

Parliamentary Responsible Government and the Protection of Rights

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As Australia approaches its constitutional centenary, there is a new urgency in informed public debate about how well human rights are protected and what additional measures ought to be adopted for better protecting rights including, most notably, a bill of rights. Australia is inevitably caught up in the international wave of concern for enhanced protection of human rights which is producing an expanding web of influential international agreements and expectations. Comparable liberal democratic countries with which Australia is accustomed to identify itself, such as the United Kingdom, Canada, the United States and New Zealand have all adopted bills of rights or, as in the case of the United Kingdom, become increasingly subject to European international rights jurisdiction.

Heightened concern with protecting human rights in Australia has been evident in a range of public statements and forums in recent years. In 1988, the Chief Justice of the High Court, Sir Anthony Mason, announced that he had changed his mind in favour of a bill of rights because Australia was going against the international trend and getting out of step with comparable countries such as Canada.¹ Again in 1988, the Constitutional Commission, after exhaustive consideration, came out in favour of a Canadian-style entrenched bill of rights for Australia and proposed that a new chapter be added to the Constitution or that purpose.²

Nor was such public interest in the improved protection of rights scotched by

the abortive 1988 referendums. In that instance, a modest proposal to extend three existing guarantees of human rights which bind the Commonwealth — religious freedom, just compensation for property acquired by the state, and trial by jury — to also bind the States suffered the worst defeat of any proposal ever put to the Australian people, winning only thirty per cent support.³ At the Constitutional Centenary Conference of 1991, the issue of guaranteeing basic rights was put firmly back on the public agenda. This national meeting of leading citizens from across the spectrum of Australian public life identified twelve key issues for review, with a view to possible constitutional reform, in the decade leading up to the constitutional centenary. Topping the list was 'Guarantees of Basic Rights' regarding which the Conference said: 'There was strong support for a guarantee of basic rights in some form, entrenching basic rights, and especially basic democratic rights. This would also have an important symbolic function. But achieving this would require broad support

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1. Sir Anthony Mason, 'A Bill of Rights for Australia?', Address to the Australian Bar Association Bicentennial Conference, 1988.
 2. *Final Report of the Constitutional Commission*, 1988, pp. 435—838, and draft Bill No. 17 for 'An Act to alter the Constitution so as to guarantee certain rights and freedoms', pp. 1018-21.
 3. Brian Galligan, 'The 1988 Referendums and Australia's Record on Constitutional Change', *Parliamentary Affairs*, vol. 43, 1990, p. 497 at p. 499.

from the Australian community, and would necessarily be part of a long-term process of education and discussion.'⁴

Previously, for three quarters of a century, political leaders and commentators by and large had been confident, even quite smug, about how well human rights were protected in Australia. Shortly after retiring as Australia's longest serving prime minister, Sir Robert Menzies confidently asserted to an American audience: 'Responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of the Common Law, we have not felt the need of formality and definition. I would say, without hesitation, that the rights of individuals in Australia are as adequately protected as they are in any other country in the world.'⁵

In his leading textbook on Australian politics which went through four editions and five reprints between 1965 and 1978, Fin Crisp persisted with a similar confidence: 'There has been an extraordinary solidity and general pervasiveness of civil liberties during this century. . . . Australian governments normally live as quietly and unobtrusively as they may in the civil liberties field, even tolerating much very free and hostile speech and much possibly subversive fringe activity.'⁶

This traditional view of the adequacy of Australia's system of responsible government for protecting rights, articulated by Menzies and Crisp, remains strong today, being essentially the view of the non-Labor coalition parties and much of the legal establishment. Moreover, this is the view that has informed Australia's political culture and been embodied in its political and legal institutions.

There have been significant criticisms of, and reforms to, Australian governance and law orchestrated by lawyers and judges and implemented by non-Labor coalition governments: most notably, the 'New Administrative Law' and the Human Rights (now the Human Rights and Equal Opportunity) Commission. As well, the earlier smugness of Australians with the excellence of their system of rights protection has been steadily eroded during the last couple of decades by a barrage of criticism against the dangers of big and intrusive government, executive dominance and party dictatorship. Moreover, the old confidence in the effectiveness of parliamentary responsible government and the common law for protecting human rights has been undermined by more realistic accounts of the weakness of parliament and the increasingly residual domain of common law compared with the plethora of statutory laws.

Nevertheless, the Australian response to improving human rights protection so far has been to modify and add on to, rather than change radically (as with an entrenched bill of rights) the traditional order. This has resulted in a patchwork of human rights measures: national legislation against racial and sexual discrimination; administrative review of executive decision making by the Administrative Appeals Tribunal and other special departmental bodies such as the Immigration Review Tribunal as well as the Ombudsman; and the establishment by the Commonwealth and States of special commissions and officers to monitor, investigate, expose and, in some instances, remedy human rights violations. In addition, there have been improvements to parliamentary review especially through Senate committees. Most notably, a new Standing Committee for the Scrutiny of Bills was established in 1981 for the purpose

4. Constitutional Centenary Conference, Statement (1991).

5. R.G Menzies, *Central Power in the Australian Commonwealth*, London, 1967, p. 54.

6. L.F. Crisp, *Australian National Government*, Melbourne, 1978, p. 134.

of alerting the Senate, which invariably is not controlled by the government, 'to the possibility of the infringement of personal rights and liberties or the erosion of legislative power of the Parliament'.⁷ And procedures for referring bills to committees have been improved.

While these developments in statutory law, administrative review, improved parliamentary scrutiny of legislation and the establishment of independent commissions and officers have been significant, they have been modifications to the existing order which have not disturbed its basic structures and processes. In contrast, the reformist view favouring a constitutional bill of rights would entail more fundamental change, with key social and political issues which are now decided in the political arena being transferred to the courts.

The reformist view was set out in 1988 by the Constitutional Commission which discounted the strengths of the established regime rather more severely than do its traditionalist critics. The Commission opted for an entrenched bill of rights, albeit with the ingenious Canadian compromise of a legislative override. Politically more significant, however, was the earlier conversion of the Australian Labor Party to a bill of rights. Under the influence of progressive Labor lawyers such as Murphy, Whitlam, Dunstan and Wran, this traditionally centralist, statist and socialist party modified its formal commitment to centralising power in the Commonwealth government and adopted a bill-of-rights plank. Successive Whitlam and Hawke Labor Governments actually made abortive attempts at implementing statutory bills of rights in 1973, 1984 and 1987.⁸

Responsible government and federal constitutionalism

Responsible government is commonly considered to be the primary part of Australia's system of government and is certainly the oldest part. Nineteenth century Australian egalitarian democracy embraced the institutions of parliamentary responsible government which fortuitously were receiving their classic form at the time.⁹ Colonial Australians were innovators in extending the democratic franchise and devising new electoral laws and voting arrangements.¹⁰ The Australian colonies were also institutionally creative in modifying responsible government, particularly the doctrine and arrangements of ministerial responsibility, to incorporate the management of giant government instrumentalities, such as railways.¹¹

Parliamentary responsible government is an appropriate representative system for egalitarian democracy. In contrast to a presidential system, parliamentary responsible government has the executive based primarily in the popular or lower house to which it is accountable on a day-to-day basis. Hence there is a fairly direct line of accountability from the people who elect the members of parliament to the executive which holds office subject to confidence of the popular house of parliament — at least according to the classic theory. This theory of the parliamentary accountability of

7. Senate Standing Committee for Scrutiny of Bills, *Annual Report 1986-1987*, Parliamentary Paper 443/1987, p. 2.

8. Brian Galligan, 'Australia's Rejection of a Bill of Rights', *Journal of Commonwealth and Comparative Politics*, 1990, p. 344 at pp. 357-62.

9. Walter Bagehot, *The English Constitution*, London, 1867.

10. Joan Rydon, 'The Electoral System', in *Australian Politics: A Fourth Reader*, Henry Mayer & Helen Nelson (eds), 1977.

11. P.D. Finn, *Law and Government in Colonial Australia*, Melbourne, 1987.

governments did seem to explain colonial solutions in which short-lived governments rose and fell depending on the shifting factions in pre-party colonial parliaments.¹²

Moreover, the English doctrine of the sovereignty of parliament, which has enjoyed exaggerated currency in Australia, ties the legal system neatly into this democratic paradigm.¹³ But of course Australian government was never simply parliamentary responsible government either before or after federation. In colonial Australia, egalitarian democracy did not translate into majoritarianism, albeit leavened by the strong British inheritance of the rule of law. Imperial law cast a heavy shadow over early colonial government and the Colonial Laws Validity Act 1865, ironically passed to strengthen the hand of self-governing colonies, proved to be a two-edged sword which curtailed as well as affirmed the legislative autonomy of colonial parliaments. Perhaps more importantly, colonial upper houses representing established property interests provided a constant check on governments elected on a broader franchise and based in lower houses. Thus, well before federation, Australian colonial government incorporated constitutional norms of limited powers and judicial review as well as legislative checks and balances through bicameralism.¹⁴

Federation built upon, but greatly extended, this colonial constitutional tradition by adopting essentially the American federal system of limited governments, divided powers, a controlling constitution and judicial review by an independent court. The Australian founders, however, were deeply attached to parliamentary responsible government which they retained and married with federalism as the Canadians had previously done.

There has been a tendency among Australian commentators to exaggerate the extent to which responsible government has dominated Australian politics and, in particular, the working of the Australian Parliament, and to downgrade or ignore constitutional federalism and the role of the Senate. Andrew Parkin has pointed out that 'the conventional wisdom of Australian political culture and of Australian political science' which has featured as the textbook paradigm of Australian politics has been 'party responsible government'.¹⁵ Even Elaine Thompson, in her much-cited 'Washminster' mutation interpretation of Australian politics, emphasises the separation of powers within the Commonwealth government but surprisingly overlooks the more important federal division of powers.¹⁶

Despite the majoritarian assumption or preference of many that Australia is, or ought to be, a centralised and unitary system of government, the reality is radically different. Australia is a federal democracy with the people organised into dual political communities, national and state. The federal principle is profoundly evident throughout the constitutional system: in the controlling document which formally established the system of governments, specifying in detail the structures of the

12. P. Loveday & A.W. Martin, *Parliament Factions and Parties: The First Thirty Years of Responsible Government in New South Wales*, Melbourne, 1966.

13. M. James, 'The Constitution in Australian Political Thought', in M. James, ed., *The Constitutional Challenge: Essays on the Australian Constitution, Constitutionalism and Parliamentary Practice*, Sydney, 1982.

14. For strong accounts of this see Campbell Sharman, 'Australia as a Compound Republic', *Politics*, vol. 25, no.1 (1990), and 'Parliamentary Federations and Limited Government: Constitutional Design and Redesign in Australia and Canada', *Journal of Theoretical Politics*, vol. 2 (1990), p.205.

15. Andrew Parkin, 'Pluralism and Australian Political Science', *Politics*, vol. 15, no. 1, May 1980, p. 50 at p. 51.

16. Elaine Thompson, 'The "Washminster" Mutation', *Politics*, vol. 15, no. 2, (1980) at pp. 34, 38.

Commonwealth and guaranteeing State constitutions and residual powers; in the federal division of powers between the Commonwealth and State governments; in the bicameralism of the national Parliament with the Senate based on equal state representation and having virtually coequal powers with the House of Representatives¹⁷; and in the referendum procedure which makes the people masters of the constitution and requires 'double majorities' of the electors overall as well as in a majority of the States.¹⁸

The fact that Australia has a rich hybrid system of parliamentary responsible government *and* the entrenched institutions of federal democracy are both highly relevant to the rights debate. There has been a tendency in the past to focus unduly on the former and argue that responsible government plus the common law was sufficient for protecting rights in Australia. This traditional position was best articulated by Menzies, but neglected entirely the important contribution of federal constitutionalism. The reformist position advocating a bill of rights quite rightly criticises the adequacy of the traditional Menzies view, but it also neglects the significance of the federal constitution. Likewise, the reformists and Laborites who favour a bill of rights couple this extra safeguard for individual liberties to a greater centralisation of power at the national level which they prefer. The inadequacy of this narrow focus on parliamentary responsible government is developed in the next section.

Australia's impoverished rights debate

What I want to suggest is that, for the most part, public discussion and debate about how well rights are protected in Australia have not taken proper account of the richness and complexity of Australian political culture and constitutional design. The proponents of the established order such as Menzies have relied on partial accounts based upon parliamentary responsible government. Reformists such as the Australian Labor Party have embraced a bill of rights but as a counterbalance to greater centralisation of power in the national government which they prefer. In other words, the public debate over protecting rights in Australia has been partial and distorted on both the traditional and reformist sides, as the following examination shows.

The responsible government heresy

Although the American federal constitution was 'an incomparable model' for the Australian founders, as Sir Owen Dixon pointed out, they departed from it in two important respects: by retaining a responsible government executive and not adopting a bill of rights to restrict legislative action. The two exceptions were related, as Dixon explained to the American Bar Association in 1944:

The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except in so far as it might be necessary for the purpose of distributing between the States and the central Government the full content of legislative power. . . . It may surprise you to learn that in Australia one view held that these checks on legislative action were undemocratic, because to adopt them argued a want of confidence in the will of the people. Why, asked the Australian

17. The only restrictions to the Senate's legislative powers are that it cannot initiate or amend money bills, but it does have specific right to advise changes and of course can veto or fail to pass them outright. The restrictions were imposed by the Australian founders to preserve the primacy of responsible government: that is, the executive is responsible for monetary policy and is based in the lower house.

18. Brian Galligan, R. Knopff and John Uhr, 'Australian Federalism and the Debate Over a Bill of Rights', *Publius*, vol. 20, no. 53, 1990, at pp. 63-5.

democrats, should doubt be thrown on the wisdom and safety of entrusting to the chosen representatives of the people sitting either in the federal Parliament or in the State Parliaments all legislative power, substantially without fetter or restriction?

In our steadfast faith in responsible government and in plenary legislative powers distributed, but not controlled, you as Americans may perceive nothing better than a wilful refusal to see the light and an obstinate adherence to heresies; but we remain impenitent.¹⁹

The Australian heresy was to eschew a constitutional bill of rights for democratic reasons which were closely linked to the preference for responsible government — namely, that the combined processes of parliamentary representative democracy and responsible government were considered a sufficient protection.

Menzies quoted with approval these views of Dixon, his legal mentor, in public lectures delivered at the University of Virginia in 1967 shortly after he had retired as Australia's most successful Liberal prime minister. Menzies gave his own articulation which is a classic statement of the traditional Australian view that the people's democratic control over the executive through a parliament of elected representatives obviated the need for a bill of rights:

With us, a Minister is not just a nominee of the head of the government. He is and must be a Member of Parliament, elected as such, and answerable to Members of Parliament at every sitting. He is appointed by a Prime Minister similarly elected and open to regular question. Should a Minister do something which is thought to violate fundamental human freedom he can be promptly brought to account in Parliament. If his Government supports him, the Government may be attacked, and if necessary defeated. And if that, as it normally would, leads to a new General Election, the people will express their judgment at the polling booths.²⁰

Menzies concluded, in the passage quoted earlier, that democratic responsible government was regarded 'by us as the ultimate guarantee of justice and individual rights', and claimed that the rights of individuals in Australia were as adequately protected as in any other country in the world.²¹

I doubt whether Menzies, or Dixon before him, would have convinced their American audiences because the position being advocated was quite alien to American political culture. The American rights tradition is strongly informed by liberal assumptions giving primacy to the individual and distrusting popular democratic government because of its assumed propensity towards tyranny of the majority. The Australian tradition, in contrast, is premised on a more positive view of representative democracy and buttressed by a faith in the ability of democratic processes both to express the popular will and to protect individual rights. But neither would Menzies' formalised account of democratic responsible government convince many Australians today because it ignored the iron grip of party discipline and executive dominance over parliament.

19. Owen Dixon, speech to the American Bar Association in August 1944, in *Jesting Pilate and Other Papers and Addresses*, Melbourne, 1963, pp. 101–02, quoted in R.G. Menzies, *Central Power in the Australian Constitution*, London, 1967, pp. 52–3.

20. Menzies, *op. cit.*

21. *ibid.*

Even in Menzies' time, the transformation of parliamentary responsible government through dominance of disciplined parties was well documented. In reinterpreting Bagehot, R.H.S. Crossman has spelt out 'the transfer of effective power from the floor of the Commons to the great party machines and the bureaucracy of Whitehall'.²² Party discipline enabled stronger and stronger executive government control over Parliament, as Harry Evans has recently emphasised, causing a reversal of roles within parliamentary responsible government: 'Instead of executive governments being responsible to parliaments, parliaments have become responsible to executive governments. The body which is supposed to be scrutinised and controlled by parliament has actually come to control the body which is supposed to be doing the scrutinising and controlling — a reversal of roles.'²³

The consequences for rights protection are disturbing, as Justice Brennan has recently pointed out: 'A further danger to human rights and fundamental freedoms is posed by the dominance of the Executive Government, supported by its bureaucracy, over the Parliament. This dominance has undermined the theory that the Westminster model of responsible government effectively guarantees democratic control of executive power . . .'²⁴

If Menzies' stylised account of parliamentary responsible government was substantially weakened by the brute reality of party discipline, his defence of the Australian system might have been significantly strengthened by pointing out its federal constitutional features. His account was incomplete as well as distorted. Menzies' own disgraceful lapse of jeopardising basic human rights when seeking to ban the Communist Party in 1951 had been remedied not by responsible government but by constitutional restrictions to the Commonwealth Parliament's powers enforced through judicial review by the High Court. The defeat of Menzies' draconian measures for dealing with Communists was confirmed by the Australian people voting in referendum, and not via the ballot box.²⁵

Had Menzies articulated the federal constitutional aspects of Australia's system of government his American audience would have found much familiar ground. For the Australian Constitution ensures a highly fragmented and decentralised system of government with many features that the American Federalists argued, in defending the American Constitution, were an institutional means of protecting individual rights and freedoms. In the ratification debate before the Bill of Rights was added to placate the Anti-Federalists who believed that liberal democracy was possible only in small republics and decentralised confederations, Hamilton had claimed that the elaborate system of checks and balances made the American constitution 'itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS'.²⁶

With the notable exception of the executive branch, Australia has a similar array of federal and constitutional measures embodied in its system of government. An entrenched constitution specifies the powers of government, including the federal

22. Introduction to Bagehot, *The English Constitution*, 1963, p. 37.

23. Harry Evans, 'Parliament: An Unreformable Institution?', *Papers on Parliament*, No. 18.

24. G. Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response', Conference on Human Rights, Australian National University, Canberra, 15-17 July 1992, p. 8.

25. M.D. Kirby, 'H.V. Evatt, the Anti-Communist Referendum and Liberty in Australia', *Australian Bar Review*, vol. 7, no.2, 1991.

26. Alexander Hamilton, 'The Federalist No. 84'.

division of powers; the legislative will is divided through bicameralism with a strong Senate; there is a jurisdictional umpire in the independent High Court exercising judicial review; and constitutional change is provided by a referendum procedure requiring 'dual majorities'. This part of Australia's system of government is grounded in principles of federal constitutional democracy which are more pervasive than the majoritarian ones associated with parliamentary responsible government. In fact, from an institutional design point of view, it is the latter which are grafted onto the former since responsible government is the executive form within the larger constitutional system. Hence, Menzies' defence of the institutional adequacy of rights protection in Australia was doubly wrong: first, because of his benign but misleading account of parliamentary control of the executive; and second, because he omitted the elaborate constitutional system of checks and balances restricting both parliament and the executive.

Counterbalancing centralism

Curiously, reformists who favour an Australian bill of rights are usually imbued with a similar disdain for federal constitutionalism. Their advocacy of a bill of rights is not to further complement, but rather to substitute for, the dispersion of power inherent in the federal constitution. The Labor Party and critics like Geoffrey Sawyer have advocated a bill of rights as a counterbalance to greater centralisation which they also preferred. This partisan link between centralism and a bill of rights has coloured much of the public debate in Australia and needs to be properly appreciated.

The rights debate in Australia raises a puzzle about the positions of the major political parties: they seem to have been on the wrong sides. The Liberals have been generally opposed in principle, sharing Menzies' satisfaction with parliamentary responsible government and the common law, but nevertheless innovative in adopting the 'New Administrative Law' to enhance the protection of rights in a more pervasive administrative state and in establishing special human rights commissions. Labor, on the other hand, plumped for a bill of rights which was incorporated into its platform after extensive discussion in national conferences and party committees during the 1960s.

Previously, the federal Labor Party had favoured constitutional reform in order to centralise political power for purposes of 'state socialism', economic management and collective social policy goals. The Curtin and Chifley governments of the 1940s epitomised Labor's practical commitment to such purposes, centralising fiscal power in Canberra through monopolising income tax, attempting to nationalise private banks and airlines, and laying the foundation for Australia's postwar national welfare policies and Keynesian style management of the national economy. Moreover, for most of its federal history, the Labor Party was formally committed to the abolition of federalism on the grounds that such a structure of government fragmented political power and restricted reformist and socialist state action. In opposing this, the Liberals have been the self-professed guardians of the established federal system.

Labor's civil liberties platform, piloted through the 1969 party conference by Lionel Murphy, was a milestone in setting the reformist parameters of Australia's public debate over human rights protection. Its first three planks committed Labor to the following:

- (1) The constitution to be amended to provide for the protection of fundamental Civil Rights and Liberties;
- (2) The Commonwealth and State parliaments to pass Acts providing for human rights and civil liberties, and to take all possible legislative and administrative action and judicial proceedings to prevent infringement of such rights and

- liberties and in particular to prevent discrimination on the grounds of colour, race, sex, creed or politics; and
- (3) Australia to pass laws and to press for worldwide and regional implementation of international covenants on human rights. The states also to pass any laws necessary for such implementation.²⁷

Labor's switch to human rights protection was complemented by substantial modification of its traditional commitment to centralisation of political power and reconciliation with federalism.²⁸ Concerns with the dangers of 'big government', commitment to quality-of-life concerns, greater sophistication in economic thinking and in working the federal constitution were all elements in Labor's 1960s reorientation. Nevertheless, the Labor Party remained committed to a greater centralisation of power within the Australian constitutional system and tempered this with its new commitment to a bill of rights. This was apparent in the abortive 1988 referendums proposed by the Hawke Government and championed mainly by Attorney-General Bowen: one proposal was to extend the existing few entrenched rights by making them binding on the States, while another was to bring the Senate's term in line with that of the House of Representatives. The former would have extended rights protection but at the expense of the States, while the latter would have increased executive dominance at the expense of the Senate. Both elements were significant in the crushing defeat of both proposals.

The most notable academic proponent of greater centralism of constitutional powers tempered by a bill of rights was Geoffrey Sawer. Sawer advocated what he called 'organic federalism', a curious term for an advanced stage of centralisation in which the centre dominates the regional states which are reduced to administrative units. Sawer called this alternatively a 'Bill of Rights state', which he sketched as follows:

It is possible that the development towards organic federalism may better be described as a development towards a Bill of Rights state; geographically guaranteed autonomy may be replaced, gradually, by guarantees appropriate to a plural society in which the entrenched protection of an area of *individual* autonomy is the basis for denying omnipotence to a centrally organised Leviathan. The entrenching of decentralised *administration* may be regarded as an aid to protecting the Bill of Rights.²⁹

In Sawer's view, and that of the Labor Party more generally, a bill of rights is linked to a larger reformist constitutional agenda. It needs to be recognised that the position favouring a bill of rights for Australia has been a partisan one, with the Labor Party and reformist critics like Sawer in favour and the Liberals together with more conservative commentators, opposed. That in itself has been enough to ensure that public opinion is divided and constitutional entrenchment by referendum foreclosed. Even the more modest attempts of federal Labor governments to introduce statutory bills of rights have been stymied by partisanship and blocked by the Senate.

There has been a tendency among those who favour a more enlightened public debate to decry such spoiling partisanship, but not to recognise the deeper underlying

27. Australian Labor Party, *Platform, Constitution and Rules*, 1969, 'XXV: Civil Liberties', p. 31.

28. B. Galligan and D. Mardiste, 'Labor's Reconciliation with Federalism', *Australian Journal of Political Science*, vol. 27, no. 1, 1992, p. 23.

29. Geoffrey Sawer, *Modern Federalism*, Carlton, 1976, p. 104.

differences between the major parties. Labor's bill-of-rights plank has been part of a reformist constitutional agenda which, despite substantial modification, favours greater centralisation and nationalisation of power. And as American and Canadian experience clearly demonstrate, an entrenched bill of rights is a powerful nationalising instrument. Sawyer's 'Bill of Rights state' is unashamedly centralist and this model has deep resonances with traditional Laborist thinking. So far at least, such political partisanship has been sufficient to preclude the implementation of an Australian bill of rights.

Conclusion

The traditional defence of the adequacy of Australia's political system for protecting human rights, given by such eminent proponents as Menzies and Dixon, relied on the efficacy of parliamentary responsible government and the common law. While the common law can still be a vehicle for redressing rights issues, as in the recent *Mabo* case which recognised indigenous peoples' title to land and reversed the centuries old doctrine of *terra nullius*,³⁰ it has been swamped by hyperactive legislatures. This eclipsing of common law puts a heavier burden for rights protection on parliamentary responsible government. The case for the adequacy of parliamentary responsible government for protecting rights was premised on two key propositions: one, that Australia's political system was essentially one of parliamentary responsible government; and two, that parliamentary responsible government worked according to the classic model of the executive being responsible to parliament which was in turn democratically accountable to the people. Since neither proposition is true, however, this traditional account of the adequacy of rights protection in Australia is fundamentally flawed.

Even by Menzies time, distinguished commentators like R.H.S. Crossman had reinterpreted Bagehot's classic account of parliamentary responsible government to take account of party discipline which led to executive dominance. In other words, an increasingly powerful political executive backed up by a huge administrative bureaucracy had come to dominate parliament by means of party discipline. This substitution of party for parliamentary control was reflected in the Australian paradigm of 'party responsible government' which, as Parkin pointed out, was the conventional wisdom of Australian political culture and of Australian political science. Clearly, party responsible government was more of a threat to, rather than a bulwark of protection for, human rights.

But fortunately, this was only a partial and distorted picture of Australia's system of government which consists of a federal constitution, as well as parliamentary responsible government. Even if party responsible government had become 'elective dictatorship' without effective checks against executive despotism, as Lord Hailsham brilliantly characterised the English constitution, Australia could never be described in this way. That is because Australia has an entrenched system of constitutional government in which power is diffused among multiple governments with limited powers, in which an independent court decides jurisdictional disputes concerning a government's powers, and in which the powerful national government does not usually control the Senate. Such dispersion of power substantially checks and restrains government in Australia and is a powerful institutional protection for human rights. We are forcefully reminded of this by the High Court's recent decision

30. *Mabo v. Queensland* (1992), 66 ALJR 408.

to strike down Commonwealth legislation banning political advertising on the electronic media on the eve of two state election campaigns.³¹

The failure to articulate and appreciate the potency of the federal constitution for protecting rights has led to a superficial and unrealistic public debate about the adequacy of rights protection in Australia. To make sensible assessments of the institutional arrangements which we have and to offer realistic proposals for reform, we do need to understand the system which is in place. A more enlightened public debate over the adequacy of Australia's established institutions for protecting rights would need to recognise the erosion of *parliamentary*, and its subversion by *party* responsible government. And the potential threat to human rights from party responsible government would need to be balanced against the substantial restraints imposed by the federal constitution.

Questioner — I am Dennis Stevenson from the ACT Parliament. The Labor Party, for much of its existence, has supported the right of citizens to initiate referendums. Would you comment on whether you think that their ability to initiate referendums — perhaps on the three areas of recall, initiating new legislation, and vetoing existing or proposed legislation — would hand a level of power back to the people.

Prof. Galligan — This is a very good issue. You compare Australia's record of constitutional change with others, and you see that it is not that bad. What is bad is the proportion of proposals that succeed compared with the number that we make. Even if you said that our record was fairly bad, one of the obvious reasons is that proposals can be put up under the existing formula only by the national government — and you would expect the national Government would, for the most part, be putting up proposals which would enhance its own power, and this has usually been the case.

I am very much in favour of broadening the means whereby you can bring forward constitutional amendments. For example, I would find it quite favourable to have some formula for bringing them from the States, either the majority of the States or something like that. With reservation, I would also be in favour of a popular referendum scheme where a specified number of citizens could bring forward some proposal. I suppose my reservation would be to ensure that that process was not taken over by a sort of fringe ratbag group. Who is a fringe ratbag depends on where you sit and what your position is. But there is a tendency for single issue political groups to be able to marshal the numbers, to get proposals up, which would not have any chance of gaining the support required for a referendum to be successful.

In short, I would be in favour of broadening the avenue for bringing forward constitutional proposals. I think, if nothing else, it reflects the health of the system — if people are sufficiently interested, they will bring a constitutional amendment rather than be disillusioned and drop out or, worse still, perhaps start rioting in the streets. So, with reservations, I would be in favour of both State and popular referendum avenues.

Questioner — My name is Joan Macnee — a Londoner from Melbourne and also a very responsible citizen. There is a need, I believe, for us to all understand that we need to look at not only our own methods but other people's as well. Unless we look at

31. *Australian Capital Television v. Commonwealth* (1992) 66 ALJR 695.

it in context and have some understanding of Switzerland, Scandinavia et cetera, we are really not getting a good look at it at all.

Prof. Galligan — I appreciate those comments and I would appreciate your comments on this, as I would any others. On understanding other peoples, I think that although I have been dwelling, in a sense, on the institutional aspects of this, the human understanding, the human learning part is crucial. You can have a Bill of Rights and still have slavery for nearly a century, as the Americans did to their shame. You can have a Bill of Rights and have some of the grossest forms of racial discrimination, as again the Americans did up until the 1950s.

I think that we need an informed institutional debate in Australia but the people of Australia also need perhaps a change of heart. You might even argue then that, if we need to have a change of heart, we do not need any institutional changes.

As far as learning from other countries is concerned, I think it is very important for Australians to be aware of the institutional developments in other countries and also how, increasingly, the instruments of international human rights are having a direct impact on Australia. If you look at the major opinions in the Mabo case reversing the doctrine of terra nullius you will see that the judges specifically say there that we need to re-interpret the common law in Australia to take account of the international accords which govern these matters in other countries and also the current values of Australians.

Questioner — In weighing up the pros and cons of a bill of rights, I would be interested to hear your comments on the costs. I have heard some people's reservations that a bill of rights could be very costly for countries. What is the evidence from overseas and what are your comments?

Prof. Galligan — It is very hard to know. You can, in a sense, work out a list in which there are costs and savings. Presumably, if a lot of difficult political, bureaucratic issues, which are now dealt with by the executive, are transferred to the courts — which they would be — then there would be savings on the bureaucratic, political side. But presumably there would be extra expenses in the cost of litigation through the courts.

It is very hard to quantify this. Certainly, you can say that the courts get a lot more action. Individual groups and individuals themselves, depending on their right of taking things to the court, become very adept at doing that. For example, if you are a women's electoral lobby member in Canada — they probably do not call it that now — you do not waste much of your time lobbying politicians. You would get some good lawyers, get some money together and make a case before the Supreme Court. If you win, you do so regardless of what all the legislatures across Canada might think.

It is very difficult to say. Gerard Brennan, in an address a couple of weeks ago — the one I quoted here today — drew attention to the cost factor in current litigation and the implications of that when you had a bill of rights. If we can afford a one billion dollar parliament, it seems to me that the costs, as well as the pluses and minuses, of having a bill of rights are really neither here nor there, particularly if, at the end of the day, we get better justice from it.

Questioner—Why do you consider the Democrats' approach to government to be silly and not workable? Would you like to expand on it, please?

Prof. Galligan—I have great respect for the Democrats. However, there was a statement which came out over the weekend that perhaps we could do away with the States and somehow, out of this sort of centralist Utopia, there might come better policies. I thought that everyone had buried this idea long ago. If the Democrats had the balance of power in Canberra, I guess it would make their job much easier if we did not have any States.

These days, I think that serious proposals canvassing whether we ought to abolish the States are really quite silly. I can give you one of my discussion papers that Harry Evans was flashing around earlier which makes the case at some length for that. I am going to send one to the Democrats' headquarters as well. Thank you.