

## The Common Law and the Protection of Human Rights

Chief Justice RS French  
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### Introduction

1           The debate about whether Australia should have a Human Rights Act is being pursued vigorously around the country. I express no view on its merits. It has, however, involved repeated reference to the term "unelected judges". That term has been used to suggest that a kind of democratic deficit would result if judges were to be required to make decisions involving the weighing up of important but competing societal values – the kind of judgments not unusual in human rights jurisprudence.

2           There is, of course, nothing particularly unusual about judges making that kind of judgment under both statute law and the common law. So far as it concerns the judicial function, the human rights debate does not offer a choice between judges making that kind of decision or never making that kind of decision. The question at the heart of the debate is really one of degree, namely would a Human Rights Act take the judges too far beyond their current functions into the area of social policy?

3           There are strong protagonists on either side of the argument and it has a political dimension. It does, however, provide an opportunity for us to reflect upon what it is that courts already do in applying the common law which has been developed by the unelected judges of England and Australia. It provides an opportunity to reflect about the way in which

many of the things we think of as basic rights and freedoms come from the common law and how the common law is used to interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms. We do so against the backdrop of the supremacy of Parliament which can, by using clear words for which it can be held politically accountable, qualify or extinguish those rights and freedoms except to the extent that they may be protected by the Constitution. For, subject to the Constitution, the Commonwealth Parliament can legislate to change the common law just as it can legislate to change its own statute law. It could also legislate to modify or repeal its own Human Rights Act if it were to enact one. The Parliaments of the States are in a similar position, save that it is not open to them to enact laws which are inconsistent with valid laws of the Commonwealth.

4           It is helpful to start by thinking about the common law and its character as part of the constitutional legacy we inherited from the United Kingdom.

### **The common law – a constitutional legacy**

5           The phrase "common law" refers to a body of principles or rules of law worked out on a case-by-case basis by courts in England and latterly in this country. That judicial law-making process is incremental. It has been described as being like "the sluggish movement of the glacier rather than the catastrophic charge of the avalanche"<sup>1</sup>.

6           The common law has a constitutional dimension because, amongst

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<sup>1</sup> Rogers, *Winfield and Jolowicz on Tort*, (14th ed, Sweet & Maxwell, 1994) 17.

other things, as Sir John Latham wrote in 1960<sup>2</sup>:

... in the interpretation of the Constitution, as of all statutes, common law rules are applied.

That constitutional dimension is also reflected in the institutional arrangements which the common law brings with it. At its core are public courts which adjudicate between parties and which are the authorised interpreters of the law which they administer<sup>3</sup>. As Professor Goodhart said, the most striking feature of the common law is its public law, it being "... primarily a method of administering justice"<sup>4</sup>.

7 In the first of his McPherson Lectures last year, Spigelman CJ recounted the role of "natural rights" in Blackstone's formulation of the common law, Bentham's attack upon the idea of such rights as "nonsense on stilts", and Henry Stephen's 19th century writing-down of Blackstone's rights terminology<sup>5</sup>. Blackstone's language of natural right does not have the same force today, but the role of the common law as a repository of rights and freedoms is of considerable significance. A recent, non-exhaustive list of common law rights in Australia contains the following<sup>6</sup>:

- . the right of access to the courts;
- . immunity from deprivation of property without compensation;

<sup>2</sup> Latham J, "Australia", (1960) 76 *Law Quarterly Review* 54 at 57.

<sup>3</sup> Pollock F, *The Expansion of the Common Law* (1904) 51.

<sup>4</sup> Goodhart AL, "What is the Common Law" (1960) 76 *Law Quarterly Review* 45 at 46.

<sup>5</sup> Spigelman CJ, "The Common Law Bill of Rights", 10 March 2008, University of Queensland, Brisbane.

<sup>6</sup> Corrin J, "Australia: Country Report on Human rights", (2009) *Victoria University of Wellington Law Review*, 37 at 41-42.

- legal professional privilege;
- privilege against self-incrimination;
- immunity from the extension of the scope of a penal statute by a court;
- freedom from extension of governmental immunity by a court;
- immunity from interference with vested property rights;
- immunity from interference with equality of religion; and
- the right to access legal counsel when accused of a serious crime.

To that list one would add:

- no deprivation of liberty, except by law;
- the right to procedural fairness when affected by the exercise of public power; and
- freedom of speech and of movement.

These rights are of course of a limited nature and are contingent in the sense that, subject to the Constitution, they can be modified or extinguished by Parliament.

8           It is also important to recognise, as Peter Bailey points out in his recent book on human rights in Australia, that common law "rights" have varied meanings. In their application to interpersonal relationships, expressed in the law of tort or contract or in respect of property rights, they are justiciable and may be said to have "a binding effect". But "rights", to movement, assembly or religion, for example, are more in the nature of "freedoms". They cannot be enforced, save to the extent that their infringement may constitute an actionable wrong such as an

interference with property rights or a tort. Bailey says<sup>7</sup>:

So a common law "freedom" is not really like a human rights type claim. A common law "freedom" is built up as a general principle appears to be established by individual cases. The single instances come first; the "freedom" follows as a kind of title. In human rights, the "right" comes first and the remedy (if one can be achieved) follows.

9 The common law method, in contrast with that involved in the implementation of a Bill of Rights, was described by Professor Lumb as being "based on a step by step approach, with the recognition and development of rights reflecting a casuistic approach to the interpretation of a "rights" issue in the light of relevant remedies and legislative restrictions"<sup>8</sup>. Professor Lumb wrote in 1983 of judges in a common law system without a constitutional Bill of Rights<sup>9</sup>:

The creativity of the judges is ... restricted by the ground rules of the system which does not have its source in a fundamental constitutional document which is subject to final review by a constitutional court. As a corollary of this, the doctrine of parliamentary sovereignty enables the rules to be changed and even abrogated. Judicial decisions even of the most basic nature (whatever may be the conventions which restrict the legislative power) are subject to being superseded by legislation which, although open to interpretation, is not open to invalidation by a constitutional court.

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<sup>7</sup> Bailey P, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis, 2009) [1.5.3].

<sup>8</sup> Lumb RD, *Australian Constitutionalism*, (Butterworths, 1983) 102.

<sup>9</sup> Lumb, RD, *Australian Constitutionalism*, (Butterworths, 1983) 102.

Lumb went on to suggest that rights and freedoms might be regarded as "residual in nature" and defined by reference to statutory rules and common law exceptions. In my opinion, however, the word "residual" is too weak, having regard to the way in which the courts have developed the principle of legality affecting the interpretation of statutes by reference to those rights and freedoms.

### **Common law rights and freedoms and the interpretation of statutes**

10           The common law has been referred to in the High Court as "... the ultimate constitutional foundation in Australia"<sup>10</sup>. It has a pervasive influence upon constitutional and statutory interpretation. As McHugh J said in *Theophanous*, a case which applied the implied freedom of political communication to the common law of defamation<sup>11</sup>:

The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture.

11           The exercise of legislative power in Australia takes place in the constitutional setting of a "liberal democracy founded on the principles and traditions of the common law"<sup>12</sup>. The importance of the principles and traditions of the common law in Australia is reflected in the long-established proposition that statute law is to be interpreted consistently

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<sup>10</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182.

<sup>11</sup> *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 196.

<sup>12</sup> *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587.

with the common law where the words of the statute permit. Historically this proposition may be seen to have derived from judicial antagonism to legislative incursions on judge-made law. In a passage still frequently quoted, O'Connor J in the 1908 decision *Potter v Minahan*<sup>13</sup> said, referring to the 4th edition of Maxwell on *The Interpretation of Statutes*:

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.  
[Footnote omitted]

12           The principle enunciated in *Potter v Minahan* has evolved into an approach to interpretation which is protective of fundamental rights and freedoms and which closely resembles the "principle of legality" developed by the courts of the United Kingdom. That principle has the form of a strong presumption that broadly expressed official discretions are to be subject to rights and freedoms recognised by the common law. It has been explained in the House of Lords as requiring that Parliament "squarely confront what it is doing and accept the political cost"<sup>14</sup>. Parliament cannot override fundamental rights by general or ambiguous words. The underlying rationale is the risk that, absent clear words, the

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<sup>13</sup> (1908) 7 CLR 277 at 304.

<sup>14</sup> *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131. See also *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 and Dyzenhaus D, Hunt M and Taggart M, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 *Oxford University Commonwealth Law Journal* 5.

full implications of a proposed statute law may pass unnoticed<sup>15</sup>:

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.

13 In the celebrated *Metric Martyrs* case<sup>16</sup>, Laws LJ may have pushed the envelope of the principle when he characterised it as protecting "rights of a constitutional character recognised by the common law". The abrogation of such rights by statute would require a demonstration of the actual intention of the legislature to do so, rather than some imputed or constructive or presumed intention. That could only be done if the statute used words or words so specific that the inference of an intention to abrogate such a right would be irresistible. Laws LJ described this approach as providing "most of the benefits of a written constitution, in which fundamental rights are accorded special respect", while preserving the sovereignty of the legislature and the flexibility of the uncodified British Constitution<sup>17</sup>.

14 Although Commonwealth statutes in Australia are made under a written constitution, the Constitution does not in terms guarantee common law rights and freedoms against legislative incursion. Nevertheless, the interpretive rule can be regarded as "constitutional" in character even if the rights and freedoms which it protects are not.

<sup>15</sup> [2000] 2 AC 115 at 131.

<sup>16</sup> *Thoburn v Sunderland City Council* [2003] QB 151.

<sup>17</sup> [2003] QB 151 at 187.



15           There have been many applications of the general rule which, in Australia, had its origin in *Potter v Minahan*. It has been expressed in quite emphatic terms. Common law rights and freedoms are not to be invaded except by "plain words"<sup>18</sup> or necessary implication<sup>19</sup>.

16           In *Bropho v State of Western Australia*<sup>20</sup> the High Court of Australia restated the presumption "against the modification or abolition of fundamental rights or principles" and identified the passage from Maxwell quoted in *Potter v Minahan* as supplying its rationale. What was important about the restatement was the strength of its affirmation. It was affirmed again in *Coco v The Queen*<sup>21</sup> in the context of interference with individual rights and freedoms. The presumption, however, is not limited in terms to those rights, freedoms or doctrines presently recognised by the common law. Native title, which was not recognised by the common law of Australia until 1992, is taken not to have been extinguished by legislation unless the legislation reveals a plain and clear intent to have that effect. This presumption applies to legislation which may have predated the decision in *Mabo (No 2)* by many decades and in some cases by more than 100 years. It is a requirement which flows from "the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interest in land"<sup>22</sup>. It may be

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<sup>18</sup> *Re Cuno* (1889) 43 Ch D 12 at 17 per Bowen LJ.

<sup>19</sup> *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206 per Higgins J.

<sup>20</sup> (1990) 171 CLR 1.

<sup>21</sup> (1994) 179 CLR 427.

<sup>22</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 64.

seen as a particular application of the presumption against interference with common law rights only recently discovered by the courts.

17 Two recent high profile cases involving the application of the presumption were judgments of the Full Court of the Federal Court in *Minister for Immigration and Citizenship v Haneef*<sup>23</sup> and *Evans v New South Wales*<sup>24</sup>. In *Haneef*, after referring to what the High Court said in *Coco* and what Lord Hoffman had said, enunciating the principle of legality in *Simms*, the Full Court construed the term "association" in s 501 of the *Migration Act 1958* (Cth) narrowly. That section defined the circumstances in which a person would not pass the "character test" and so be liable for refusal or cancellation of a visa on character grounds. The relevant criterion was that:

The person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct.

The Court there said<sup>25</sup>:

Having regard to its ordinary meaning, the context in which it appears and the legislated purpose, we conclude that the association to which s 501(6)(b) refers is an association involving some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation. The association must be such as to have *some* bearing upon the person's character. (emphasis in original)

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<sup>23</sup> (2007) 163 FCR 414.

<sup>24</sup> (2008) 168 FCR 576.

<sup>25</sup> (2007) 163 FCR 414 at 447 [130]

18 In determining the validity of a regulation made under the *World Youth Day Act 2006* (NSW), the Full Court referred to *Potter v Minahan, Bropho and Coco* and quoted what Gleeson CJ said about the principle of legality in *Electrolux Home Products Pty Ltd v Australian Workers' Union*<sup>26</sup>. The former Chief Justice had said:

The presumption is not merely a commonsense guide to what a parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.

In that case, the regulation making power, interpreted according to the common law principle, was found not to authorise a regulation directed to conduct causing "annoyance ... to participants in a World Youth Day event".

19 In the quotation from Professor Lumb's text on Australian constitutionalism mentioned earlier, the suggestion was made that common law rights and freedoms could be regarded as "residual". And indeed the common law has always adhered to the proposition that "... everybody is free to do anything, subject only to the provisions of the law"<sup>27</sup>. That may suggest that freedom is what is left over when the law is exhausted. But the principle of legality in England and the interpretive principle in Australia suggest that it is more than that. TRS Allan put it

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<sup>26</sup> (2004) 221 CLR 309.

<sup>27</sup> *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283 (Lord Gough); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564.

thus<sup>28</sup>:

The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.

20 By way of example, there has long been a particular recognition at common law that freedom of speech and the press serves the public interest. Blackstone said that freedom of the press is "essential to the nature of a free State"<sup>29</sup>. Lord Coleridge in 1891 characterised the right of free speech as "one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done".<sup>30</sup>

21 The limitations on freedom of speech in respect of "criminal matters" and "wrongful acts" which were accepted by both Blackstone and Lord Coleridge beg the question of what could be treated as "criminal" or "wrongful" by the legislature. This point was taken up in

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<sup>28</sup> Allan T R S, "The Common Law of the Constitution: Fundamental Rights and First Principles" in Saunders C (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 148.

<sup>29</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1769), Vol 4, 151-152.

<sup>30</sup> *Bonnard v Perryman* [1891] 2 Ch 269 at 284 and see *R v Police of the Metropolis; Ex parte Blackburn (No 2)* [1968] 2 QB 150 at 155; *Wheeler v Leicester City Council* [1995] AC 105 at 106; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 220.

criticism of the Blackstone approach in the United States, in the context of discussion about the First Amendment<sup>31</sup>.

22           Despite its limits and vulnerability to statutory change, the common law gives a high value to freedom of expression, particularly the freedom to criticise public bodies<sup>32</sup>. Courts applying the common law may be expected to proceed on an assumption that freedom of expression is not to be limited save by clear words or necessary implication. An example of a common law principle expressly protecting freedom of speech is the rule in England that local authorities and other organs of government cannot sue for libel at common law. There is no public interest favouring the right to sue and it was said by the House of Lords in the *Derbyshire County Council Case* in 1993 to be contrary to the public interest "because to admit such actions would place an undesirable fetter on freedom of speech"<sup>33</sup>. That principle was applied by the New South Wales Court of Appeal in 1994<sup>34</sup>.

23           The Court of Appeal in the *Derbyshire County Council Case*, referred to Article 10 of the European Convention on Human Rights, which relates to freedom of expression. The United Kingdom is party to that Convention. Balcombe and Butler-Sloss LJ took the view that, where the law is uncertain, the courts should approach it in such a way as

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<sup>31</sup> Chafee Z, *Freedom of Speech*, (Legal Books Repr, 1920 ) 11.

<sup>32</sup> *Halsbury's Laws of England* (4th ed, 1989) Vol 8(2) par 107.

<sup>33</sup> *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 at 549.

<sup>34</sup> *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.

to ensure that it does not involve a breach of Article 10<sup>35</sup>. And in a New South Wales Court of Appeal decision in the following year,<sup>36</sup> Kirby P referred to the provisions of Article 19.2 of the International Covenant on Civil and Political Rights, which Australia has ratified<sup>37</sup>.

24           The application of the principle in support of freedom of expression was seen at the level of constitutional characterisation of powers in the decision of the High Court in *Davis v Commonwealth*<sup>38</sup>. 1988 was the bicentenary of European settlement of Australia. A company was established called the Australian Bicentennial Authority to plan and implement celebrations of the bicentenary. The *Australian Bicentennial Authority Act 1980* (Cth) was enacted to, inter alia, to reserve to the Authority the right to use or licence the use of words such as "bicentenary", "bicentennial", "200 years", "Australia", "Sydney", "Melbourne", "Founding", "First Settlement" and others in conjunction with the figures 1788, 1988 or 88. Articles or goods bearing any of these combinations without the consent of the Authority would be forfeited to the Commonwealth. In their joint judgment striking down some aspects of these protections, Mason CJ, Deane and Gaudron JJ (Wilson, Dawson

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<sup>35</sup> *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770 at 813.

<sup>36</sup> The *Derbyshire* and *Ballina* cases were discussed by Kirby J as part of a wider consideration of domestic application of international human rights norm and the *Bangalore Principles: The Road from Bangalore – The First Ten Years of the Bangalore Principles on the Domestic Application of International Human Rights Norms*.

<sup>37</sup> (1994) 33 NSWLR 680 at 698.

<sup>38</sup> (1988) 166 CLR 79.

and Toohey JJ agreeing) said<sup>39</sup>:

Here the framework of regulation ... reaches far beyond the legitimate objects sought to be achieved and impinges on freedom of expression by enabling the Authority to regulate the use of common expressions and by making unauthorized use a criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.

25           The common law can of course only go so far. It does not provide the support for freedom of expression that would accord it the status of a "right". It cannot withstand plainly inconsistent statute law.

26           The interpretive presumptions have not gone without criticism. Lords Simon and Diplock said of the general presumption<sup>40</sup>:

We are inclined to think that it may have evolved through a distillation of forensic experience of the way parliament proceeded at a time when conservatism alternated with a radicalism which had a strong ideological attachment to the common law. However valid this particular aspect of the forensic experience may have been in the past, its force may be questioned in these days of statutory activism.

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<sup>39</sup> (1988) 166 CLR 79 at 100; see at 116 per Brennan J.

<sup>40</sup> *Maunsell v Olins* [1975] AC 373 at 394.

Julius Stone, writing in 1946, described the effects of the presumptions upon legislation, which is the major source of law, as "obviously serious"<sup>41</sup>.

27 In his 1908 essay in the *Harvard Law Review* on common law and legislation, Roscoe Pound described the general presumption as lacking justification and confronting the social reformer and legal reformer with the situation that a legislative act representing the fruits of their labours would find no sympathy in those who apply it, would be construed strictly and would be made to interfere with the status quo as little as possible<sup>42</sup>. In the concluding portion of his essay he enunciated the democratic principle which should cause statute law to be preferred over common law<sup>43</sup>:

We recognize that legislation is the more truly democratic form of law-making. We see in legislation the more direct and accurate expression of the general will. We are told that law-making of the future will consist in putting the sanction of society on what has been worked out in the sociological laboratory. That courts cannot conduct such laboratories is self evident. Courts are fond of saying that they apply old principles to new situations. But at times they must apply new principles to situations both old and new. The new principles are in legislation. The old principles are in common law. The former are as much to be respected and made effective as the latter – probably more so as our legislation improves. The public cannot be relied upon

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<sup>41</sup> Stone J, *The Province and Function of Law: Law Logic, Justice and Social Control: A Study in Jurisprudence* (Associated General Publications Pty Ltd, Sydney, 1946) 199.

<sup>42</sup> Pound R, "Common Law and Legislation" (1908) 21 *Harvard Law Review* 383 at 387.

<sup>43</sup> *Ibid* at 406-407.



permanently to tolerate judicial obstruction or nullification of the social policies to which more and more it is compelled to be committed.

28 Finn J has observed of a similar rule of construction applied in the United States:

More generally the more we expose the bases of our interpretative principles and evaluate them in the light both of contemporary legislative practice and the modern understanding of interpretation as a process; the greater is the likelihood of continuing reappraisal of the validity and vitality of those principles.

29 The common law interpretive principle protective of rights and freedoms against statutory incursion retains its vitality, although it has evolved from its origins in a rather anti-democratic, judicial antagonism to change wrought by statute. It has a significant role to play in the protection of rights and freedoms in contemporary society, while operating in a way that is entirely consistent with the principle of parliamentary supremacy. Whether it goes far enough, or whether we need a Human Rights Act to enhance that protection with judicial and/or administrative consideration of statutory consistency with human rights and freedoms, is a matter for ongoing debate.