judicial recognition in Australia: his supposedly constitutionally-implied Bill of Rights, and the termination in 1901 of British power to legislate for Australia.

A *Fundamental Rights*

In a series of cases over several years, Justice Murphy purported to imply a whole catalogue of fundamental rights from the Commonwealth Constitution. Legislation is to be construed, if possible, so as not to conflict with these rights but, if such a construction proves impossible, the legislation is invalid for contravening an implied constitutional prohibition. Justice Murphy's comments have been largely obiter; only twice, in *McGraw-Hinds (Aust) Pty Ltd* v *Smith* in 1979, and *Miller* v *TCN Channel Nine Pty Ltd* in 1986[41], was legislation invalidated on this ground. Moreover, those decisions were relatively uncontroversial because the relevant implied constitutional guarantee applied by Justice Murphy (freedom of interstate communication) was regarded by his colleagues as largely embodied in an express constitutional provision, namely s 92.

Rights recognized include freedom of speech, assembly, communication and travel throughout the Commonwealth, freedom from slavery, serfdom, cruel and unusual punishment, and arbitrary discrimination on the ground of sex, and freedom for fully competent adults from subjection to the guardianship of others.[42]

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[38] Allan, *supra* n 16.

[39] *Australian Communist Party* v *Commonwealth* (1951) 83 CLR 1, 193 per Dixon J, 258 per Fullagar J; *In the Marriage of Cormick* (1984) 156 CLR 170, 177.

[40] *Re Manitoba Language Rights* [1985] 1 SCR 721. For the Court's order see [1985] 2 SCR 347.

[41] (1979) 144 CLR 633; (1986) 67 ALR 321.

[42] *R* v *Director-General of Social Welfare for Victoria, ex parte Henry* (1975) 133 CLR 369, 388 (slavery, serfdom, self-determination); *Buck* v *Bavone* (1976) 135 CLR 110, 137 (travel); *Ansett Transport Industries (Operations) Pty Ltd* v *Commonwealth* (1977) 139 CLR 54, 87-88 (travel, speech and communication); *Seamen's Union of Australia* v *Utah Development Co* (1978) 144 CLR 120, 157 (serfdom); *McGraw-Hinds (Australia) Pty Ltd* v *Smith* (1979) 144 CLR 633, 668-670 (slavery, serfdom, rule of law, freedom of movement and communication); *Ansett Trans-*

Justice Murphy claimed to derive these rights by implication from the Constitution, arguing that such implication is as justifiable as other widely-accepted implications, such as responsible government and implied prohibitions derived from the federal system.[43] Indeed, he believed that "much of the greatest importance is implied",[44] which is no doubt true; hence, these freedoms are "so elementary that it was not necessary to mention them in the Constitution . . ."[45]. Yet he rarely specified the constitutional provision or structural feature from which particular rights were supposedly implied and, when he did refer to specific provisions, the derivation seemed rather tenuous to say the least. Thus, freedom to travel throughout the Commonwealth supposedly derives "from the union of the people in an indissoluble Commonwealth",[46] referred to in the preamble to the Constitution. And:

> Elections of federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between the States, but in and between every part of the Commonwealth. The proper operation of the system of representative government requires the same freedoms between elections. These are also necessary for the proper operation of the Constitutions of the States . . . . From these provisions and from the concept of the Commonwealth arises an implication of a constitutional guarantee of such freedoms, freedoms so elementary that it was not necessary to mention them in the Constitution . . . . The freedoms are not absolute, but nearly so. They are subject to necessary regulation . . . . The freedoms may not be restricted by the [Commonwealth] Parliament or State Parliaments except for such compelling reasons.[47]

Justice Murphy was, perhaps, on firmer ground — at least, terrain trodden by others[48] — when he employed fundamental principles of civil liberty to confine the ambit of the incidental power.[49]

In truth, Justice Murphy's (presumably open-ended) implied Bill of Rights is probably based upon the unstated premise that certain fundamental rights and freedoms are part of the common law which, Sir Owen Dixon argued

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port Industries (Operations) Pty Ltd v *Wardley* (1980) 142 CLR 237, 267 (sexual discrimination); *Uebergang* v *Australian Wheat Board* (1980) 145 CLR 266, 311-312 (freedom of speech, assembly, communication and travel); *Sillery* v *R* (1981) 35 ALR 227, 233-234 (cruel and unusual punishment) *Miller* v *TCN Channel Nine Pty Ltd* (1986) 67 ALR 321, 336-338 (freedom of speech, communication and travel).

[43] *Miller* v *TCN Channel Nine Pty Ltd* (1986) 67 ALR 321, 336, 338; *Uebergang* v *Australian Wheat Board* (1980) 145 CLR 266, 311-312; *McGraw-Hinds (Australia) Pty Ltd* v *Smith* (1979) 144 CLR 633, 668-670.

[44] *McGraw-Hinds (Aust) Pty Ltd* v *Smith* (1979) 144 CLR 633, 668.

[45] *Ansett Transport Industries (Operations) Pty Ltd* v *Commonwealth* (1977) 139 CLR 54, 88.

[46] *Buck* v *Bavone* (1976) 135 CLR 110, 137; *Ansett* quoted p 229.

[47] *Ansett Transport Industries (Operations) Pty Ltd* v *Commonwealth* (1977) 139 CLR 54, 88. *Cf* G de Q Walker, "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion" (1985) 59 ALJ 276, 283 who suggests that the entrenched provisions of State constitutions arguably "embody a clearly implied premise that the legislature is to be constituted in accordance with the principles of democratic representation and majority rule", and that these principles imply some freedom of speech, press, and association.

[48] eg *Victoria* v *Commonwealth* (the *Second Uniform Tax* case) (1957) 99 CLR 575, 614 per Dixon CJ; *Gazzo* v *Comptroller of Stamps (Victoria)* (1981) 149 CLR 227, 240 per Gibbs C J; I. Zines, *The High Court and the Constitution* (2nd Edn 1987) 36-39.

[49] *Sillery* v *R* (1981) 35 ALR 227, 234.

thirty years ago, is "the source of the authority of the Parliament at Westminster"[50], which enacted the Commonwealth Constitution, and, therefore, "an ultimate constitutional foundation" of Australia.[51] Alternatively – although Justice Murphy would probably have seen no incompatibility between the two concepts – these fundamental rights and freedoms may have their source in a Lockean notion of inalienable natural rights, recognized by the United States Declaration of Independence (1776) and the French Declaration of the Rights of Man and Citizen (1789).[52]

Is Justice Murphy's claim that certain fundamental rights and liberties are implied in the Commonwealth Constitution tenable, or should his implied Bill of Rights be regarded as an extra-constitutional judicial construct?

Respect for democratic values, including civil liberties, is obviously an important element of Australia's cultural heritage, being an aspect of British culture which all colonies inherited from the mother country together with (or, perhaps, as part of) the common law. R W M Dias has noted that "it is insufficiently appreciated that not only effectiveness but also conformity to morality and justice is among the very springs of [the] being and continued life" of the *grundnorm*.[53] But how far does this constitutional "entrenchment" of civil liberty extend? In particular, does it limit the principle of parliamentary supremacy?

The orthodox and, until recently, almost universally-accepted answer was no. While, as already noted, courts should interpret legislation and apply the rules of the common law against a background of national adherence to civil libertarian values,[54] those values were only "a constraint on, but not a barrier to" Parliament's legislative power.[55] But Justice Murphy, of course, erected a "barrier", being unsatisfied with mere "constraints", an extension of orthodox principles which has enjoyed little support, especially among his colleagues.[56] Indeed, Australian courts had earlier specifically rejected arguments that Commonwealth or State legislation could be invalidated for contravening Magna Carta[57] or the Bill of Rights of 1689.[58]

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[50] Dixon, *supra* n 13, 242 (*Jesting Pilate*, 206).

[51] *Ibid passim*.

[52] Murphy J noted that the framers of the Commonwealth Constitution "had the benefit" of these two declarations, as well as the *Federalist Papers* and the work of J S Mill: *Western Australia* v *Commonwealth* (1975) 134 CLR 201, 283-284.

[53] R W M Dias, "Legal Politics: Norms Behind the *Grundnorm*" [1968] CLJ 233, 255.

[54] *Supra*, text at nn 15-17, 24-25.

[55] Allan, *supra* n 16, 138. Accord *ibid*, 140. (But see Allan, supra n 17, 620-623, 624-627, 628-629, where he goes much further, arguing that British judges could refuse to apply legislation which contravened fundamental community standards of political morality, including principles of democracy, justice and fairness.)

[56] *Cf* Justice Deane's cryptic allusion to an "arguable" implied constitutional prohibition based upon "the underlying equality of the people of the Commonwealth under the law of the Constitution": *Queensland Electricity Commission* v *Commonwealth* (1985) 159 CLR 192, 247. An American observer has commended Justice Murphy for "legitimately and wisely ... [honouring] the public policy of his community": Antieau, *supra* n 24, para 6.08. See generally P Bickovskii, "No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution" (1977) 8 F L Rev 460, 470-479; M Coper, *Encounters with the Australian Constitution* (1987) Ch 8.

[57] *Chia Gee* v *Martin* (1905) 3 CLR 649, 653; *Re Cusack* (1985) 60 ALJR 302, 303-304 (Wilson J).

[58] *Cobb & Co Ltd* v *Kropp* [1965] Qd R 285, 298 (Gibbs J), 301 (Hart J); *Re Cusack* (1985) 60 ALJR 302, 303-304 (Wilson J).

However, the case for constitutionally-entrenched fundamental rights beyond the reach of legislation is not totally unarguable, and could claim support (not necessarily convincingly) from several sources.

First, is the concept of "fundamental law", including civil liberties derived from natural law and/or the common law, binding even upon Parliament, which persisted (somewhat fitfully) in England until the late eighteenth century,[59] and included among its notable adherents Chief Justices Coke, Hobart, Vaughan, Holt and Lord Camden?[60] But the doctrine of "fundamental law" was effectively obsolete in Britain by the end of the eighteenth century,[61] if not much earlier, as Maitland appears to suggest,[62] and was never part of the Australian constitutional tradition – at least not until the advent of Justice Murphy.

Justice Murphy could conceivably claim support from the obsolete notion of "fundamental law" by arguing that, because its demise was effected by judges – the rule that British courts would not review the validity of parliamentary legislation having been (supposedly) established by the judges themselves[63] – judges can also resurrect it.[64] As Justice Murphy argued in another context, "Judges have created the doctrine of civil death and judges can abolish it. Judges have closed the doors of the courts and judges can re-open them."[65]

This is not the place for a discussion of the proper limits of judicial power and judicial creativity. Suffice it to say that the doctrine of "fundamental law" was so completely defunct in Anglo-Australian jurisprudence at the time the Commonwealth was established that its resuscitation would contravene both the separation of powers and s 128 of the Commonwealth Constitution.[66]

However, the doctrine of inalienable natural rights persisted in America, enjoying, indeed, a renaissance at the end of the eighteenth century,[67] just

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[59] W S Holdsworth, *A History of English Law* (1938) x, 526-531; (1952) xiii, 169. For views favouring "fundamental law", see J W Gough, *Fundamental Law in English Constitutional History* (rev ed 1971), 140, 166, 179-186, 192 (Otis), 193-194 (Lord Camden C J), 194-195 (Earl of Chatham), 198 (Sharpe), 201 (Burke), and for rejection of the doctrine see *ibid* 119 (Filmer), 138 (Milton), 152 (Tyrrell), 171 (Halifax), 202 (Lord Kenyon L C).

[60] *Dr Bonham's* Case (1610) 8 Co Rep 113b, 118a; 77 ER 638, 652 (Coke CJ); *Day* v *Savadge* (1614) Hob 85, 87, 80 ER 235, 237 (Hobart C J); *Thomas* v *Sorrell* (1673) Vaughan 330, 336-337; 124 ER 1098, 1102 (Vaughan C J); *City of London* v *Wood* (1701) 12 Mod 669, 687-688; 88 ER 1592, 1602 (Holt C J); Lord Camden in 1766 and 1775, denying Parliament's power to tax (Americans) without their consent: TC Hansard (ed), *The Parliamentary History of England* (1813, repr 1966) xvi, 168, 169, 177-178; ibid xviii 164; *R* v *Love* (1651) 5 St Tr 43, 172 (Keble L P: legislation "not consonant to ... Scripture, or to right reason ... is not the law of England"). For references to debates regarding *Dr Bonham's* case, see G Winterton "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 *LQR* 591, 593-594; G Winterton, "Parliamentary Supremacy and the Judiciary" (1981) 97 *LQR* 265, 273 n 82.

[61] Holdsworth, *supra* n 59 x, 530-531; Gough *supra* n 59, 195, 202 ff.

[62] F W Maitland, *The Constitutional History of England* (1908) 254-255, 298, 301.

[63] eg H W R Wade, *Constitutional Fundamentals* (1980) 26, 39. But see Winterton, "Parliamentary Supremacy and the Judiciary", *supra* n 60, 272-273.

[64] *Cf* Wade, *supra* n 63, 39.

[65] *Dugan* v *Mirror Newspapers Ltd* (1978) 142 CLR 583, 611 per Murphy J dissenting.

[66] But see *infra*, text at nn 78-85.

[67] T C Grey, "Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought" (1978) 30 Stan L Rev 843, 865 ff esp. 881-882; B Bailyn, *The Ideological Origins of the American Revolution* (1967), 175 ff. But see also L F Goldstein, "Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law" (1986) 48 J of Politics 51.

when it was finally becoming obsolete in England. It has endured in America to this day,[68] partly because it received apparent recognition in the Ninth Amendment to the United States Constitution which provides:

> The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.[69]

As the late Professor Paul Kauper noted, that provision is

> a clear expression that the rights set forth in the Bill of Rights were not created by the Bill of Rights but were simply declared there. The Ninth Amendment implicitly embodies natural rights philosophy.[70]

This notion, that fundamental human rights precede positive law and do not owe their existence to it, is not confined to American jurisprudence, and has received judicial recognition in many countries,[71] including Canada,[72] Ireland,[73] and Trinidad and Tobago.[74] But, while it supports the practice of Justice Murphy and others to construe the Constitution and legislation against a background of fundamental human rights,[75] the Commonwealth Constitution, unlike those of other jurisdictions which have employed natural law concepts of fundamental rights, provides no textual support whatever for invalidating legislation which contravenes such rights. We have no Ninth Amendment and no Bill of Rights, not even a provision that our Constitution is "similar in Principle to that of the United Kingdom",[76] upon which some Canadian judges in the 1950s hung certain fundamental rights.[77]

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[68] eg Grey, *supra* n 2, 709-713, 715-717; *infra* n 69.

[69] Applied by Goldberg J concurring, in *Griswold* v *Connecticut* (1965) 381 US 479, 488 ff. For debate on the meaning of the Ninth Amendment see, eg R Berger, "The Ninth Amendment" (1980) 66 Corn L Rev 1; Ely, *supra* n 1, 33-40; R L Caplan, "The History and Meaning of the Ninth Amendment" (1983) 69 Va L Rev 223; C R Massey, "Federalism and Fundamental Rights: The Ninth Amendment" (1987) 38 Hast L J 305.

[70] P G Kauper, "The Higher Law and the Rights of Man in a Revolutionary Society", in *America's Continuing Revolution* (American Enterprise Institute for Public Policy Research, 1975), 43, 52, 60-61.

[71] Antieau, *supra* n 24, para 10.17.

[72] *Chabot* v *School Commissioners of Lamorandiere* (1957) 12 DLR (2d) 796, 807 per Casey J (Que QB, App), discussed by F R Scott, "Case and Comment" (1958) 36 Can Bar Rev 248, 250-251; *infra*, n 77.

[73] *McGee* v *A-G* [1974] IR 284, esp 310, 317-319 per Walsh J; *Murray* v *A-G* [1985] ILRM 542, 548 (HC). See generally D M Clarke, "The Role of Natural Law in Irish Constitutional Law" (1982) 17 Irish Jurist 187. Note that the Irish Constitution explicitly recognizes the family as "a moral institution possessing inalienable and imprescriptible rights, *antecedent and superior to all positive law*." (Art 41.1.1). Italics added.

[74] *Lassalle* v *A-G* (1971) 18 WIR 379, 395 per Phillips J A (T & TCA): "The fundamental rights and freedoms guaranteed by the Constitution do not owe their existence to it. They are previously existing rights, for the most part derived from the common law ...".

[75] *Supra*, text at nn 15, 24.

[76] Preamble to the Constitution Act 1867 (UK).

[77] *Switzman* v *Elbling* [1957] SCR 285, 328 per Abbott J (freedom of speech); *Saumur* v *City of Quebec* [1953] 2 SCR 299, 330 per Rand J (freedom of speech), but see *contra* 384 per Cartright and Fauteux JJ dissenting; *R* v *Hess (No 2)* [1949] 4 DLR 199, 206, 208-209 per O'Halloran JA (BCCA) (integrity of judicial power). But note that Casey J in *Chabot* (*supra* n 72) did not allude to the preamble to the Constitution Act in holding (*obiter*) that the right of "inviolability of conscience", including the right to control the religious education of one's children, found its source in natural law and, therefore, because these rights "find their existence in the very nature of man, ... they cannot be taken away and *they must prevail should they conflict with the provisions of positive law*." (12 DLR (2d), 807). Italics added.

Justice Murphy's (supposedly) implied Bill of Rights could, finally, derive support from recent developments which amount to a revival in "fundamental" or "natural" law thinking, probably induced by fears of "elective dictatorship" under a system of parliamentary supremacy.[78] Apart from Justice Murphy in Australia, the leading judicial exponent (in *obiter dicta*) of limitations on parliamentary supremacy based upon "fundamental"/"natural" law notions has been Justice Cooke, President of the New Zealand Court of Appeal.[79] Justice Cooke began by doubting in 1979 "whether it is self-evident" that the New Zealand Parliament (which enjoys the same "sovereignty" as its British counterpart) could constitutionally "confer on a body other than the Courts power to determine conclusively whether or not actions in the Courts are barred".[80] Three years later, two colleagues joined him in noting that:

> ... Indeed we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights.[81]

Two years later, Justice Cooke's "reservations" had become more general: observing that "[s]ome common law rights presumably lie so deep that even Parliament could not override them", he held that a statute authorizing torture would probably be unconstitutional.[82]

Although, as yet, no British judge has endorsed this doctrine, it would be wrong to suppose that it is confined to the antipodes. In his Richard Dimbleby Lecture of November 1980, Lord Denning wistfully endorsed the concept, although he appears to have accepted that the present legal position was to the contrary:[83]

> The longer I am in the law – and the more statutes I have to interpret – the more I think the Judges here ought to have a power of judicial review of legislation similar to that in the United States: whereby the Judges can set aside statutes which are contrary to our unwritten Constitution – in that they are repugnant to reason or to fundamentals.[84]

Moreover, the doctrine has some (few) adherents among British academics, a recent exponent being Trevor Allan:

> I argue that the doctrine of sovereignty is grounded in the community's political morality, and that a purported rule whose substantive content flagrantly contradicted the essentials of that morality could not be accepted as law by virtue

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[78] See Lord Hailsham's three works, *Elective Dictatorship* (Richard Dimbleby Lecture, BBC, 1976); *The Dilemma of Democracy* (1978), Ch xx; *Hamlyn Revisited: The British Legal System Today* (1983), 25-32.

[79] J L Caldwell, "Judicial Sovereignty – A New View" [1984] NZLJ 357; P Joseph, "Literal Compulsion and Fundamental Rights" [1987] NZLJ 102; Sir Robin Cooke, "Practicalities of a Bill of Rights" (1986) 2 Aust Bar Rev 189, 201.

[80] *L* v *M* [1979] 2 NZLR 519, 527 per Cooke J dissenting.

[81] *New Zealand Drivers' Association* v *New Zealand Road Carriers* [1982] 1 NZLR 374, 390 per Cooke, McMullin and Ongley JJ.

[82] *Taylor* v *New Zealand Poultry Board* [1984] 1 NZLR 394, 398; *Fraser* v *State Services Commission* [1984] 1 NZLR 116, 121.

[83] Lord Denning, *Misuse of Power* (Richard Dimbleby Lecture, BBC, 1980), 11, reprinted (1981) 55 ALJ 720, 723.

[84] *Ibid* 12, 55 ALJ, 723.

> of the doctrine. If the doctrine is itself based on the virtues of representative democracy, that must be because representative democracy is regarded as likely to secure most effectively certain fundamental standards of civilised government. A statute whose moral content was incompatible with such standards could not therefore consistently derive "validity" from the process of enactment.[85]

A resuscitated "fundamental law" doctrine faces at least two difficulties. First, does its exposition by judges fall within the accepted boundaries of the judicial function? Are not Justices Cooke and Murphy assuming the role not merely of a legislature, but of a constitutional Convention? Opinions inevitably differ on the proper ambit of the judicial function, but in this writer's opinion the revived "fundamental law" doctrine falls beyond it. In view of the current, and quite bitter, controversy over the introduction of a *statutory* Bill of Rights in Australia, New Zealand and the United Kingdom, the imposition of an open-ended *constitutional* Bill of Rights by judicial fiat appears both surreptitious and, indeed, undemocratic – which is particularly ironic in view of its justification in *community* values, including democracy. The essential distinction between, on the one hand, employing community moral standards to interpret the Constitution and legislation and, on the other, striking down legislation which offends them must once again be emphasized. The community would probably happily accept the first (although it is doubtful that its opinion has ever been sought), but the Bill of Rights debate clearly suggests that the second enjoys no such consensus.

Secondly, even if the "fundamental law" doctrine were acceptable, how is its content to be determined, other than by the subjective opinion of each judge as to the content of fundamental moral principles?[86] Would we not have a Murphy Bill of Rights, a Barwick Bill of Rights, a Dawson Bill of Rights, and so on? This concern is, of course, at the heart of the interpretivist v. non-interpretivist debate in the United States, where it was well reflected recently in the Supreme Court's reluctance "to take a more expansive view of [its] authority to discover new fundamental rights imbedded in the Due Process Clause."[87] Speaking for the majority, Justice White noted that:

> The Court is most vulnerable and comes closest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.[88]

Simon Lee's criticism of Allan's thesis is likewise apposite here. He is sceptical of:

> ... Allan's assumptions that there is any such thing as a 'shared political morality' in the United Kingdom and that, if there were, judges would be well placed to determine what it was.

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[85] Allan, *supra* n 17, 623 n 34. Accord *ibid* 620-623, 624-627, 628-629; J Jaconelli, Comment [1985] PL 629, 630-631. *Cf* Sir Ivor Jennings: "We should be grateful for Coke's dictum that if the occasion arose, a judge would do what a judge should do": *The Law and the Constitution* (5th ed, 1959), 160, quoted by Allan, *supra*, 622 n 28.

[86] As Justice Iredell remarked in 1798: "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say [if it had power to declare a statute against natural justice void] would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.": *Calder* v *Bull* (1798) 3 US (3 Dall) 386, 399 per Iredell J, concurring.

[87] *Bowers* v *Hardwick* (1986) 92 L Ed 2d 140, 148.

[88] *Ibid.*

> . . . [T]alk of shared morality is 'nonsense at the very top of a very high ladder.' There seems little reason to suppose, in any event, that unelected and virtually irremovable judges are better placed than elected, accountable and removable politicians to ascend the ladder in search of any such shared political morality.[89]

It must, nevertheless, be conceded that few would dissent from the substance of the fundamental principles already recognized, although many, including the present writer, would dispute their supposed status as *constitutional* norms. Apart from the fundamental rights and freedoms recognized by Justices Murphy and Cooke — freedom of speech, assembly, communication and travel, a right of self-determination, and freedom from slavery, torture, cruel and unusual punishment, and sexual discrimination[90] — judges and other commentators have long accorded special status to rules protecting the independence and integrity of the judiciary and its functions (most, if not all, of which are already entrenched in the Commonwealth Constitution).[91] Quite appropriately, *Bonham's* case[92] (the principal source of the concept of judically-enforceable "fundamental law") and its progeny[93] concerned a central principle of judicial integrity, that no-one should be a judge in his own cause.[94] Judges and commentators have also recognized as fundamental the principle that the legislature should not reverse judicial decisions in particular cases[95] — although admittedly it sometimes has.[96]

In conclusion, for the reasons noted above, it is submitted that Justice Murphy's supposedly-implied Bill of Rights lacks an adequate constitutional foundation. Hence, as important and desirable as these rights, freedoms and fundamental principles may be, they are not constitutional, but *extra-constitutional.*

B *British Sovereignty over Australia*

Until the coming into effect of the Australia Acts 1986 (Cth and UK),[97] the British Parliament retained power to legislate for Australia[98] — which it exercised in enacting the Statute of Westminster in 1931 and the Australia

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[89] S Lee, Comment [1985] PL 632, 633. See generally *ibid* 633-635.

[90] For Murphy J, *supra* n 42; for Cooke J, *supra* n 82.

[91] eg Cooke J, *supra*, text at nn 80-81; Wade, *supra* n 63, 68 (". . . the judges have almost given us a constitution, establishing a kind of entrenched provision to the effect that even Parliament cannot deprive them of their proper function."); Walker, *supra* n 47, 281, 282 (endorsing Wade).

[92] (1610) 8 Co Rep 113b, 118a; 77 ER 638, 652.

[93] *Day* v *Savadge* (1614) and *City of London* v *Wood* (1701), *supra* n 60.

[94] *Cf R* v *Federal Court of Bankruptcy, ex parte Lowenstein* (1938) 59 CLR 556, 588-589 per Dixon and Evatt JJ, dissenting.

[95] *R* v *Hess* (No 2) [1949] 4 DLR 199, 206, 208-209 per O'Halloran J A (BCCA); Jaconelli, supra n 85, 631. *Cf* the *BLF* case (*supra* n 15), especially per Street C J, where, however, the New South Wales Court of Appeal unanimously held the State legislation valid.

[96] eg the War Damage Act 1965 (UK), reversing the effect of *Burmah Oil Co (Burma Trading) Ltd* v *Lord Advocate* [1965] AC 75 (HL); A L Goodhart, "The Burmah Oil Case and the War Damage Act 1965" (1966) 82 LQR 97; J W Bridge, "Retrospective Legislation and the Rule of Law in Britain" (1967) 35 UMKC L Rev 132. For examples from other countries, see S Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in *Judicial Independence: The Contemporary Debate* (S Shetreet and J Deschênes eds, 1985), 590, 609-610, 621.

[97] On 3 March 1986.

[98] This power was terminated by the Australia Acts 1986 (Cth and UK) s 1.

Act in 1986 – and State legislation repugnant to British legislation applying therein by paramount force was invalid pursuant to the Colonial Laws Validity Act 1865 (UK),[99] a disability from which the Commonwealth had been freed in 1939.[100]

The above represents the orthodox view of the pre-1986 legal position, the sole judicial dissentient being Justice Murphy who argued that the British Parliament's power to legislate for Australia terminated upon federation in 1901, and that thereafter both the Commonwealth and the States could legislate repugnantly to British legislation purporting to apply therein by paramount force. In 1976 he wrote:

> The United Kingdom Parliament has no power ... to make a law having force in any part of Australia.
> The suggested basis for such a power is the doctrine of supremacy of the United Kingdom Parliament ... .
> This doctrine of supremacy is part of the United Kingdom's municipal law (which includes Imperial law applying to colonies). When a colony or territory ceases to be under the political control of the United Kingdom Government, the supremacy ceases, and with it all legislative authority over the former colony or subject territory. If the supremacy were not confined to municipal law, the United Kingdom Parliament would still have the power to legislate for nations such as India and Ireland ... .
>
> This paramount force and the Imperial Parliament no longer exist for Australia. Australia is an independent and equal member of the community of nations. Its relationship with the United Kingdom has long ceased to be imperial-colonial and is now international ... .
> In my opinion (notwithstanding many statements to the contrary) Australia's independence should be taken as dating from 1901.[101]

By what means did the British Parliament's power to legislate for Australia terminate in 1901? If s 128 of the Commonwealth Constitution (enacted by the British Parliament) could be regarded as a provision whereby the British Parliament abdicated "sovereignty" over Australia, Justice Murphy's theory would be compatible with orthodox notions of parliamentary supremacy expounded by Dicey,[102] and British "sovereignty" over Australia would have ended by *constitutional* means.[103] Justice Murphy, indeed, argued that s 128 had this effect:

> [The Constitution] is capable of amendment by the procedure in s 128 which involves the Australian people, without reference to the United Kingdom. Since

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[99] The Colonial Laws Validity Act 1865 (UK) s 2, made inapplicable to State legislation by the Australia Acts 1986 (Cth and UK) s 3.

[100] By the Statute of Westminster Adoption Act 1942 (Cth) s 3, adopting the Statute of Westminster 1931 (UK) s 2, with effect from 3 September 1939.

[101] *Bistricic* v *Rokov* (1976) 135 CLR 552, 565, 567. Accord *China Ocean Shipping Co* v *South Australia* (1979) 145 CLR 172, 236-239 per Murphy J, dissenting; *Kirmani* v *Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351, 382-384.

[102] A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959), 68-69 n 1. See further Winterton, "The British Grundnorm", *supra* n 60, 600-604.

[103] *Cf* Sir Maurice Byers' more limited view that by s 128 of the Commonwealth Constitution the British Parliament abdicated its power to amend that Constitution : "Conventions Associated with the Commonwealth Constitution" (1982) 56 ALJ 316, 318 (letter); "Current Constitutional Problems", in *Current Constitutional Problems in Australia* (1982), 51, 55.

> 1901, it could have been amended expressly to exclude (or enable Parliament to exclude) the operation of any United Kingdom Act.[104] This feature has been ignored in the conclusion that until 1942, or even later, the Commonwealth of Australia was a colony subject to the legislative supremacy of the United Kingdom Parliament. The fact that constitutional alteration enabled Australia (without reference to the United Kingdom) to exclude any doctrine of supremacy of United Kingdom law (as incorporated in the Colonial Laws Validity Act, 1865 (Imp.) or otherwise) shows that the Commonwealth had no colonial status and that the legislative supremacy of the United Kingdom Parliament over Australia had ended. In my opinion, since 1901 no Act of the Australian Parliament has been or could be invalid except for inconsistency with the Constitution. The view that the Colonial Laws Validity Act and various other Imperial Acts applied notwithstanding the Constitution logically requires reading into s 128 a limitation that the section does not permit any constitutional alteration inconsistent with those Imperial Acts.[105]

Although Justice Murphy is virtually alone in maintaining that the British Parliament's power to legislate for Australia terminated in 1901,[106] several commentators have argued that it terminated sometime later, possibly even before Australia's adoption of the Statute of Westminster in 1942 (with effect from 3 September 1939).[107] It is, of course, difficult to argue that the Statute of Westminster itself constituted an abdication of British parliamentary "sovereignty" over Australia, because that statute recognized that the British Parliament could legislate both on Commonwealth matters (at its request and with its consent)[108] and on matters "within the authority of the States".[109] These powers were, of course, exercised recently by the enactment of the Australia Act 1986 (UK).[110]

Commentators have, instead, argued that changes in the *political* relationship between Australia and the United Kingdom have had the effect of chang-

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[104] *Contra* (as to United Kingdom legislation applying in Australia by paramount force – at least until 1939), J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901, repr 1976), 994; G Craven, *Secession: the Ultimate States Right* (1986), 162-163. *cf* the discussion of the relationship between ss 2 and 5 of the Colonial Laws Validity Act 1865 (UK) by Isaacs and Rich JJ in *McCawley* v *R* (1918) 26 CLR 9, 50-51, discussed in K Booker and G Winterton, "The Act of Settlement and the Employment of Aliens" (1981) 12 F L Rev 212, 228-229.

[105] *China Ocean Shipping Co* v *South Australia* (1979) 145 CLR 172, 236-237 per Murphy J, dissenting.

[106] eg Zines, *supra* n 48, 244 n 1; LJM Cooray, *Conventions, the Australian Constitution and the Future* (1979), 98; Bickovskii, *supra* n 56, 469.

[107] Cooray, *supra* n 106, 98-100; For critical factors, 98-99. C*f* R D Lumb, "Fundamental Law and the Processes of Constitutional Change in Australia" (1978) 9 F L Rev 148, 154-155, 157-158 (although, notwithstanding s 128, the British Parliament could have amended the Commonwealth Constitution in 1901, it lost that power sometime before 1950). But see *contra* Craven, *supra* n 104, 138-140.

[108] The Statute of Westminster 1931 (UK) s 4, repealed for Australia by the Australia Acts 1986 (Cth and UK) s 12.

[109] The Statute of Westminster 1931 (UK) s 9(2), repealed for Australia by the Australia Acts 1986 (Cth and UK) s 12.

[110] Passed at the request and with the consent of the Commonwealth and State Parliaments and Governments: Australia Acts (Request) Act 1985, passed by all the States; Australia (Request and Consent) Act 1985 (Cth).

ing their *legal* relationship as well.[111] Justice Murphy also relied upon this ground in addition to his more legalistic argument based upon s 128 of the Constitution:

> The idea that Australia's constitutional position is detached from the political realities is constitutional error.[112] *A fundamental change of a political nature may bring about a fundamental change in legal doctrine.*[113] This Court, however, has almost consistently failed to give effect to the fundamental change which occurred in 1901.[114]

This argument maintains, in effect, that the Constitution has been amended by *extra-constitutional* means – that changed political circumstances have changed the law.[115] It is important to note that, as with Justice Murphy's supposedly-implied Bill of Rights, the extra-constitutional notion is not employed merely as background to the interpretation of constitutional provisions, such as the external affairs power[116] or the ambit of the prerogative powers included within s 61 of the Constitution,[117] which, as has been noted, is entirely proper (provided, of course, that the extra-constitutional notion is itself acceptable).[118] Instead, what is being alleged is that the extra-constitutional considerations have actually changed the law: power which the British Parliament once had has been terminated by extra-constitutional means.[119] At this point Australian constitutional jurisprudence enters the realm shared by principles of "necessity" and revolutionary changes of *grundnorm* which have bedevilled other countries, including those mentioned at the beginning of this essay.[120]

3. CONCLUSION

Australia is indeed fortunate that extra-constitutional notions should have appeared in so benevolent (indeed beneficial) a context as the protection of human rights and the termination of obsolete British sovereignty over Australia. But our constitutional heritage also includes some darker moments, and we may indeed be thankful that principles of "necessity", which have

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[111] *Supra* n 107. *Cf Kirmani* v *Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351, 441-442 per Deane J.

[112] Murphy J referred to *Commonwealth* v *Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 412 per Isaacs J.

[113] Quoting S A de Smith, *Constitutional and Administrative Law* (3rd ed by H Street, B de Smith and R Brazier, 1977), 68.

[114] *China Ocean Shipping Co* v *South Australia* (1979) 145 CLR 172, 237 per Murphy J, dissenting.

[115] *Cf* Allan, *supra* n 17, 619: "Legal validity cannot be divorced from political reality".

[116] eg *Kirmani* v *Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351, 371 (Gibbs C J), 381-382 (Mason J), 385 (Murphy J), 441 (Deane J); Zines, *supra* n 48, 263-264.

[117] Winterton, *supra* n 11, 23-24, 40, 51.

[118] *Supra*, text at nn 24-25.

[119] For a more modest claim, based upon s 4 of the Statute of Westminster 1931 (UK) (interpreting it as a "manner and form" provision), which does not enter extra-constitutional territory, see Winterton, "The British Grundnorm", *supra* n 60, 602-603. But see *Manuel* v *A-G* [1983] Ch 77 (CA).

[120] eg Cooray, *supra* n 106, 93-100; J M Finnis, "Revolutions and Continuity of Law", in *Oxford Essays in Jurisprudence* (2nd ser, AWB Simpson ed, 1973), 44, 52 ff.

figured so prominently in the jurisprudence of other countries, have largely by-passed us.[121] However, we should not forget that extra-constitutionality is a slippery slope, and that the principle of "necessity" which may enable the courts of a democracy, such as Canada or Cyprus, to prevent a breakdown in the legal system[122] can also be employed to legitimate a coup d'etat, as in Pakistan, Uganda, the Seychelles, Nigeria and Grenada.[123] Hence, all extra-constitutional notions should be treated with extreme caution. Once the realm of extra-constitutional power has been entered, there is no logical limit to its ambit; only the constitution can fix the boundaries for the lawful exercise of power. Once the constitution is removed as the frame of reference for the lawful exercise of authority, the only substitute is the balance of political – and, ultimately, military – power in the nation. As Thomas Jefferson noted wisely in 1791:

> To take a single step beyond the boundaries ... specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.[124]

POSTSCRIPT

The subject of implied fundamental rights, discussed in Part 2A of this article, was considered in some detail by the New South Wales Court of Appeal in *Building Construction Employees and Builders' Labourers Federation* v *Minister for Industrial Relations* (1986) 7 NSWLR 372. Kirby P, who referred to an earlier draft of this article, reached the same conclusion as the present writer (p 405). The other judges, with the possible exception of Street CJ (p 387), also rejected the notion of fundamental common law principles incapable of being overriden by Parliament. However, Street CJ thought that some such notions might bind the New South Wales Parliament through the 'peace, welfare and good government' clause in the Constitution Act 1902 (NSW) s 5 (pp 383-385), and Priestley JA tended to concur (pp 421-422). (Murphy J had drawn a similar conclusion from the phrase 'peace, order and good government' in ss 51 and 52 of the Commonwealth Constitution: *Sillery* v *R* (1981) 35 ALR 227, 234) Kirby P (p 406) and Mahoney JA (p 413) took a contrary view, and Glass JA left the question open (p 407).

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[121] eg *Gratwick* v *Johnson* (1945) 70 CLR 1, 11-12 (Latham C J), 20 (Dixon J), discussing the maxim *salus populi suprema lex*. For a rare argument based upon the principle of "necessity", see the unpublished paper by Peter Johnston noted in G Winterton, "Can the Commonwealth Parliament Enact 'Manner and Form' Legislation?" (1980) 11 F L Rev 167, 170.

[122] *Re Manitoba Language Rights* [1985] 1 SCR 721; *A-G of the Republic* v *Mustafa Ibrahim* [1964] Cyprus L R 195, discussed in *Re Manitoba Language Rights, supra* 761-763, 766.

[123] *State* v *Dosso* PLD 1958 SC 533; *Begum Nusrat Bhutto* v *Chief of Army Staff* PLD 1977 SC 657 (but see *Asma Jilani* v *Government of Punjab* PLD 1972 SC 139, overruling *State* v *Dosso, supra*); *Uganda* v *Commissioner of Prisons, ex parte Matovu* [1966] EA 514 (Uganda HC); *Ramniklal Valabjhi* v *Controller of Taxes* (Seychelles CA, 11 August 1981, unrep noted in (1981) 7 CLB 1249); *Nigerian Union of Journalists* v *A-G of Nigeria* [1986] LRC (Const) 1 (Nigeria CA); *Mitchell* v *DPP* [1985] LRC (Const) 127 (Grenada HC), affirmed [1986] LRC (Const) 35 (CA), and see also *Mitchell* v *DPP* [1986] AC 73 (PC). There is a vast literature on this subject. eg L Wolf-Phillips, *Constitutional Legitimacy: A Study of the Doctrine of Necessity* (nd c 1980); M M Stavsky, "The Doctrine of State Necessity in Pakistan" (1983) 16 Corn Int'l LJ 341; Farooq Hassan, "A Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup d'Etat in the Common Law" (1984) 20 Stan J Int'l L 191; B O Nwabueze, *Constitutionalism in the Emergent States* (1973) Chs VII and VIII; B O Nwabueze, *Judicialism in Commonwealth Africa* (1977) Ch VII.

[124] *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (1791), in 19 *The Papers of Thomas Jefferson* (J Boyd ed, 1974), 276.