The Courts and the Parliament

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Introduction

It is a privilege to be able to present a paper in the Banco Court of this magnificent new Queen Elizabeth II Supreme and District Courts Building in Brisbane. As yet no forensic word has been uttered in anger in this courtroom. However the day is young and we have topics to discuss which, in some minds, are matters of sensitivity. The relationship between the courts and the Parliament is one such topic.

There is a beguilingly simple model of the relationship between Parliament, the executive and the judiciary in a representative democracy with responsible government. According to that model, Parliament can make, amend, or repeal laws, the executive administers such laws and the judiciary settles disputes involving their interpretation and application and also settles disputes involving the application of common law and equitable principles. If the truth were so simple, there would be a good deal less work for constitutional lawyers to do. The United Kingdom, unburdened by a single written Constitution and by federal complications, if you don't count devolution and the European Union, does not answer to that simple model. The reality is a good deal untidier in that country and, a fortiori, in Australia and Canada, and other countries which have adopted written constitutions limiting legislative and executive power whether it be by way of human rights guarantees or the distribution of power between polities of a federation, or both.

The purpose of this presentation is to focus upon the functional relationship between the Parliament and the judiciary in Australia, with particular emphasis on the function of the courts in statutory interpretation and the function of the Parliament in the enactment of laws. That relationship is, in part, defined by the terms of Commonwealth and State Constitutions and Commonwealth statutes conferring self-government on the Northern Territory and the

Australian Capital Territory. Their interpretation and application and that of the laws made under them is informed by the common law of Australia. As Sir John Latham said in 1960:

> in the interpretation of the Constitution and of all statutes common law rules are applied.[1]

The common law has a constitutional dimension. It has been referred to in the High Court as '... the ultimate constitutional foundation in Australia'.[2] It gives content to institutional relationships between legislature, executive and judiciary. At its heart, as Sir Frederick Pollock said, are public courts which adjudicate between parties and are the authorised interpreters of the law which they administer.[3]

The common law, the courts and parliamentary sovereignty

The common law may be seen as closely connected to an historically evolved concept of the essential characteristics of judicial power. Blackstone wrote, in 1765, of the long and uniform usage of many ages by which the Kings of England had delegated their whole judicial power to the judges of their several courts[4] and by which their judicial power was separated from legislative and executive powers. Echoing Montesquieu, he wrote:

> In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removable at pleasure by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.[5]

As the late Professor Lumb pointed out in his book on *Australian Constitutionalism*, Blackstone's general outline of the Constitution and the laws of England 'was to influence

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1 Sir John Latham, 'Australia' (1960) 76 *Law Quarterly Review* 54, 57.

2 *Wik Peoples v Queensland* (1996) 187 CLR 1, 182 (Gummow J).

3 Sir Frederick Pollock, *The Expansion of the Common Law* (Little, Brown and Company, 1904) 51.

4 Sir William Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 7, 258.

5 Ibid 259.

profoundly the understanding of these laws in the Australian colonies which were to adopt the principles embodied therein.'[6] Importantly the Australian colonies, like other British colonies, adopted judicial systems on the British model. Those courts, as Bruce McPherson has written, heard and determined cases 'in the manner of their judicial counterparts in the place of the law's origin.'[7] The interaction between the common law concept of a court and the Australian Constitution was borne out by Sir Victor Windeyer in his judgment in *Kotsis v Kotsis*:

> The nature of a court and the functions of court officers were matters that were well known in England long before the Australian colonies began. The meaning of the word 'court' has thus come to us through a long history: and it is by the light of that that it is to be understood in ss 71, 72 and 73 of the Constitution.[8]

Importantly, those provisions of the Constitution refer not only to the High Court and the courts created by the Commonwealth Parliament but also to other courts in which the Commonwealth Parliament can invest federal jurisdiction. Those courts include the courts of the States and Territories. The courts as understood in 19th century Britain exercised 'the fairness and impartiality which characterize proceedings in Courts of Justice, and are proper to the function of a judge'.[9] Those and other essential characteristics of decisional independence, adherence to the open court principle and the obligation to give reasons for decision have been found in Australia to have constitutional significance affecting the scope of the competence of all parliaments to make laws impinging on the institutional integrity of those courts understood in terms of their defining or essential characteristics.[10]

Before turning to the relationship between Parliament and the judiciary in Australia, it is useful to reflect upon that relationship in the United Kingdom. That is a relationship which is sometimes discussed under the rather elusive designation of 'constitutionalism'. The

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6 Richard Lumb, *Australian Constitutionalism* (Butterworths, 1983) 25.

7 Bruce McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland, 2007) 405.

8 (1970) 122 CLR 69, 91.

9 *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, 447 (Fry LJ).

10 See, eg, *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] and authorities there cited.

meaning of that term in Britain today is the subject of debate. It is linked to the notion of a British 'constitution'. That idea has been variously described. One pithy aphorism asserts that the British Constitution is 'what happens'.[11] Another reduces the British Constitution to one rule namely 'what the Queen and Parliament enacts is law.'[12] The relationship between the United Kingdom and Europe and the devolution legislation of the 1990s suggest levels of complexity which cannot be captured by such simple statements. It is sufficient for the present to focus on the discussion about parliamentary sovereignty and the role of the courts.

Professor Tony Bradley, writing in the most recent edition of Jowell and Oliver's book, *The Changing Constitution*, refers to Sir Stephen Sedley's description of 'a new and still emerging constitutional paradigm ... of a bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's Ministers are answerable - politically to Parliament, legally to the courts.'[13] As Bradley observes, that insight raises questions about the respective boundaries of the legislature and the courts, whether they neatly complement each other, whether there is competition or rivalry between them and, in the event of disagreement, how it may be resolved.[14] The concept of bi-polar sovereignty is not novel. It received an imprimatur from the House of Lords over two decades ago in *X Ltd v Morgan-Grampian Ltd*.[15] Lord Bridge, with whom the four other Law Lords sitting on that case agreed, said:

> In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.[16]

Notwithstanding the power of the concept of parliamentary sovereignty in the United Kingdom, the possibility of fundamental common law constraints on the legislative power of

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11 J A G Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1, 19.

12 Vernon Bogdanor, *The New British Constitution* (Hart Publishing, 2009) 13.

13 Sir Stephen Sedley, 'Human Rights: A Twenty First Century Agenda' [1995] *Public Law* 386, 389.

14 Anthony Bradley, 'The Sovereignty of Parliament - Form or Substance?' in Jowell and Oliver (eds) *The Changing Constitution* (Oxford University Press, 7th ed, 2011) 34, 37.

15 [1991] 1 AC 1.

16 [1991] 1 AC 1, 48.

the parliament has been raised. Lord Woolf, in an essay[17] published in the journal *Public Law* in 1995, identified two principles upon which the rule of law depended:

- The supremacy of parliament in its legislative capacity.

- The function of the courts as final arbiters in the interpretation and application of the law.

Within that framework, as he described it, neither institution trespasses on the role of the other. Parliament respects the *sub judice* rule in order to avoid interfering with the role of the courts. The courts respect parliamentary privilege and do not become involved with the internal workings of the legislature. Legislation may confer or modify statutory jurisdictions and control how the courts exercise their jurisdiction. Lord Woolf, however, drew a distinction between that kind of legislative action and that which seeks to undermine in a fundamental way the rule of law on which the unwritten constitution depends, for example, by removing or substantially impairing the judicial review jurisdiction of the court. He said of that jurisdiction that it was:

> in its origin ... as ancient as the common law, predates our present form of parliamentary democracy and the Bill of Rights.[18]

Absent the protection of a written constitution against such intrusions on the judicial function, Lord Woolf was prepared to define a limit on the supremacy of parliament which it would be the responsibility of the courts to identify and uphold.[19] Lord Justice Laws in the same edition of *Public Law* was more explicit. He said:

> As a matter of fundamental principle, it is my opinion that the survival and flourishing of a democracy in which basic rights (of which freedom of expression may be taken as a paradigm) are not only respected but enshrined requires that those who exercise democratic, political power must have limits set to what they may do: limits which they

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17 Lord Woolf, 'Droit Public - English Style' [1995] *Public Law* 57.

18 Ibid 68.

19 Ibid 67-69.

> are not allowed to overstep. If this is right, it is a function of democratic power itself that it be not absolute.[20]

Those views questioning the absolute character of parliamentary supremacy were contested by the late Lord Bingham in his book on the *Rule of Law*. Drawing upon the writing of a respected Australian academic, Professor Jeffrey Goldsworthy in his book *The Sovereignty of Parliament*, Lord Bingham said:

> As Goldsworthy demonstrates, to my mind wholly convincingly, the principle of parliamentary sovereignty has been endorsed without reservation by the greatest authorities on our constitutional, legal and cultural history.

There is a question whether any such constraint could exist at common law in Australia. In 1988 the High Court of Australia in *Union Steamship Co of Australia Pty Ltd v King*,[21] referred to the position of the New South Wales State Parliament, which was authorised by its Constitutions to make laws for the peace, order and good government of the State, and said:

> Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law ... a view which Lord Reid firmly rejected in *Pickin v British Railways Board* ([1974] AC 765 at 782), is another question which we need not explore.[22]

The cases which seemed to favour some such restraints were all New Zealand decisions.[23] The question has not been further explored although it was mentioned in passing in *South Australia v Totani*.[24]

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20 The Hon Sir John Laws, 'Law and Democracy' [1995] *Public Law* 72.

21 (1988) 166 CLR 1.

22 (1988) 166 CLR 1, 10.

23 *Drivers v Road Carriers* (1982) 1 NZLR 374, 390; *Fraser v State Services Commission* (1984) 1 NZLR 116, 121; *Taylor v New Zealand Poultry Board* (1984) 1 NZLR 394, 398.

24 (2010) 242 CLR 1, 29 [31].

Lord Woolf's example of a law abolishing the judicial review function of the courts would face considerable constitutional difficulties in Australia. The jurisdiction of the High Court of Australia to review decisions of officers of the Commonwealth for jurisdictional error is conferred by s 75(v) of the Constitution as jurisdiction 'in all matters ... in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.' That jurisdiction cannot be taken away by statute. A similar protection is afforded to the Supreme Courts of the States by principles developed from a consideration of Ch III of the Constitution and their place under it. The principles outlined in the joint judgment of six members of the High Court in *Kirk v Industrial Court (NSW)*:[25]

- Chapter III of the Constitution requires that there be a body filling the description 'the Supreme Court of a State'.[26]

- It is beyond the legislative power of a State so to alter the constitutional character of its Supreme Court that it ceases to meet the constitutional description.[27]

- A defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority to decide, by granting relief in the nature of prohibition and certiorari and mandamus directed to inferior courts and tribunals, on grounds of jurisdictional error.

- A privative provision in State legislation which purports to strip the Supreme Court of the State of its authority to confine inferior courts within the limits of their jurisdictions by granting relief on the grounds of jurisdictional is beyond the powers of the State legislatures. It is beyond power because it purports to remove a defining characteristic of the Supreme Court of the State.

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25 (2010) 239 CLR 531, 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

26 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 48, 76.

27 (2006) 228 CLR 48, 76 [63].

Beyond these propositions a line of decisions in the High Court have established the broad principle that a State legislature cannot confer on a State court a function which substantially impairs its institutional integrity and which is therefore incompatible with its role under Ch III of the Constitution as the recipient or potential recipient of federal jurisdiction.[28] The term 'institutional integrity' has been linked to the defining or essential characteristics of a court which include the reality and appearance of decisional independence and impartiality, procedural fairness,[29] adherence to the open court principle[30] and the provision of reasons for decisions.[31] The general principle is derived from the Constitution, the integrated character of the national judiciary for which it provides and, in particular, the provisions it makes for vesting federal jurisdiction in State courts, as well as the role of the High Court as the final appellate court for all Australian courts.[32]

Constructional choice in statutory interpretation

An important element of the constitutional relationship between Parliament and the courts, whether or not they are created by or under a written constitution, is the function of the courts in interpreting the laws made by the Parliament.

Statutory interpretation is the field in which Parliament, the Executive and the courts interact in the discharge of their respective functions. Parliament makes the laws, the Executive exercises powers and discharges obligations conferred on it by those laws and the courts hear and determine cases including cases about the correct interpretation of the laws. Such decisions may involve disputes between subject and subject, or subject and government or between governments. The court's interpretation of legislation may have consequences for powers conferred upon the Executive Government.

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28 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

29 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

30 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

31 *Wainohu v New South Wales* (2011) 243 CLR 181.

32 *Baker v The Queen* (2004) 223 CLR 513, 543 [82] (Kirby J).

When contested interpretations of law are advanced in litigation and close scrutiny of the law is required to resolve the contest, a degree of indeterminacy is often apparent. It is in the nature of language that words have nuances and shades of meaning. Nuances and shades of meaning do not disappear when words are used in statutes. Combinations of words may narrow their individual indeterminacies, but may also have the reverse effect. It is not at all unusual therefore that, in a contest about the meaning of a statute, more than one reasonable outcome is exposed. Courts are frequently faced with constructional choices. Where the choice is identified and made according to rules which reflect the constitutional function of the court interpreting the statute, the choice can be regarded as legitimate even though reasonable minds might differ as to the outcome. The legitimacy of an interpretation of a statute is frequently asserted with the claim that it accords with or reflects the legislative intention. That concept requires further consideration. It is often used as if it is a truth sought by the courts in their interpretive function.

Legislative Intention

A frequently quoted statement from the High Court about statutory interpretation is found in the joint judgment of Justices McHugh, Gummow, Kirby and Hayne in *Project Blue Sky Inc v Australian Broadcasting Authority*.[33] The case concerned the interpretation of s 122 of the *Broadcasting Services Act 1992* (Cth) which required the Australian Broadcasting Authority to determine standards to be observed by commercial television broadcasting licensees. In particular, the section provided that such standards were to relate to 'the Australian content of programs'. That phrase was not defined. The Court held that it was a flexible expression that included matter reflecting Australian identity character and culture. In the joint judgment their Honours said:

> the duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken* to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the

[33] (1998) 194 CLR 355.

> words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.[34]

The courts take as their starting point in the interpretation of statutes the ordinary and grammatical sense of the words. This is consistent with the proposition that in a representative democracy those who are subject to the law, those who invoke it and those who apply it are entitled to expect that it means what it says. As Gaudron J said in 1991:

> that rule is dictated by elementary considerations of fairness, for, after all, those who are subject to the laws commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.[35]

The concept of legislative intention however, is a construct. It has been called a fiction on the basis that neither individual members of Parliament necessarily mean the same thing by voting on a Bill 'or, in some cases anything at all'.[36] It has also been said that if 'legislative intention' is used as a description of a collective mental state of the body of individuals who make up the parliament, then it is a fiction with no useful purpose.[37]

In their recent joint judgment in *Byrnes v Kendle*[38] which concerned the intention of a person who signed an acknowledgment of trust, Heydon and Crennan JJ considered the question of authorial intention in relation to constitutions, statutes, contracts, trusts and Shakespearian sonnets. They quoted a paper by Charles Fried, published in the *Harvard Law Review* in 1987 in which the author said:

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34 (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (footnote omitted) (emphasis added).

35 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 340.

36 *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 339 (Gaudron J).

37 (1991) 172 CLR 319, 345-346 (McHugh J).

38 (2011) 243 CLR 253, 282-283 [95], citing 'Sonnet LXV and the "Black Ink" of the Framer's Intention', (1987) 100 *Harvard Law Review* 751, 758-759 (emphasis in original).

> The argument placing paramount importance upon an author's mental state ignores the fact that authors writing a sonnet or a constitution seek to take their intention and embody it in specific words. I insist that words and text are chosen to embody intentions and thus replace inquiries into subjective mental states. In short, the text *is* the intention of the authors or of the framers.

Heydon and Crennan JJ related that passage, which concerned constitutional construction, to statutory construction and to the construction of contracts. What then is the function of the concept of parliamentary or legislative intention. Are the real intentions of the legislators who voted for a statute to be inquired into and somehow assembled by the Court into a collective mental state, which may then inform the interpretation of the statute. In my opinion, the answer to that question is no.

The significance of the concept of 'legislative intention' has been considered recently in decisions of the High Court. One of those was *Lacey v Attorney-General (Qld)*,[39] which was delivered on 7 April 2011. The case concerned the construction of a provision of the *Criminal Code 1899* (Qld) permitting appeals by the Attorney-General against sentences imposed on convicted persons. The contested question of interpretation was whether or not it was necessary for the Court of Appeal to identify error on the part of the primary judge before it could intervene in such an appeal. Six Justices in a joint judgment referred to *Project Blue Sky* and the objective of giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have. The joint judgment then said of legislative intention:

> The legislative intention … is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.[40]

In an earlier decision, *Zheng v Cai*, the Court said:

> judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making,

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39 (2011) 242 CLR 573.

40 (2011) 242 CLR 573, 592 [43] (footnotes omitted).

> interpretation and application of laws … the preferred construction by the Court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.[41]

This approach has been criticised by Professor Goldsworthy.[42] He has referred to a number of matters which, in his view, militate in favour of the reality of legislative intention:

- the long history of courts asserting that the discernment of legislative intention is the object of statutory interpretation;

- the application of maxims which only make sense on the basis that they clarify legislative intention;

- the use of legislative intention to justify the correction of drafting errors; and

- the making of implications, the use of statutory purpose and of context which are only meaningful as based upon or reflecting legislative intention.

I refer to those objections not to rebut them but because they make serious points which help inform ongoing discussion of this important issue affecting the theory of the relationship between the courts and the Parliament. It is interesting, in the context of constitutional interpretation and the intentions of the framers of the Constitution, to look back upon the remarks made by Sir John Downer at the Melbourne session of the 1898 Australasian Federal Convention in which he remarked:

> With [Judges] rest the interpretation of intentions which we may have in our minds, but which have not occurred to us at the present time. With them rests the obligation of finding out principles which are in the minds of this Convention in framing this Bill and applying them to cases which have never occurred before, and which are very little thought of by any of us.[43]

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41 (2009) 239 CLR 446, 455-456 [28] (footnotes omitted).

42 Jeffrey Goldsworthy, 'The High Court Term 2011' (Paper presented at the Gilbert and Tobin Centre of Public Law 2012 Constitutional Law Conference, Sydney, 17 February 2012) 3-4.

43 *Official Record of the Debates of the Australasian Federal* Convention, (Melbourne), 1898, 275 cited in James Thomson, 'Constitutional Interpretation: History and the High Court: A Bibliographical Survey' (1982) 5 *University of New South Wales Law Journal* 309, 322 n 61.

Text and Purpose

Despite what was said in *Lacey* and *Zheng* about legislative intention, interpretation does involve the identification of a statutory purpose. It is possible to determine the purpose of a constructed thing, be it a tool or a law, without exploring the intention of its maker. I may look at the human eye and say its purpose is to enable its possessor to see. That does not answer the question whether it evidences a creator's intention. The purpose of a statute may appear from an express statement in the statute itself or by inference from the terms of the statute and by appropriate reference to extrinsic materials. These may include a Second Reading Speech or Explanatory Memorandum relating to the Act and perhaps the report of a Law Reform Commission or other body whose recommendations have led to the enactment of the statute. Reference to such material is expressly authorised in respect of Commonwealth statutes by the *Acts Interpretation Act 1901* (Cth) ('the Acts Interpretation Act') and, in respect of State and Territory statutes, by similar provisions in State and Territory laws. Ultimately however, it is the text of the statute which governs. If the Minister in introducing the proposed statute to Parliament made statements about its intended meaning which the text cannot bear, then the text must determine the available interpretations even if they do not reflect the ministerial intention.[44]

Common law interpretive rules

The statute law and the common law provide rules for the interpretation of statutes. These guide the constructional choices which a court may have to make between alternative readings of a provision in an Act.

An important rule found in both the common law and the interpretation of statutes favours a constructional choice which is valid over one which is invalid. Sir Owen Dixon explained the rule in 1945 when he said:

> In discharging our duty of passing upon the validity of an enactment, we should make every reasonable intendment in its favour. We should give to the powers conferred

[44] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518; *Mills v Meeking* (1991) 69 CLR 214, 223, 226 (Mason CJ and Toohey J); *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492; *Federal Commissioner of Taxation v Tyan* (2000) 201 CLR 109, 126 [29].

> upon the Parliament as ample an application as the expressed intention and the recognized implications of the Constitution will allow. We should interpret the enactment, so far as its language permits, so as to bring it within the application of those powers and we should not, unless the intention is clear, read it as exceeding them.[45]

The rule so expressed reflects a judicial respect for the parliamentary function and an approach which favours constructive over destructive interpretation.

A further interpretive rule of considerable importance derived from the common law is the principle of legality. That principle requires courts to favour a construction of a statute which will avoid or mitigate infringement by the statute upon fundamental rights and freedoms. It has been explained in the House of Lords as requiring that Parliament squarely confront what it is doing and accept the political costs. Fundamental rights are not to be overridden by general or ambiguous words. There is a risk that absent clear words the full implications of a proposed statute may pass unnoticed by those who are voting for it. Those observations about the principle were made in the House of Lords in *R v Secretary of State for the Home Department; Ex parte Simms* leading to the conclusion that:

> In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[46]

Commonwealth and State statutes in Australia are made under Constitutions which do not in terms guarantee common law rights and freedoms against legislative incursion. The principle of legality can nevertheless be regarded as 'constitutional' in character even if the rights and freedoms which it protects are not.[47] In Australia it appears to have had its earliest expression in the judgment of O'Connor J in *Potter v Minahan*[48] quoting from the 4th edition of *Maxwell on the Interpretation of Statutes*, which in turn borrowed from a judgment of

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45 *Attorney General (Vict) v Commonwealth* (1945) 71 CLR 237, 267.

46 [2000] 2 AC 115, 131 (Lord Hoffmann).

47 *Evans v State of New South Wales* (2008) 250 FCR 33, [70] (Branson, French and Stone JJ).

48 (1908) 7 CLR 277, 304.

Marshall CJ in a case about bankruptcy priorities.[49] The principle as enunciated by O'Connor J was that:

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.[50]

In a sense, this is the common law imposing on the Parliament what might broadly be called a manner and form requirement for clear language before courts will construe a statute as displacing fundamental rights and freedoms.

Among the rights protected by this principle are property rights. In Australia, it was applied to native title recognised at common law. Native title is taken not to have been extinguished by legislation unless the legislation reveals a plain and clear intent to have that effect. That requirement was said in *Mabo v Queensland (No 2)*[51] to flow from 'the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land'.

While the supremacy of Parliament enables it, subject to the Constitution, to override the common law rights and freedoms, the strength of the principle should not be underestimated. Common law rights and freedoms have weight.[52] The common law accords high value to freedom of expression, particularly the freedom to criticise public bodies. This is distinct from the freedom of political communication which the Court has implied in the Commonwealth Constitution and which cannot be transgressed by any Australian parliament.

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49 *United States v Fisher*, 6 US (2 Cranch) 358, 390 (1805).

50 P B Maxwell, *Maxwell On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) 122 (footnote omitted).

51 (1992) 175 CLR 1, 64.

52 T R S Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 146, 148.

The common law principle of legality has a significant role to play in the protection of rights and freedoms in contemporary society while operating consistently with the principle of parliamentary supremacy. It does not, however, authorise the courts to rewrite statutes in order to accord with fundamental human rights and freedoms. A question yet to be explored is the extent, if any, to which rights and freedoms guaranteed by various international Conventions to which Australia is a party or which might have become part of international customary law, may be picked up by the principle of legality and thereby inform statutory interpretation.

There is a useful discussion of the principle by Dan Meagher, an Associate Professor of Law at Deakin University, in the *Melbourne University Law Review*.[53] Meagher observes that although it has frequently been applied the principle of legality lacks extended judicial exegesis, particularly in so far as it may be invoked to construe statutes by reference to human rights and freedoms guaranteed in international instruments. He suggests that there is a question whether proportionality analysis has a part to play in such an application of the principle. He asks whether, for reasons of democratic legitimacy, Australian courts may decline to develop the principle of legality in that direction. One argument he notes against such a development of the principle is that it might involve the courts in creating a common law Bill of Rights which, so far as it relates to the interpretive role of the courts, is indistinguishable from that proposed by the recent report of the National Human Rights Consultative Committee and not adopted by Government nor the Commonwealth Parliament. An interpretive role of that kind is conferred upon the Victorian courts by the Charter of Human Rights and Responsibilities and, similarly, on the courts of the Australian Capital Territory by the *Human Rights Act 2004* (ACT). As to the merits of those observations, I make no comment beyond saying that they are worthy of further consideration and discussion.

Against that background it is useful to refer to the function conferred on the judiciary by interpretive rules created by human rights statutes in Victoria and the Australian Capital Territory.

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[53] Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights (2011) 35 *Melbourne University Law Review* 449-478.

The boundaries of the interpretive function - Human Rights Charters

The function of the courts in interpreting statutes involves law making in a broad sense. That aspect of their interpretive role arises in two ways:

- A law enacted by the Parliament may be capable of more than one construction compatible with general principles of statutory interpretation. In determining, in the context of a dispute, which construction is to be preferred, the court settles the meaning of the law.

- A law passed by the Parliament deliberately leaves it open to the courts to develop its application case-by-case. Broadly expressed legal rules such as the prohibition on misleading or deceptive conduct fall into that category. So too, do broadly expressed standards using terms such as 'reasonable', 'good faith' and 'unconscionable'.

The second kind of task resembles that set for the judiciary by the broadly expressed language of a written constitution. Again returning to the 1898 Melbourne session of the Australasian Federal Convention, Isaac Isaacs, then a colonial delegate, later to become a Justice and Chief Justice of the High Court and the first Australian-borne Governor-General, said:

> We are taking infinite trouble to express what we mean in this Constitution; but as in America as it will be here that the *makers of the Constitution* were not merely the Conventions who sat, and the States who ratified their conclusions, but the judges of the Supreme Court.[54]

Both kinds of interpretive task are involved in the application of statutory human rights charters embodying interpretive rules along the lines of those adopted in Victoria and the Australia Capital Territory, the United Kingdom and New Zealand. The first is seen in the interpretation of statutes compatibly with human rights and freedoms. The second is seen in the application of human rights guarantees case-by-case.

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[54] *Official Record of the Debates of the Australasian Federal* Convention, (Melbourne), 1898, 283, cited in Thomson, above n 40, 322 n 61.

Section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) relevantly provides:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

In *Momcilovic v The Queen*[55] the High Court applied that interpretive rule to the construction of a reverse onus provision in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). The provision in question imposed a legal burden of disproof of possession of drugs on a person in whose premises the drugs were found. A majority of the Court held that the interpretive rule would not permit the provision to be read down to one imposing a mere evidential burden. Nevertheless it was able to hold, consistently with the language of the statute that the reverse onus provision, while applicable to charges of possession, did not apply to the more serious offence of possession for sale. The approach taken to the interpretive principle by the majority was broadly equivalent to the interpretive approach reflected in the principle of legality applied in that case to the presumption of innocence which was designated as one of the human rights covered by the Charter.

In the United Kingdom, the courts have applied the interpretive provision, s 3 of the *Human Rights Act 1968* (UK), in a more robust way which, from an Australian perspective, might seem to push close to the boundary of the judicial legislative functions. Initially, s 3 of the *Human Rights Act* was characterised as an express enactment of the principle of legality.[56] However in *Ghaidan v Godin-Mendoza*[57] a majority of the Law Lords took the view that s 3 travelled beyond the limits of the principle of legality. It was described as 'apt to require a court to read in words which changed the meaning of the enacted legislation, so as to make it convention-compliant.'[58] It was described as 'remedial'.[59] The extent of the remedial interpretation permitted by s 3 was constrained by metaphorical requirements that

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55 (2011) 85 ALJR 957.

56 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 132 (Lord Hoffmann).

57 [2004] 2 AC 557.

58 [2004] 2 AC 557, 571-572 [32] (Lord Nicholls).

59 [2004] 2 AC 557, 577 [49] (Lord Steyn).

the application of the section 'be compatible with the underlying thrust of the legislation' and 'go with the grain of the legislation', that it not remove 'the very core and essence, the pith and substance' or violate a 'cardinal principle' of the legislation. The interpretive function did not require 'legislative deliberation'.[60] In a subsequent case *R (Wilkinson) v Inland Revenue Commissioners*,[61] Lord Hoffmann equated s 3 of the *Human Rights Act* with the principle of legality saying:

> Just as the 'principle of legality' meant that statutes were to be construed against the background of human rights subsisting at common law, so now s 3 requires them to be construed against the background of Convention rights.[62]

The other Law Lords in *Wilkinson* agreed with Lord Hoffmann. Nevertheless, the approach adopted in *Ghaidan* prevails. Lord Phillips in *Ahmed v Her Majesty's Treasury* said:

> I believe that the House of Lords has extended the reach of s 3 of the HRA beyond that of the principle of legality.[63]

In our constitutional setting the limits of the function of the judiciary undertaking statutory interpretation mark a constitutional boundary between the judiciary and the Parliament. While there is no doubt that the choices which the judiciary makes in construing and applying statutes have a law-making dimension, they remain consistent with the separation of legislative and judicial powers if they are confined to functions, that is constructional choices or case-by-case development of principle, which have been left open by the Parliament.

Parliamentary interaction with the judicial process

This presentation has focussed upon that function of the courts, the interpretation of statutes, which lies at or close to the boundary between the legislative function of the Parliament and the law making function of the courts. There are fundamental differences

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60 [2004] 2 AC 557, 572 [33] (Lord Nicholls).

61 (2005) 1 WLR 1718.

62 (2005) 1 WLR 1718, 1723 [17]; (2006) 1 All ER 529, 535.

63 [2010] 2 AC 534, 646 [112].

between the two functions. Parliament makes its laws to give effect to public policies which are thought to be beneficial. The formulation of such policies and the laws designed to give effect to them involve political decisions and consideration of a spectrum of interests that may be advanced or disadvantaged by the law. These are things beyond the constitutional competence of the courts. The courts, on the other hand, deal with interpretation in so far as it is necessary to do so to decide disputes. The courts do not choose the disputes which come before them. Nor can courts, particularly final appellate courts, avoid the reality that their interpretation of statutes may have wider consequences, perhaps adverse to public policy, which the statutes were intended to advance. In the end, however, if an interpretation is adopted which Parliament does not wish to leave in place, it is open to it to amend the statute in order to overcome the effect of the interpretation.

It is important to state that in amending a statute to avoid the consequences of a particular judicial interpretation the Parliament does not thereby interfere with the judicial function or do anything that is in any sense constitutionally illegitimate.

In two recent cases the High Court has considered and rejected challenges to the validity of laws which were brought on the basis that the laws involved impermissible legislative interference in judgments of the courts.[64] In each case the Court held that amending legislation changed the legal consequences of the particular judgments but did not involve an interference with the judgments themselves. That does not mean that it is open to the Parliament to direct the courts as to the outcome of the exercise of their jurisdiction, nor to require courts to act under executive direction in the discharge of their functions.

There is a reciprocal restraint exercised by courts in relation to matters falling within parliamentary privilege and the intramural provisions of parliament. The restraint in relation to the latter does not extend to non-compliance with entrenched manner and form requirements for conditioning the validity of particular classes of legislation.

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64 *Australian Education Union v General Manager of Fair Work Australia* (2012) 86 ALJR 595; *Crump v New South Wales* (2012) 86 ALJR 623.

Conclusion

The relationship between the courts and the Parliament is defined by Commonwealth and State Constitutions and the common law. To work that relationship also requires the respect of each for the limits of its own function and the proper functions of the other. It requires courtesy and civil discourse between the institutions. These are necessary aspects of any working relationship however tightly defined by law.