Judicial Reasonings and Responsibilities in Constitutional Cases

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Throughout the Easter voyage of the SS *Lucinda* in 1891, as it paddled about the Hawkesbury River, were two of the three members of the Drafting Committee for the 1891 Constitutional Convention — Samuel Walker Griffith and Charles Cameron Kingston. They were joined by Edmund Barton as alternate for the third member, Andrew Inglis Clark from Tasmania, during the attack of influenza which kept him away until the Middle Harbour part of the cruise.[1]

On the *Lucinda* the Committee took the draft of Chapter III on the Federal Judicature to an advanced stage, much of it on the basis of Inglis Clark's now famous draft.[2]

Not surprisingly, there is little express indication of what the delegates on the *Lucinda* and other delegates expected from the Federal Judicature as to its performance standards. But some negative indications may be inferred from their views about the Privy Council. For instance, Griffith wrote to Inglis Clark in 1900:

> I have very little respect for the P.C., as now constituted. They often fail to deal with the real point in the case at all.[3]

Inglis Clark also had an unfavourable impression, later mentioning (among other things) that, when he appeared before the Privy Council on behalf of the Tasmanian Government, 'only one of the judges was awake and the other three were all dozing'.[4]

Kingston from South Australia, and no doubt others, would have been familiar with the difficulties caused by Justice Benjamin Boothby in the Supreme Court of South Australia in the 1860s. He had persisted, even after the enactment of the *Colonial Laws Validity Act* 1865 (UK), in striking down legislation of the South Australian Parliament. An address by both Houses of that Parliament for his removal was carried in 1867 on the ground of misbehaviour.[5] The removal was not for any alleged corruption or the like: there was no suggestion that Boothby did not honestly believe that his decisions were legally justified.

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1 J A La Nauze, *The Making of the Australian Constitution* (1972) 64.

2 Id 25, 56, 66–7; J Reynolds, 'A.I. Clark's American Sympathies and his Influence on the Australian Federation' (1958) 32 ALJ 62, 67.

3 Quoted in J M Bennett, *Keystone of the Federal Arch* (1980) 6.

4 La Nauze, op cit (fn 1) 67.

5 A C Castles, article on Benjamin Boothby in the *Australian Dictionary of Biography* (1969) Vol III, 194, 195–6.

Among the various requirements, the Founders would certainly have expected judges, in developing the law, to do so with strict impartiality. Another of their expectations would have been that judicial reasoning should be logical, though recognising, of course, that logic is far from sufficient. They would also have expected judges to try to ensure the completeness and accuracy of the legal materials on which they rely. The Founders would also have thought that judges should not reach preconceived conclusions and then select from the materials those ingredients which support their conclusions, ignoring materials that tend against them, or misrepresenting the materials — for example, by deliberately subjecting quotations to inappropriate surgical treatment.

One thing the Founders would surely *not* have envisaged is that judges would claim a responsibility to do justice otherwise than according to law [6] or that they would claim either infallibility or immunity from criticism.

As to criticism, former Chief Justice Warren Burger of the United States Supreme Court once said:

> A court which is final and unreviewable needs more careful scrutiny than any other. Unreviewable power is most likely to self-indulge itself and the least likely to engage in dispassionate self-analysis. . . . In a country like ours no public institution, or the people who operate it, can be above public debate.[7]

(He said this some time before being appointed to the Supreme Court, and before publication by Bob Woodward and Scott Armstrong of their book *The Brethren* in 1979.)

What I intend to do is to examine a selection of recent cases in which, I respectfully suggest, there are serious errors and other deficiencies in the reasoning on important constitutional issues. The purpose, in accordance with the general theme of the Lucinda Lectures, is to consider what changes, both in judicial procedures and substantive matters, might be desirable or otherwise in the coming years.

By 'errors' I mean errors of logic or fact, not merely exercises of judgment on the basis of logically correct reasoning and correct presentations of all relevant materials. For instance, I do *not* include the *Political Broadcasts* case,[8] since the general principles formulated by the Court seem to me to be reasonably arguable, especially when put on the narrower basis adopted by McHugh J. Some might think that, in applying those principles to the particular legislation, the majority gave too little weight to the views of the

[6] Cf Sir Anthony Mason, 'The Role of the Judge at the Turn of the Century', Fifth Annual Oration in Judicial Administration, 2 December 1993, esp 5, 26 and 30: 'The fundamental role of the judge is to administer justice according to law, not only with fairness and integrity, but also with understanding'.

[7] In a speech to the Ohio Judicial Conference, delivered on 4 September 1968; the quoted excerpt is published in B Woodward and S Armstrong, *The Brethren — Inside the Supreme Court* (1979) 5.

[8] *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106.

Parliament.[9] But even if I were to disagree with the particular 'balance' struck in that case, it would not be the kind of 'error' to which I shall be directing my remarks.

Errors of the kinds that I *do* have in mind are found in the *Incorporation* case,[10] but not in the majority judgment. That judgment held that the power in s 51(xx) of the Constitution to legislate with respect to corporations '*formed* within the limits of Australia' does not extend to the *formation* of corporations. It seems to me to reach the better conclusion in the light of the constitutional language, the historical background and the awkwardness involved in implementing the concept of legislation limited to the formation of trading and financial corporations.

The 'errors' in that case that I have in mind occur in some of the reasoning by Deane J in his dissenting judgment. His Honour referred to the argument that the power in s 51(xx) of the Constitution to make laws with respect to 'trading and financial corporations formed within the limits of Australia' does not extend to the formation of companies. He then said:

> One might as well say that a legislative power with respect to locally *manufactured* motor vehicles would not extend to laws governing the local *manufacture* of motor vehicles. . .[11]

But such a power would surely raise the very same kind of question as s 51(xx) — that is, whether the power with respect to *manufactured* vehicles is limited to laws about vehicles that *have been manufactured* at any particular time when the law is applied. Deane J also stated:

> One might as well say ... that the legislative power with respect to *lighthouses* does not extend to laws governing the *erection* of lighthouses . . .[12]

Certainly the lighthouses power in s 51(vii) of the Constitution does extend to laws concerning the erection of lighthouses — just as a power simply to legislate with respect to 'corporations' would support laws dealing with the formation of corporations. But a power with respect simply to 'lighthouses' is not analogous to s 51(xx); the true analogy would be a power with respect to 'lighthouses erected in Australia'.

I shall be giving more examples of such errors later in this article. Flaws such as these in judgments by our most eminent judges must be comforting to inferior courts, just as they are immensely comforting to us advisers and lecturers when we make mistakes of our own from time to time. But such mistakes can cause problems and, of course, are best avoided. Presumably

[9] D Z Cass, 'Through the Looking Glass: The High Court and the Right to Speech' (1993) 4 *Pub LR* 229; G Kennett, 'Individual Rights, the High Court and the Constitution', paper delivered at a Constitutional Law Forum, Attorney-General's Department, 19 August 1993; A R Blackshield, 'The Implied Freedom of Communication', paper (to be published) delivered at the Conference on *Future Directions in Constitutional Law*, Australian National University, 3–4 December 1993; cf H P Lee, 'The Australian High Court and Implied Constitutional Guarantees' [1993] *Pub Law* 606.

[10] *New South Wales* v *The Commonwealth* (1990) 169 CLR 482.

[11] Id 505 (emphasis added).

[12] Id 505–6 (emphasis added).

they could be avoided by better communication between Justices so that mistakes can be corrected before judgments are delivered (even if this might not necessarily affect the conclusions).

As to the extent of communication within the High Court, little appears to be known (unlike that in the United States Supreme Court as described in *The Brethren*).[13] It appears that draft judgments *are* circulated. And, in a video displayed to tourists in the High Court foyer, the Chief Justice says that the Justices hold regular judicial meetings and also ad hoc ones. Nevertheless, opportunities to discover errors before judgment do sometimes seem to be missed. In some cases this may happen because judgments do not focus fully on all the arguments employed in other judgments in the case. They 'pass like ships in the night'.[14] But judges need to deal, not only with all the arguments raised by the parties, but also with the arguments relied upon by other members of their court. Unless they do so, we can never know whether they took those arguments into account and, if they did not, whether their judgments would still have been the same if they had done so. I do not advocate the 'wheeling and dealing' which seems to be practised in the US Supreme Court, if the account in *The Brethren* is accurate. That practice could, to some extent, be thought to be an abdication of the responsibility of each judge to decide cases in accordance with what he or she honestly believes to be the legally best view after weighing all the relevant material. But one must nevertheless admire the vigour of the mutual correction and criticism that takes place inside and outside the conferences within the US Supreme Court. Due respect for another judge's autonomy is surely compatible, not only with pointing out errors that are noticed before the other's judgment is delivered, but also with fully and explicitly dealing with opposing arguments in it.

In cases where the *entire* High Court appears to have fallen into basic error (and has therefore given the greatest comfort to fallible readers), the problem may lie, not only in communication within the Court, but in certain other aspects.

An example I want to examine here is *Bourke* v *State Bank of NSW*.[15] The question in that case was whether certain prohibitions in the *Trade Practices Act* 1974 (Cth) applied to conduct by the State Bank of NSW in the course of its banking within NSW ('intra-state State banking'). The provisions that created the problem were definitions enacted in 1977 and, I suspect, without

[13] See fn 7 supra.

[14] For a particularly notable example see *The Commonwealth* v *Evans Deakin Industries Ltd* (1986) 161 CLR 254, in which the majority did not deal at all with the basic constitutional issues which were considered by Brennan J, though the actual decision can probably be justified: see D J Rose, 'The Government and Contract' in P D Finn (ed), *Essays in Contract* (1987) 234–8; and, on waiver, see *Breavington* v *Godleman* (1988) 169 CLR 41. Another notable example is *Chu Kheng Lim* v *The Minister for Immigration* (1992) 176 CLR 1, in so far as it concerned the interpretation of s 54R of the *Migration Act* 1958 (Cth) (and note also that no mention is made in any of the judgments of the very relevant definition of 'custody' in s 54K).

[15] (1990) 170 CLR 276. Another example is *Air Caledonie International* v *The Commonwealth* (1988) 165 CLR 462. If the only effect of an amending Act is to amend the principal Act, the taxation is not 'imposed' by the amending Act: it must be imposed only by the principal Act as amended. Hence s 55 should not have affected the amending Act on that argument.

advice at an appropriate level. The High Court held that the prohibitions did not validly apply to intra-state State banking. The conclusion is clearly correct but the reasoning seems to involve a fundamental error concerning the characterisation of Commonwealth laws for the purposes of s 51 of the Constitution.

I am concerned only with the prohibition in s 52(1)[16] of the *Trade Practices Act* which read:

> A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

The word 'corporation' was defined to include a 'financial corporation', which was in turn defined in two 'limbs'. I am concerned only with the first, which applied to any '*financial corporation formed within the limits of Australia*'. (The second limb covered any corporation carrying on *banking* business in certain circumstances.)

The Court held that the prohibition was invalid in so far as it purported to apply to intra-state State banking.[17] The Court's reason was that, in so far as the prohibition in s 52(1) affected the actions of banks in their banking business, the prohibition was a law *with respect to banking*.[18] The provision touched upon or concerned intra-state[19] State banking to such an extent that it could not be characterised as a law with respect to banking other than intra-state State banking[20] and therefore exceeded the banking power. But it was read down so as to exclude intra-state State banking.

The crucial sentence in the judgment is simply an *assertion* that, in so far as the prohibition based on the first definitional limb about deceptive practices by financial corporations purported to apply to practices in the course of banking, it was a law with respect to banking.[21] The Court gave no reasons at all on this fundamental issue of characterisation. If correct, it would have very wide implications. But it seems to be clearly wrong. Suppose that s 52 had been expressed to prohibit all deceptive commercial practices, whether by corporations or anyone else. Suppose the Commonwealth had argued that it could be characterised as a law with respect to banking in so far as it applied to

[16] The position with s 52A was significantly different. It applied to unconscionable conduct in connection with the supply of 'services', the definition of which contained a separate paragraph dealing with banking services: see fn 23 infra.

[17] *Bourke* v *State Bank of NSW* (1990) 170 CLR 276, 292.

[18] The Court did not mention the convincing submission by intervening States that the case should be decided on the ground that the relationship between s 51(xiii) and s 51(xx) is a special one based partly on the historical background to s 51(xx) and partly on the fact that the exception in s 51(xiii) would be futile (except in regard to unincorporated State banks) if s 51(xx) applied to banking without any limitation as regards intra-state State banking. The comprehensive nature of s 51(xx) distinguishes it from limited Commonwealth powers such as those with respect to bills of exchange, or even defence, which can quite sensibly apply to intra-state State banking.

[19] *Bourke* v *State Bank of NSW* (1990) 170 CLR 276, 288–9 — their Honours refer simply to 'State banking' but presumably meant State banking within the relevant State.

[20] Ibid. The Court's reasoning seems to mean that the *Cheques and Payment Orders Act* 1986 (Cth), Part VI, which is headed 'Duties and Liabilities of Banks' and seems clearly to be a law with respect to banking (as well as one with respect to bills of exchange), cannot validly apply to intra-state State banking. This would surely be a very strange result.

[21] Id 290; and assumed 291.

deceptive practices in the course of banking, or as a law with respect to overseas trade in so far as it applied to deceptive practices in overseas trade, or as a law with respect to aliens in so far as it applied to deceptive practices by aliens.[22] The argument would have been quickly rejected, and rightly so. It is the same with s 52(1) applying to deceptive commercial practices by financial corporations generally. How can it possibly be said that, in so far as it applies to deceptive practices in the course of banking, it is a law with respect to banking?

The decision cannot be explained on the basis that s 51(xiii) of the Constitution implies an exclusive State power with respect to intra-state State banking since the Court expressly (and rightly) rejected that proposition.[23] Nor can reading down provide the answer: the question of reading down could (and did) arise on the Court's approach only *after* the law had been characterised as one with respect to banking and so in excess of the banking power because of its inclusion of intra-state State banking.[24]

So what caused the error? We can only speculate. But one thing can be said: the proposition on which the Court based its decision was not canvassed at all at the hearing or in the written outlines of submissions. The error could have been avoided if the Court had acquainted the parties and interveners of the proposed characterisation and had invited further submissions.

As for *Bourke* itself, it is very hard for anyone — even a Commonwealth lawyer — to get very excited about the constitutional aspects of State banking. In any case, if I am right in my analysis, the mistake in *Bourke* was due merely to oversight and will be corrected in due course. It is therefore not a very troubling mistake. And, as I have indicated, it is a very comforting one. But there are some recent cases where the comfort given by errors is offset by some rather disturbing aspects. The judgments I have in mind seem to have resulted from a natural tendency to overlook flaws in one's own reasoning where one strongly believes the conclusion to be a desirable one. In those cases, some

[22] See, eg, *Pidoto* v *Victoria* (1943) 68 CLR 87, 108 per Latham CJ; *Strickland* v *Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

[23] *Bourke* v *State Bank of NSW* (1990) 170 CLR 276, 288. Nor can it be justified on the basis that the first limb of the definition took its character in some way from the second limb. If that were the explanation, a law simply dealing with misleading practices by 'financial corporations' within the meaning of s 51(xx) would not be subject to any restriction concerning State banking. And note the contrast between s 52 and s 52A which referred to 'services', the definition of which (in s 4) contained a separate paragraph concerning banking services. (This was not mentioned in the judgment, though it had been raised by Deane J in argument: see the transcript of proceedings in *Bourke* v *State Bank of NSW*, 6 March 1990, 57.)

[24] *Russell* v *Russell* (1979) 134 CLR 495, 541–2 per Mason J, 535 per Stephen J (agreeing); cf 513–14 per Barwick CJ, 527–9 per Gibbs J referring to *Pidoto* v *Victoria* (1943) 68 CLR 87 per Latham CJ; *Re F; Ex parte F* (1986) 161 CLR 376, 384–5 per Gibbs CJ; also *Huddart Parker Ltd* v *The Commonwealth* (1931) 44 CLR 492, and *R* v *Wright; Ex parte Waterside Workers Federation of Australia* (1955) 93 CLR 528. In the last two cases the laws were clearly intended to be laws with respect to overseas and interstate trade and commerce. Expressions such as employment 'in connection with' transport 'in relation to' such trade might have taken the legislation beyond the power in s 51(i). However, it was held to have been intended to apply distributively and was read down accordingly so as to apply to the circumstances before the court which were within the valid scope of the Act (and without considering how far the Act could validly extend beyond those circumstances).

Justices have apparently thought that the relevant powers of Parliaments ought to be restricted in the interests of justice as they see it. In developing reasons in support of those conclusions, they seem not to have noticed serious shortcomings in logic and factual accuracy.

One such case is *Polyukhovich* v *The Commonwealth* (the *War Crimes Act* case).[25] Although the challenge to the legislation in its application to that case was rejected by four Justices, the issue of the Commonwealth's power to enact retrospective criminal laws generally is still not resolved.[26] So it is worth examining the dissenting judgments of Brennan, Deane and Gaudron JJ.

First, I shall look at Deane J's reliance on United States materials. It might seem at first sight that this is only a fringe aspect of his judgment. But that is not so. It concerned the scope of the fundamental and vital principle of the separation of legislative and judicial powers. It was an important part of his attempt to refute the argument adopted by Mason CJ, Dawson and McHugh JJ.

The US Constitution prohibits the enactment of any 'Bill of Attainder or ex post facto Law'.[27] Deane J stated that, at the time when the Australian Constitution was adopted,

> it had long been recognised in the United States that the Bill of Attainder Clause did no more than make express what was, in any event, implicit in the doctrine of the separation of judicial from legislative and executive powers.[28]

However, I do not myself see any of the cited US material[29] as supporting that proposition, except in relation to Bills of Attainder in the usual (narrow) sense as distinct from ex post facto criminal laws generally. It is difficult to see why,

[25] (1991) 172 CLR 501.

[26] This is because one of the four (Toohey J) upheld the particular legislation, in its application in that particular case, on the basis of his assumption that the conduct was a crime under a foreign law applying at the time and place when and where it occurred. He left open the issue of other kinds of retroactive criminal laws. Brennan J (dissenting) disposed of the case on the ground that the conduct which was made an offence did not have a sufficient connection with Australia. It is therefore theoretically possible that Deane and Gaudron JJ would be joined by Brennan and Toohey JJ to make a majority against retrospective laws that do not merely duplicate an existing Australian or foreign criminal liability.

[27] Article I, s 9, cl 3 (federal laws); Article I, s 10, cl 1 (State laws).

[28] *Polyukhovich* (1991) 172 CLR 501, 617.

[29] For example, in *Polyukhovich* Deane J relied upon the statement by Chase J in *Calder* v *Bull* 3 US 386, 389 (1798) that the express prohibition on ex post facto laws was introduced only 'for greater caution': ibid. That statement linked back to a passage in which Chase J did not mention the separation of powers as such but referred to what he called the 'first great principles of the social compact' and the 'general principles of law and reason'. On those grounds not only ex post facto criminal laws were precluded, but also laws which 'violate the right of an antecedent lawful private contract; or the right of private property'. The separation of powers was not the reason for the invalidity of these last two categories and there seems no ground for inferring that it was the reason for the invalidity of ex post facto criminal laws generally (as distinct from Acts of Attainder in the narrow sense).

if the separation of powers precluded retrospective criminal laws, it would not also preclude retrospective civil laws.[30]

Deane J then proceeded to consider a passage in Inglis Clark's *Studies in Australian Constitutional Law*.[31] Since Inglis Clark was one of those on board the *Lucinda*, it is particularly appropriate here that his view be stated accurately for the record. The first sentence of the passage quoted by Deane J begins: 'The Constitution does not prohibit the Parliament of the Commonwealth from making retroactive laws'. Deane J's response was that Clark must have intended his sentence to mean only that the Constitution does not prohibit retroactive laws 'directly', and that it is therefore consistent with the proposition that the general separation of powers prohibits them, or at least criminal ones, by implication.[32]

The rest of the passage as quoted by Deane J unfortunately gives the impression that the references by Inglis Clark to legislation held invalid in the United States concerned ex post facto laws as such. However, the passage as quoted contains an ellipsis, indicating that the original had undergone some surgical treatment. Deane J must have thought that the portion he excised was only an insignificant appendix. In fact, it is very significant. The excised part refers to taxation laws, not criminal laws. One must therefore wonder what that has got to do with retrospective laws since neither Inglis Clark nor anyone else, to my knowledge, has ever queried the power to enact laws altering tax liability retrospectively. In fact, the full quotation and the cited cases show that Inglis Clark was not referring at all to retroactive laws as such. Instead he was referring to laws (whether retroactive *or prospective*)[33] whose form was to *declare* that previous legislation meant something other than what courts had held. The making of *declarations* as to the meaning of legislation (including declarations with only prospective effect) was held to be an exclusively judicial function. It was clear that a statute not in that declaratory form could apply so far as the separation of powers was concerned.

The fact that none of the cases cited by Inglis Clark were criminal cases makes this clear, since (as Inglis Clark understood) there was no barrier in the United States to retrospective non-criminal laws if they steered clear of the declaratory form. It does seem to me that Deane J missed the point of what Inglis Clark described as the relevant 'underlying principle', namely: 'to declare what the law is or has been is a judicial power; to declare what the law shall be is legislative'.[34] The point lay in the word 'declare': the principle was not opposed to a retroactive law expressed, not in a *declaratory* form, but in the form of an enactment *changing* the law retrospectively. Indeed, the actual

[30] Gaudron J in *Polyukhovich* suggested a distinction in that 'a retrospective civil law is very much like a statutory fiction in that it is a convenient way of formulating laws which, by their application to the facts in issue, determine the nature and extent of ... present rights, obligations or liabilities': id 705. She did not explain how this differs from retrospective criminal laws, given that the latter determine the nature and extent of 'present ... liabilities' to punishment.

[31] A I Clark, *Studies in Australian Constitutional Law* (2nd ed, 1905) 39–40.

[32] *Polyukhovich* (1991) 172 CLR 501, 619.

[33] Such as that considered in *The Governor* v *Porter and Sureties* (1844) 5 Humph 165, cited by Clark, which seems to have involved only prospective legislation.

[34] *Polyukhovich* (1991) 172 CLR 501, 619.

view of Inglis Clark on the US position was indicated in the *War Crimes Act* case itself by McHugh J[35] who quoted the following statement made by Clark:

> Any *exposition* of the purport of the language of an existing law, or any *declaration* of the existence of any rights or liabilities as the result of its enactment, is not an exercise of legislative power; . . . it is an attempted encroachment on the province of the Judiciary and is therefore invalid.[36]

I pass now to Deane J's general argument.[37] A full analysis is not within the scope of this article but a few comments will indicate the flavour.

There is first a quotation[38] from Blackstone's *Commentaries*, stating that '*all* punishment under a retrospective law *must* be cruel and unjust'.[39] The case before the High Court in *Polyukhovich* concerned alleged participation by the defendant in part of the Holocaust. It is therefore difficult to believe that the quotation was meant to suggest that retroactive criminal laws are *always* 'cruel and unjust'. But if they are not unjust in all cases, why should the Parliament be denied *all* power to enact retroactive criminal laws? Why should not the Parliament be able to enact such legislation where it considers it just to do so?

One remark made by Deane J relevant to this matter is that a power to enact retrospective laws could be used to effect 'extraordinary injustice'.[40] So too could prospective laws, but the risk that a legislative power will be abused is no reason to deny its existence. His Honour gave no reason why all power to enact retroactive criminal laws should be denied on *that* ground.

Deane J did seek to give other reasons for his complete denial of the power to the Parliament. They are very imaginative. But they seem to me to fail in a number of respects; upon analysis, they dissolve into mere assertions without reasons.

Part of the argument seems to involve a logically inadequate use of certain metaphors such as 'trespassing' on 'fields' and 'invading hearts'. The core of the argument is in the following passage:

> The legislation *invades the heart* of the *exclusively judicial* function of determining criminal guilt, that is to say, of determining whether past conduct constituted a criminal contravention of the law. It *pre-empts and negates* what would otherwise be an inevitable judicial determination that, since the act of the particular person did not constitute a criminal contravention

[35] Id 720–1.
[36] Clark, op cit (fn 31) 39 (emphasis added); this is further elaborated id 41.
[37] *Polyukhovich* (1991) 172 CLR 501, 606–16.
[38] Id 609 (emphasis added).
[39] W Blackstone, *Commentaries on the Laws of England* (1830) Vol I, 45–6.
[40] *Polyukhovich* (1991) 172 CLR 501, 615–16. Deane J seems to find a special objection in the fact that, because of s 109 of the Constitution, a retroactive Commonwealth law prohibiting a class of conduct would (if valid) override a State law that compelled such conduct at the time. But equally there is a (theoretical) risk of a Commonwealth retroactive law prohibiting conduct that was compelled by a previous Commonwealth law. So this point by Deane J establishes nothing special in the operation of s 109 in this context.

> of any Commonwealth law which was applicable at the time when it was done, that person committed no crime under our law.[41]

No doubt determining whether a person is guilty of a breach of a law in force at the time of the alleged conduct (a) is at the 'heart' of judicial power, and (b) is exclusively judicial. But it does not follow that determining whether a person has breached a retrospective law is not *also* part of judicial power (even if, in some metaphorical sense, it is not at its 'heart').

Furthermore, how can the 'heart' of judicial power be 'invaded', 'pre-empted' or 'negated' by legislation requiring courts to apply a retroactive criminal provision? Why should we not say simply that it is *supplemented*? The courts retain an unimpaired ability to determine guilt or otherwise under prospective laws. Certainly an ex post facto law, if valid, would preclude a finding that the person is not guilty of an offence if the conduct is proved. But the fact that the ex post facto law, *if valid*, would have that effect cannot itself establish its invalidity. Logically, some *independent* reason must be given for the invalidity. Upon analysis, none is given by Deane J — it all deflates into a mere assertion that, according to the true 'nature' of criminal laws, ex post facto laws are not 'laws'. Whatever attractions that may have in some forms of natural law philosophy, it is hardly convincing as a proposition of constitutional law.

It is from these and other illusory threads that Deane J wove the fabric of his argument for holding that the Parliament lacked power to enact retroactive criminal laws.

Gaudron J, unlike Deane J, would have upheld the *War Crimes Act* if it had done no more that duplicate an Australian law applicable to the conduct at the time and place of its occurrence.[42] But, like Deane J, she held that it was a 'usurpation of judicial power' by Parliament[43] and also that, in so far as functions were given to the courts, such a law was 'repugnant to the judicial process' and hence incompatible with Chapter III.[44]

Gaudron J asserted that the function conferred on the court '*negates*' that which is the '*essence*' of judicial power in a criminal trial. That 'essence' is, according to her Honour, the 'determination of the guilt or innocence by the application of the law to the facts as found'[45] or 'the application of law to facts to determine their legal consequence'.[46] But how is a trial under a retroactive law any different in this respect from one under a prospective law? Her reasoning is seriously incomplete in that she did not explain at all why she disagreed with the statement by McHugh J that both kinds of trial involve determining whether the accused has done something falling within the relevant class of conduct and giving it the legal consequences provided for in the law.[47]

[41] Id 613 (emphasis added).
[42] Id 707.
[43] Id 706.
[44] Ibid.
[45] Ibid.
[46] Id 708.
[47] Id 721.

Gaudron J seems, at a crucial point, to be saying that *all* retroactive criminal laws are '*invented to fit the facts after they had become known*'.[48] But that description of the war crimes legislation would surely be quite untrue: it was not 'invented to fit the facts of' *Polyukhovich* or any other case. If she was not intending to say that it was a law 'invented to fit the facts', she must have been saying that it was just *like* such a law. But on that issue she did not answer the analyses in opposing judgments. In particular, she did not give any reasons to refute Dawson J's extended consideration of that issue.[49] Dawson J acknowledged that the concept of Acts of Attainder might include laws targeting particular people by narrow definitions of the relevant conduct. There might be no reasonable explanation for the narrowness of the definition other than an intention to catch the people who engaged in that particular conduct but not to catch others whose conduct was indistinguishable. An extreme example would be a law limited to persons who killed Jews at a specified time and place on a certain day in 1942. Some fine lines might theoretically need to be drawn. But the very problem of drawing a clear line is one reason for leaving the power with Parliament (except for Bills of Attainder tightly defined).

Next, I want to make some brief comments on the dissenting judgment of Brennan J. He held against the legislation, not because of Chapter III, but because he thought there was a gap in the external affairs power in the case of conduct lacking any 'sufficient' connection with Australia at the time it took place. He asserted that this gap would be 'no great lacuna' in Australian legislative powers.[50] Yet the Parliament enacted the legislation after long debates about punishing Nazi atrocities and a majority clearly did think that the matter was significant. His Honour did not indicate why a gap that, in some sense might be described as not 'great', is not a constitutionally — and sometimes socially — significant one.

Brennan J also seems to have believed that conduct overseas by persons who have since come to reside here is never a matter of sufficient concern to Australia to support legislation under the external affairs power.[51] Deane J stated that that is 'obviously' not so.[52] The point could hardly be better illustrated, of course, than by the alleged circumstances in the *War Crimes Act* case.

Brennan J also spoke of the limit on the external affairs power as being a guarantee of immunity against unjustified 'harassment' of foreigners by the Parliament in matters that have no connection with Australia. One must ask whether, if Mr Polyukhovich had been found guilty, the legislation could really have been described as 'harassment'. And if not, why should the Parliament be entirely denied the power just because the Court might consider that, in *some* cases, it could be exercised to 'harass' people. As with Deane J's remark about the possibility of 'extraordinary injustice' being caused by retroactive laws, there seems to be a certain underlying attitude among some

[48] Id 704–5 (emphasis added).
[49] Id 648–50.
[50] Id 552.
[51] Id 553–6.
[52] Id 606.

members of the Court towards the Parliament. I shall be saying more about this shortly.

I turn next to *Leeth* v *The Commonwealth*[53] which contains what seem to me to be errors with very serious implications. The case itself concerned the rather unspectacular question of the minimum non-parole periods for people convicted of offences against prospective Commonweath laws. Subject to the Constitution, the *Judiciary Act* 1903 (Cth) purported to apply the provisions of State laws to Commonwealth prisoners in gaols in the respective States. The State minimums differed. Thus under State law a person sentenced in one State to a given prison term could be released on parole earlier than a person sentenced to the same term in another State.

The Court decided by a majority of four Justices to three that the Commonwealth legislation was valid. Three Justices (Mason CJ, Dawson and McHugh JJ), in a joint judgment, held that the variations from State to State were constitutionally irrelevant.[54] They pointed to the various express prohibitions on geographical discrimination such as s 51(ii) and s 99[55] and concluded that these left no room for a general implied constitutional prohibition on laws prescribing rules differing from State to State. Brennan J also upheld the legislation. However, while he did not say so expressly, it seems that he would have held it invalid if he had found no rational justification for the variation in non-parole periods.[56]

Gaudron J thought that the legislation was invalid but on the basis of an implied prohibition against laws directing courts to discriminate, at least on a geographical basis.[57] Deane and Toohey JJ, in a joint judgment, went much further. They thought the provisions were invalid on the ground that they infringed an implied constitutional requirement of *substantive legal equality*.[58]

The result is that four Justices supported an implied prohibition against discrimination between people of the Commonwealth, with two of them going beyond geographical discrimination. The judgments have far-reaching implications. The reasoning therefore invites an assessment of its completeness and the accuracy of its logic and the materials relied upon.

Brennan J's only reason seems to be that discrimination on a geographical basis in sentencing or in minimum non-parole periods would be 'offensive to the constitutional unity of the Australian people "in one indissoluble Federal Commonwealth", recited in the preamble to the Constitution Act'.[59] But the Preamble alone, either as a matter of language or historical intention, hardly

[53] (1992) 174 CLR 455.
[54] Id 467–8.
[55] Others are s 51(iii) concerning bounties, and s 117 concerning residents of different States.
[56] *Leeth* (1992) 174 CLR 455, 478–80. He also said it would have been invalid if the maximum *penalties* for a given offence were to vary from State to State depending on the locality of the court in which the offender is convicted.
[57] Id 501. It seems difficult, however, to sustain a distinction between laws concerning court orders and other laws, given that the duty of the courts is to make whatever orders are required by valid laws.
[58] Id 485–6.
[59] Id 475.

sustains such an implication. Where are the provisions in the Constitution that support it? What of the fact that the Constitution contains several express limited prohibitions against geographical discrimination? Brennan J did not mention at all the arguments relied upon in the judgments of the other majority Justices. The reasoning is therefore seriously incomplete on that aspect.

Deane and Toohey JJ similarly relied[60] on the Preamble, but also on some other arguments. One such argument was the proposition that, in 1900, there was a principle of *substantive legal equality in the common law* which was incorporated as an implied requirement in the Constitution.[61] This is not, it seems, limited to *geographical* non-discrimination. With possible exceptions to be mentioned, it would seem to apply to *any* legal differences between people (and perhaps corporations). It would render them invalid unless 'reasonably capable' — in the opinion of the Court, of course — of being seen to be based on 'rational and relevant' differences in the circumstances.[62]

Since all laws make distinctions between people, the validity of all Commonwealth legislation (unless it falls within one of the exceptions) would depend on whether a majority of the High Court thought that the distinctions created by the law were capable of being seen to be 'rational and relevant'. So, on that approach, if people in some particular category are given a social security benefit, the High Court must (subject to the exceptions) decide whether the distinction between the people in that category and other people is capable of being thought to be 'rational and relevant'. And if people in one category get a pension of $200 and those in another get $100, the High Court must decide whether that difference is based on 'rational and relevant' grounds — that is, whether it is justifiable on the basis of the factual differences and the Court's notions of desirable social policy.

Deane and Toohey JJ said that there existed exceptions where the implied limitation would be inconsistent with the nature of the legislative power. Perhaps social security benefits would be regarded as an exception. But it is not easy to see what the criteria might be, or indeed why, in principle, the prohibition on 'irrational' and 'irrelevant' differences should be subject to any exceptions at all (except perhaps in defence or quarantine emergencies or the like).

Deane and Toohey JJ proceeded to give several reasons why they thought the supposed doctrine of 'substantive legal equality' is incorporated in the Constitution as an implied limit on Commonwealth power. First, in addition to their reliance on the Preamble, they invoked Covering Clause 5, which provides that the Constitution and Commonwealth laws shall be binding on the courts, judges and people. They asserted that Covering Clause 5 enacted the common law doctrine of 'legal equality'.[63] Note that they did *not* say '*substantive* legal equality'. Covering Clause 5 might conceivably give some support to a doctrine of 'legal equality' in the limited sense of equality before

[60] Id 486.
[61] Id 485–6.
[62] Id 488–9.
[63] Id 486.

the law as embodied in Dicey's Rule of Law (to which I shall return). But the question in issue was whether Covering Clause 5 supported a doctrine of *substantive* legal equality — the clause gives no assistance on that question.

Next, Deane and Toohey JJ referred to the obligation under Chapter III to act judicially and said:

> At the heart of that obligation is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds.[64]

However, there are logical problems in this. Deane and Toohey JJ would, of course, accept that the judicial responsibility under Chapter III is not to do justice 'full stop', but to do justice *according to law,* ie, according to *valid* law. Hence they presumably accept that judges have a duty to apply a discriminatory law if it is *valid.* But logically they cannot derive any criteria of invalidity from that proposition. Nor can any proposition about the invalidity of discriminatory laws be derived from anything else that I can see in Chapter III.

One of the most notable aspects is the irrelevance of the material cited by Deane and Toohey JJ for their supposed doctrine of substantive legal equality at common law. They asserted that 'legal equality' at common law had 'two distinct but related aspects'.[65] The first was the subjection of all people to the law. They quoted Dicey's statement that 'every man, whatever be his rank or condition, is subject to the ordinary law . . . and amenable to the jurisdiction of the ordinary courts'.[66] The second aspect, they said, was the 'underlying or inherent theoretical equality of all persons under the law and before the courts'. This was supported only by a footnote[67] reference to a passage in Holdsworth's *A History of English Law,*[68] which, in turn is a reference to a passage in Dicey's seventh edition: 'equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts'.[69] If that sounds familiar, it is because it is the very same in substance as the passage which Deane and Toohey JJ cited from the tenth edition in support of their first aspect. It seems to have nothing whatever to do with *substantive* equality.[70]

Next, I want to look briefly at how Deane and Toohey JJ dealt[71] with the argument, adopted by Mason CJ, Dawson and McHugh JJ, that the express

[64] Id 487.
[65] Id 485.
[66] A V Dicey, *Introduction to the Study of the Law of the Constitution* (E C S Wade (ed), 10th ed, 1959) 193.
[67] *Leeth* (1992) 174 CLR 455, 485 fn 62. The citation is preceded by 'See, e.g.' which suggests that there were other references in mind. It would be helpful to know what they were.
[68] W Holdsworth, *A History of English Law* (1938) 649.
[69] A V Dicey, *Introduction to the Study of the Law of the Constitution* (7th ed, 1908) 98.
[70] The general reliance on substantive equality as a factor in the development of the common law also seems to me to be misconceived. That factor does nothing to establish that substantive equality was intended to operate as an implied constitutional limit on legislative power.
[71] *Leeth* (1992) 174 CLR 455, 487–8.

limitations in the Constitution are a strong, if not conclusive, reason against any implication of substantive equality. Deane and Toohey JJ referred[72] to Founders' statements that an express guarantee of fundamental rights was '*unnecessary*'. They seem to suggest that this was because the Founders believed that the guarantee was sufficiently implied. But it seems established beyond any real doubt that that was not the belief. The historical record shows clearly enough that a Bill of Rights (which even in the US did not extend to full 'substantive equality') was thought unnecessary because the Founders believed that people's elected representatives would not be likely to enact laws infringing fundamental freedoms. Moreover, a Bill of Rights was thought undesirable because it would have precluded discriminatory laws against Pacific Islanders, Asians and Africans.[73]

This issue of an implied constitutional prohibition against discrimination between people is, of course, an important one. The judgment of Brennan J seems to me to impose a wholly unjustified general restriction on the Parliament's power to make laws that it considers suitable to deal with varying local conditions. It could seriously inhibit Commonwealth-State co-operation. The judgment of Deane and Toohey JJ imposes a wholly unjustified general restriction on the Parliament's power to make laws involving any kinds of distinctions between people whether on a geographical or other basis. The only exceptions they would make are where, on some unspecified (and I suspect unspecifiable) criteria, the nature of the head of power is held by the Court to be such as to permit such discrimination.

One may ask what is the explanation for the errors and inadequacies in the reasoning of the minorities in the *War Crimes Act* case and *Leeth*. Some of the mistakes might be merely oversights caused by extremely heavy workloads. But in others an underlying attitude towards the Parliament seems to have influenced the reasoning that led to the denials of legislative power.

Some indications are in fact on the public record. We have, for instance, the comments of Brennan J that

> as the wind of political expediency now chills Parliament's willingness to impose checks on the Executive and the Executive now has a large measure of control over legislation, the courts alone retain their original function of standing between government and the governed.[74]

That this is the 'original' function of the courts might come as something of a surprise. And Justice Brennan's citation of English writers concerned with the UK Parliament with its House of Lords rather tends to underplay the role of the Senate in Australia. Moreover, although Brennan J did give some acknowledgement to the existence of parliamentary safeguards, Peter Bayne[75] has pointed out some shortcomings in his remarks. Among other things, Bayne mentions Senate Committees. No one with any experience of the workings of Parliament and the Executive could think that Senate Committees are

[72] Id 485 fn 57.
[73] La Nauze, op cit (fn 1) 231–2.
[74] G Brennan, 'Courts, Democracy and the Law' (1991) 65 ALJ 32, 35.
[75] P Bayne, 'Administrative Law Note' (1992) 66 ALJ 844, 846–8.

the tool of the Executive. Moreover, there is the work done in the backbench committees in all parties, where members bring a wide range of experience and knowledge of the wishes and likely reactions of the electorate. Within the Parliament, any controversial legislation will have run the gauntlet of scrutiny in many different contexts, not only within the Government party or parties but in consultation between parties. Much legislation has bipartisan support and reflects a broad consensus. It is a matter for serious concern if a small group of lawyers constituting a court seeks to invalidate legislation on grounds that reflect an inadequate understanding of legislative and executive processes and safeguards. No doubt Parliaments are far from perfect, like Governments (and one must add, the courts). But even if the defects were as serious as painted in some of the polemics,[76] the remedy lies in improving the operations of parliamentary democracy.

Next, it is impossible to resist the temptation to make some mention of the recent speech delivered by Justice Toohey at a conference on *Constitutional Change in the 1990s* at Darwin in July 1992.[77] After quoting largely from English writings asserting that there is 'little formal check on arbitrary government',[78] Toohey J said:

> It might be contended that the courts should . . . conclude . . . that where the people of Australia, in adopting a constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties — a presumption only rebuttable by express authorisation in the constitutional document.[79]

In discussing that proposition, I am fortunately relieved from any possible inhibitions since Sir Anthony Mason, in an interview reported in the *Australian Lawyer*, said that the proposition

> was indeed heavily qualified and the judge wasn't expressing that as his personal view. . . . When judges participate in seminars they, from time to time, identify possible lines of argument without giving their personal approval to those lines of argument.[80]

I shall therefore refer to the proposition as the 'Darwin proposition', since to label it the 'Toohey proposition' might unfairly suggest that it was endorsed by his Honour.

Although the Darwin proposition was stated only with reference to the Commonwealth Constitution, it may inevitably extend also to the powers of a State Parliament to make laws for the 'peace, order and good government' of the State (including the power to alter the State Constitution) and to the provisions of the *Australia Act* 1986 (Cth)/*Australia Act* 1986 (UK) in relation to State powers. Thus it could be argued that adoption of the Darwin prop-

[76] For example, P Finn, 'The Abuse of Public Power in Australia' (1994) 5 *Pub LR* 42.
[77] J Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Pub LR* 158.
[78] Id 162.
[79] Id 170.
[80] See B Virtue, 'High Court is Planning New Rules' (1993) 28(6) *Australian Lawyer* 18, 26–7.

osition would preclude the State Parliaments, as well as the Commonwealth Parliament, from overriding whatever the High Court from time to time regarded as sufficiently 'fundamental' common law liberties. And there would be no reason to limit it to common law 'liberties' in any narrow sense; it could extend to any supposedly 'fundamental' common law rules.

Some discussion of the Darwin proposition has already appeared in law journals and elsewhere.[81] It seems to me, however, that it is in danger of being dignified by too much attention. For my part, little needs to be said except that it has no merit whatever. Judicial adoption of it would, in my view, be difficult to distinguish from the behaviour of Justice Benjamin Boothby.[82] The words 'peace, order [or welfare] and good government' were never words of limitation to be applied by the courts as the basis for a veto on legislation infringing supposed 'fundamental common law liberties'. We have clear enough indications of the Founders' intentions from the Convention Debates,[83] Quick and Garran, decisions in late nineteenth century cases such as *R* v *Burah*,[84] and the common understanding of members of the colonial legislatures, not to mention Dicey as regards the sovereignty of the UK Parliament. These aspects have been well canvassed by Jeffrey Goldsworthy and others[85] and I need not repeat them all here.

I will say, however, that the Darwin proposition cannot be justified by the argument that failures by legislatures since 1900[86] to give effect to fundamental common law values justify the Court in implying constitutional guarantees of those values. A constitutional implication must be such that it could reasonably be envisaged as an express provision. It would be absurd to imagine the Constitution providing:

> If at any time the High Court considers that the Parliament has failed to protect the people by upholding what the Court holds to be common law values that ought to be enforced, the Court may accordingly imply limits on the powers of the Parliament.

Nor could a decision to adopt the Darwin proposition be legally justified on the ground that the referendum procedure under s 128 would be available to alter whatever the Court had held to be the effect of the Constitution.[87] If that

[81] For example, D A Smallbone, 'Recent Suggestions of an Implied "Bill of Rights" in the Constitution, Considered as Part of a General Trend in Constitutional Interpretation' (1993) 21 *FL Rev* 254; J Goldsworthy, 'Implications in Language, Law and the Constitution', paper (to be published) delivered at the conference on *Future Directions in Australian Constitutional Law,* Australian National University, 3–4 December 1993; G Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights', paper delivered at the same conference; cf Lee, op cit (fn 9).

[82] See fn 5 supra.

[83] See Kennett, op cit (fn 9) 13–14.

[84] (1878) 3 App Cas 889, 904; also *Hodge* v *R* (1883) 9 App Cas 117; *Powell* v *Apollo Candle Co* (1885) 10 App Cas 282; *Riel* v *R* (1885) 10 App Cas 675, 678–9.

[85] See fn 81 supra.

[86] Cf Toohey, op cit (fn 77) 163 (though the comment might not have been intended as part of a legal justification but only as a description of the social context).

[87] Id 173; this reference by Toohey J to s 128 was, however, probably not intended as part of a possible legal justification of the Darwin proposition but only as an argument against criticism of the judicial functions under an express Bill of Rights as being 'un-democratic'.

were a justification, it would apply equally to any decision interpreting the Constitution, no matter how much it departed from proper judicial standards of interpretation.

Another aspect is that not all aspects of the common law as stated by courts around 1900 are now acceptable. For instance, there is the discriminatory treatment of women which was described by Deane and Toohey JJ in *Leeth* as an 'anomaly' to be put 'to one side'.[88] There are many others. Presumably at least some such 'anomalies' could now be treated as never having been part of the 'true' common law.[89] But if such an 'anomaly' is treated as having been part of the common law in and about 1900, there is a problem for the Darwin proposition. Acceptance of it would have to include an explanation of why some aspects of the common law but not others should operate as constitutional constraints. No doubt some moves are obvious; for instance, some unwelcome rules would be denied the label of 'fundamental' common law values. But, in essence, adoption of the Darwin proposition would be very like the recent statement by a New Zealand judge (in a non-constitutional context) that he regards himself as free to give effect to the 'sense of justice immanent in the community' — as interpreted, of course, by himself. But, as a New Zealand barrister has written:

> There is nothing in the judicial oath permitting judges to make up the law as they go along in reliance on what they divine to be the sense of justice immanent in the community.[90]

And there is nothing in Chapter III or anywhere else in our Constitution that supports that kind of behaviour.

The question whether the High Court should imply restraints upon the Parliaments under the existing Constitution is, of course, a different question from whether the people should alter the Constitution so as to authorise the High Court to apply them as under a Bill of Rights. Whether a constitutional or statutory Bill of Rights would be desirable is beyond the scope of this article. I merely note that the value judgments and legal reasoning such as those in the minority judgments in the *War Crimes Act* case[91] and *Leeth*[92] are relevant. They could easily have been majorities. Should we, subject only to

[88] *Leeth* (1992) 174 CLR 455, 486. Note that legislation was needed to abolish other common law inequalities and injustices — eg, the legal disabilities of religious minorities, and rules relating to employees (eg, the doctrine of common employment), contributory negligence, and the lack of rights of appeal from jury convictions in criminal cases.

[89] Cf *Mabo* v *Queensland (No 2)* (1992) 175 CLR 1; see also *Environment Protection Authority* v *Caltex Refining Co Pty Ltd* (1993) 68 ALJR 127 (Mason CJ, Brennan, Toohey and McHugh JJ; Deane, Dawson and Gaudron JJ dissenting).

[90] D F Dugdale, 'A Polite Response to Mr Justice Thomas' (1993) 23 VUWLR 125, 128. He also points out that the function of the courts is not simply to do justice in the particular cases before them, but to give guidance for people in arranging their affairs so as to keep out of court: id 126. In constitutional contexts, vague implications, and tests of validity such as whether a law is (in the view of a court) 'reasonably proportionate' to the end to be achieved (cf *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1, 28–31), are making it increasingly difficult for legislators and people generally to know how particular legislation stands in advance of a constitutional challenge.

[91] (1991) 172 CLR 501.

[92] (1992) 174 CLR 455.

s 128, make our parliaments hostages to the risk of such judgments by a group of seven lawyers having whatever mix of personal attitudes emerges — so very haphazardly — from retirements and deaths in office?[93]

It will be interesting to see how these issues develop in this *Lucinda* decade. In particular, will a High Court majority succumb to the temptation to subject parliaments to misconceived implied restrictions that have no foundation in the text, structure or historical background of the Constitution, and which, I am fairly confident, would have astonished most[94] — and probably all — of those on board the *Lucinda*?

My comments on these constitutional cases have been made with great respect. They are, of course, not intended in the least to imply that those on board the *Lucinda* who planned the Federal Judicature just over a century ago would have been disappointed with the overall performance of the Judiciary in constitutional cases.

[93] The question is not answered by the slogan that 'judges are better than politicians at protecting individual rights'. No doubt individuals are often pleased by the results they get from judges, but one question is whether an appropriate balance is struck between the individual interests involved and all the other interests that make up the broader 'public interest'. It is by no means apparent that Parliaments should abdicate that task to courts. It should also be noted that it has not been courts but rather Parliaments (or constitutional assemblies), and Governments (in promoting and acceding to international covenants), that have made the basic rules against discrimination on grounds of race, sex, disabilities and other characteristics (eg, the *Racial Discrimination Act* 1975 (Cth), the *Sex Discrimination Act* 1984 (Cth), and the *Disability Discrimination Act* 1992 (Cth)). Note also the statutory forms of review of administrative action that are more satisfactory than those developed by the courts (eg, the *Administrative Appeals Tribunal Act* 1975 (Cth) and the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)).

[94] Even Inglis Clark; there is no indication that it was only 'for greater caution' that he supported a clause modelled on the Fourteenth Amendment to the US Constitution: cf La Nauze, op cit (fn 1) 230–1.