LEGALITY - SPIRIT AND PRINCIPLE

MURRAY GLEESON*

THE SECOND MAGNA CARTA LECTURE

NEW SOUTH WALES PARLIAMENT HOUSE, SYDNEY

20 NOVEMBER 2003

In his Inaugural Magna Carta Lecture, Lord Irvine of Lairg referred to the shared constitutional heritage of Britain and Australia[1]. He identified, as part of our inheritance "the fundamental common law doctrine of legality"[2], which, he said, represents "the kernel of the rule of law"[3]. The idea of legality, as the term is used in this context, may be explained by reference to two contrasting examples.

In his account of the Peloponnesian War[4], Thucydides constructed a dialogue between the Athenian envoys, and the commissioners of Melos, whose submission the envoys were seeking. In modern terms, Athens regarded Melos as a threat to its vital interests, and had decided that it should be subjugated. The envoys began by rejecting any idea that there was a law that governed their conduct. They said: "[We] shall not trouble you with specious pretences ... either of how we have a right to our empire because we overthrew the [Persians], or are now attacking you because of the wrong that you have done us ... and make a long

speech that will not be believed; ... since you know as well as we do the right, as the world goes, is only in question between equal power, while the strong do what they can and the weak suffer what they must." When the Melians invoked equity, pointing out that others had been left free, the Athenians replied that, if other states maintained their independence, it was only because they were strong, and Athens was afraid to molest them. When the Melians invoked the gods, the Athenians said: "Of the gods we believe, and of men we know, that by a necessary law of nature they rule wherever they can." This is a clear exposition of the alternative to legality.

A contrasting example is the American Declaration of Independence. It set out to justify the overthrow of existing authority. The American revolutionaries did not simply declare that, with the help of their allies, they had succeeded in armed conflict, and were asserting their will to govern themselves. They claimed that their conduct was justified by reference to a higher law. They appealed to natural law, and inalienable human rights. They charged their former rulers with unlawful acts. They set out to demonstrate that the law was on their side. There were good practical reasons why they should do so. In terms of both international and domestic relations, acceptance of the legitimacy of their new government was important to their security and welfare.

Legitimacy implies the existence of an external rule or standard by reference to which power or authority is constituted, and behaviour, including the behaviour of those vested with power or authority, is measured. As Lord Irvine pointed out[5], at the time of Magna Carta, although the absolute legal authority of the King was accepted, the rules of succession were not settled. A contest for succession provided an opportunity for other powerful elements in the community to extract concessions from potential rulers. Such concessions might be more or less enduring, and more or less enforceable, depending upon later developments. They might be seen as an intermediate stage in the progress from the state of nature described by the Athenians to a modern conception of a society organized under the rule of law.

This is not the occasion to examine the protean concept of sovereignty, but the concept of legal constraint upon law-making capacity has a long history. One such constraint arose from a view of law as custom. Complaints against medieval rulers were commonly based upon an assertion that they had changed the law. The power to make laws was seen as power to declare true law, rather than to change it. Of the medieval idea of legislation, Kern wrote[6]:

> "There is, in the Middle Ages, no such thing as the 'first application of a legal rule'. Law is old; new law is a contradiction in terms; for either new law is derived explicitly from the old, or it conflicts with the old, in which case it is not lawful. The fundamental idea remains the same; the old law is the true law, and the true law is the old law. According to medieval ideas, therefore, the enactment of new law is not possible at

> all; and all legislation and legal reform is conceived of as the restoration of the good old law which has been violated."

Over time, there developed a different idea of the exercise of law-making authority, whether by sovereign monarchs, or bodies acting as representatives of some or all of the people. Yet it is only in fairly recent times that parliaments have taken on the role of permanent and active agencies of law reform. In Australia, as in the United Kingdom, modern parliaments turn out a volume of legislation that would have been amazing 50 years ago; and legislation covers a wide range of issues once left largely to the common law. There is, now, in Australia, very little litigation that does not involve the interpretation and application of an Act of a Parliament, State or Federal. Even such matters as the assessment of damages in a claim in tort for personal injury, or the sentencing of an offender, are likely to be controlled closely by legislative prescription. Parliaments undertake constant and extensive changes of the law; and this is accepted by the community as part of their proper function. Obedience to the legislative will by citizens, and by courts whose task it is to administer the law, is an aspect of legality. Yet external limitations on parliamentary law-making exist in many common law countries, including Australia. F A Hayek wrote[7]:

> "The effective limitation of power is the most important problem of social order. Government is indispensable for the formation of such an order only to protect against coercion and violence from others. But as soon as, to achieve this, government successfully claims the monopoly of coercion and violence, it becomes the chief threat to individual freedom. To limit this power was the great aim of the founders of

constitutional government in the seventeenth and eighteenth centuries."

There has never been, in Australia, a sovereign Parliament. The colonial legislatures established by the Imperial Parliament during the nineteenth century were of limited authority, and legal challenges to the validity of their legislation were not uncommon. In the early days of the colony of New South Wales, the power of Governors to make laws was subject to a requirement that it was necessary for the Chief Justice to certify that they were not repugnant to the laws of England. A conflict between Governor Darling and Chief Justice Forbes arose out of the latter's refusal to give such a certificate in respect of laws aimed at licensing and taxing the press. The Chief Justice considered them to be repugnant to a common law right of free speech[8]. The circumstances of this confrontation provide an example of the importance of the spirit, as well as the principle, of legality. The Governor was denied the power to stifle criticism by the press, which he saw as a threat to security and good order. The Imperial authorities were distant, and communications were slow. At least as important as the existence of the legal limitation on his powers was the assumption that the Governor would conform to it. It was the Governor, not the Chief Justice, who was in command of the troops. The freedom of the press was secured, not only by the legal restrictions on the Governor's power, but also by the common expectation, shared by the Governor, the Chief Justice, and the people of the colony, that those restrictions would be observed. As the Australian colonies progressed to representative government,

their familiarity with legal limitations on law-making power continued and developed. The judges of colonial courts, and especially colonial Supreme Courts, were required to decide the validity of statutes of colonial legislatures. Law-makers, and their supporters in the community, did not always accept this jurisdiction gracefully; but they accepted it. From the earliest days of European settlement, Australians have been accustomed to governments of limited authority, and to judicial power to decide the limits.

The assumption by the Imperial and local authorities, and the public, that the early Governors of New South Wales would not only make, but also obey, the law, corresponds with the modern assumption that is made in many vital respects which are so basic to our system of government that most Australians pay no attention to them. Governments, at all levels, obey the law, as a matter of course. Federal, State, and local governments, and their agencies, are frequent litigants in the courts. Sometimes, they are unsuccessful litigants. When court orders are made against them, there may be a political outcry, but the orders are complied with. Enforcement of judgments, especially against governments and their agencies, is an issue in some societies; but not in Australia. All public power must be based on law. Governments and citizens are subject to the law. This is the essence of the principle of legality.

When, at the end of the nineteenth century, the people of the Australian colonies agreed to form a federal union, the terms on

which they agreed to unite, expressed in the Australian Constitution, were given legal effect by an Act of the Imperial Parliament. The colonial tradition of the establishment of overriding legal limitations upon the power of governments and parliaments, declared and enforced if necessary by the judiciary, then took on a further dimension. To explain that dimension, it is necessary to look to jurisprudence that developed, not in the United Kingdom, but in North America.

By the time American Independence was declared, many of the State constitutions in the United States contained express guarantees of rights. The new Federal Constitution, in its original form, did not include a comprehensive statement of human rights or freedoms. What is known as the Bill of Rights was added a little later, and consisted of the first ten amendments to the Constitution. A number of the States had voted for ratification on the assurance that there would be early amendment of the Constitution to incorporate a bill of rights, and the substantive content of many of those rights had been foreshadowed in State constitutions[9]. The first ten amendments took effect in 1791. They were added to in later years, perhaps most significantly by the Fourteenth Amendment, which was held to make applicable to the States some of the guarantees that otherwise would have applied only against the Federal government[10].

The importance of the Bill of Rights of 1791 was enhanced by the decision of the Supreme Court, in 1803, in *Marbury v Madison*[11]. Marshall CJ declared that, since it is the province and duty of the judicial department of government to say what the law is, and since the Constitution is the paramount law, the Supreme Court had the power, and the duty, to declare an enactment of Congress, which was contrary to the Constitution, to be without legal effect. That was of immense significance. Any federal system of government, by its nature, involves an agreed division (and therefore limitation) of governmental (including legislative) powers. Such an agreement requires expression in a written constitution. Furthermore, it is ordinarily difficult to amend constitutions - in Australia, very difficult. This gives an unelected judiciary a power, in the application of the principle of legality, to decide that the will of an elected parliament is ineffective because it is overriden by a higher law; a law that is hard to change. Where, in addition, there was a constitution that declared, and, subject to the possibility of alteration, entrenched, rights, freedoms and guarantees, by which the legislature was bound, the result was a form of judicial power beyond any that had existed in the United Kingdom. Furthermore, the higher law (the Constitution), against which the validity of legislation was tested, was not expressed in the terms of a self-explanatory code. Its meaning was in many respects open to contestable interpretation. The judicial process of exposition of the meaning of the Constitution was to go on at the same time as the determination of the validity of legislation. Congress may be informed of the meaning of the

Constitution in the same decision as declared its legislation to be unconstitutional.

The possibility that the Supreme Court would assert this power was foreseen by the American founding fathers. It was a subject of controversy among them. Madison, when presenting the ten amendments to Congress, said that they would be effective because "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative and the executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights"[12]. Writing in *The Federalist Papers*[13], Alexander Hamilton rejected the notion that the legislature could itself be the final judge of its own powers. He said, "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is ... a fundamental law. It therefore belongs to [the judges] to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred ..." He also pointed to an important corollary, which was that, since the judges have the power and responsibility of determining the limits of legislative and executive powers, the "complete independence of the courts of justice is peculiarly essential in a limited Constitution". Not all the founders agreed with

the assumption of a power of judicial review of legislation enacted by Congress. Jefferson, in particular, strongly disagreed.

The idea that, in a federation, judges have the capacity, in the last resort, to determine the limits of the powers of the legislature and the executive, has obvious political significance. This was evident in *Marbury v Madison* itself. The litigation arose out of a struggle within the new federation between Federalists and Republicans. Jefferson was the new President, and Marshall the new Chief Justice; Jefferson was a Republican, suspicious of strong federal government; Marshall was a Federalist. In the last days of his Presidency, John Adams, who was to be replaced by Jefferson, and whom Marshall had served as Secretary of State, appointed a number of judges believed to have Federalist sympathies. One was Marshall. Federal judges had life tenure. Adams also appointed a number of justices of the peace. One was William Marbury. Marbury's commission was not delivered in time, and following Jefferson's election as President, the incoming Administration resisted Marbury's assumption of office on that ground. That was the political context in which the Supreme Court came to deal with an application for a writ of mandamus to compel delivery of the commission. There was a possibility of impeachment of Marshall himself, if the Court ordered the new executive government to implement former President Adams' controversial and incomplete appointments. The actual decision went in favour of the new government on the ground that the Supreme Court lacked the

original jurisdiction to issue mandamus, but in his reasoning the Chief Justice stated the principles as to the judiciary's power of review of the legality of legislative and executive acts in the manner foreshadowed by Hamilton. Writing in 1950, Justice Burton said:

> "The extraordinary thing is that Chief Justice Marshall found a way to announce and establish the principle of judicial review ... without making an immediate application of it hostile to the Administration and without providing the expected basis for impeachment proceedings."[14]

As an American constitutional scholar has observed, Marshall declared the primacy of the rule of law over the President, but, finding the legislation which purported to confer the power to issue mandamus to be unconstitutional, he avoided testing the Court's power of judicial review by directing a writ to the President and running the risk of defiance[15]. The decision has been described as "a masterpiece of political strategy"[16]. In 1804, Jefferson, in a letter to Abigail Adams, wrote that the opinion had the capacity to make the judiciary a despotic branch of government[17]. Marshall saw that the exercise of the power he was claiming on behalf of the judiciary required wisdom, and, using the term in its widest sense, political skill, if it were to survive as an element of democratic government. That is as true today, in Australia, as it was 200 years ago in the United States. The democratic acceptability of judicial review of legislative and administrative action is related to public perceptions of legitimacy, which is also an aspect of legality. Marshall understood that it was essential to sustain the principle of legality in spirit as well as in law. He well knew the political

significance of the power he was asserting, and he took pains to ensure public acceptance of the legitimacy of the Court's jurisdiction. That legitimacy was bound up with perceptions of judicial independence and impartiality. Marshall went to great lengths to foster the appearance as well as the reality of those qualities. For example, in order to avoid charges of political partisanship against individual Justices, he altered the Supreme Court's methods of delivering opinions, replacing individual "seriatim" opinions with single "opinions of the Court", written without any indication of whether the opinion represented a unanimous or a majority view, with any dissentients remaining silent[18]. Thomas Jefferson, in 1822, wrote that "nobody knows what opinion any individual member gave in any case, nor even that he who delivers the opinion, concurred in it himself"[19]. My intention is not to advocate a new method of delivering judgments in the High Court of Australia; it is to emphasise the care taken by Marshall CJ, in asserting a power of judicial review of legislative action, to reinforce the legitimacy of what the Supreme Court was doing. His methods were dictated by the circumstances of the time; but modern judges face a similar necessity, and their responses must be appropriate to the time.

Marbury v Madison was known to, and the principle for which it stood was taken for granted by, the framers of the Australian Constitution. The decision was 100 years old when the High Court of Australia was established. Fullagar J, in the *Communist Party*

Case, said that, in our system, the principle of *Marbury v Madison* is axiomatic[20]. Writing extra-judicially, Sir Owen Dixon said:

> "To the framers of the Commonwealth Constitution the thesis of *Marbury v Madison* was obvious. It did not need the reasoned eloquence of Marshall's utterance to convince them that simply because there were to be legislatures of limited powers, there must be a question of ultra vires for the courts."[21]

Thus, the common law principle of legality, in its application to judicial review of legislative action, reached Australia both directly from the United Kingdom, and indirectly through the precedent of federalism set by former British colonies in North America. The Imperial Parliament established colonial legislatures of limited authority, thereby making it necessary for the legislatures to accept, and the courts to declare, the limits. The former American colonies established a model of federalism, later copied in Australia, based upon a written constitution, defining and limiting all governmental authority, and decided that it was part of the judicial function to determine and declare the boundaries of legislative and executive power.

In one notable respect, Australian federalism did not follow the United States model. There was no attempt, indeed there was a conscious decision to refrain from attempting, to include in the Australian Constitution a comprehensive statement of entrenched rights and freedoms. The Australian founders left most of those matters for Parliament, in line with what, at the time, was the British tradition. This is not to say that the Australian Constitution contains

no entrenched rights or freedoms. In general form, it is a practical political instrument, dealing with issues of the kind that require resolution when the people of a number of self-governing communities agree to form a federal union, with legislative, executive and judicial power divided between central and provincial authorities. Such an agreement called forth some statements of rights and freedoms. For example, s 92 of the Constitution guarantees personal freedom of movement between the States, without burden or restriction[22]. The same section guarantees freedom of inter-State trade, and commerce. There was a time when that part of the guarantee was given what would now be described as a rights-based interpretation, but the High Court has since treated it as aimed at the elimination of economic protection, and has rejected the view that the kind of freedom guaranteed to trade and commerce corresponds with the kind of freedom guaranteed to intercourse[23]. Section 117 prevents discrimination between residents of different States[24]. There is a prohibition against the establishment of a religion, or imposing a religious test as a qualification for office[25]. The Federal Parliament's power to make laws with respect to the acquisition of property is subject to the condition that the acquisition must be on just terms[26]. Chapter III, dealing with the Judicature, contains important protections of the rule of law, including the conferring on the High Court of a power to compel officers of the Commonwealth (who include Ministers) to act according to law[27]. These are particular examples of constitutional

rights, mostly related to the necessities of setting up a federal system of government.

Mason CJ pointed out that, in our Constitution:

> "it is difficult ... to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted."[28]

Even so, substantial implications, protective of human rights and freedoms, have been found in the Constitution. They include implications from the separation of powers embodied in the Constitution[29], the conferral of federal judicial power[30], and the assumption of the rule of law[31], which has been said to involve a minimum capacity for judicial review of administrative action[32], a right to a fair trial[33], a right to privileged communications with legal advisors[34], and what has been described as "the doctrine of legal equality"[35]. An implied freedom of communication on matters of government and politics has been held to be "an indispensable incident of that system of representative government" which the Constitution created[36].

The "prevailing sentiment of the framers", referred to by Mason CJ, was in line with British sentiment at the time of Federation. The framers of the Australian Constitution regarded themselves as British, and the British, unlike the American, tradition

was to leave Parliament largely unfettered in its capacity to deal with issues of human rights and freedoms. That tradition has been overtaken recently by important changes in the British legal system. Before going to these changes, it is convenient to consider other common law manifestations of the principle of legality.

In the United Kingdom, which, unlike the United States and Australia, has a sovereign Parliament, and no written Constitution, the principle of legality nevertheless operates, and has always operated, as a powerful instrument for securing human rights. It works both through the common law, which supplements statute law, and as a principle of judicial interpretation of legislation. In a 1998 decision of the House of Lords[37], Lord Steyn[38] referred to the "spirit" and the "principle" of legality in describing long-established rules of the common law that protect substantive rights and procedural fairness, and in explaining the techniques by which courts interpret legislation. His Lordship cited a standard text on statutory interpretation[39] which referred to "presumptions of general application" which supplement the text of legislation and express fundamental principles governing civil liberties, and the relations between Parliament, the executive and the courts. Courts do not impute to the legislature an intention to abrogate or curtail fundamental human rights or freedoms unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or

curtailment. That principle is well established in the United Kingdom and Australia[40]. It is not new. In the High Court in 1908[41], O'Connor J quoted a passage from the fourth edition of *Maxwell on Statutes* where it was said that "[i]t 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 irresistable clearness", and that to give general words which produced that effect their widest possible meaning would be to give them a meaning "in which they were not really used." In the United Kingdom, the principle was explained by Lord Hoffman in *Reg v Home Secretary; Ex parte Simms*[42]:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The *Human Rights Act* 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. 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. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

In Australia, principles of statutory interpretation, and the overriding provisions of a written Constitution, may interact in a manner that gives rise to distinctive problems and solutions. An

example is provided by a recent decision of the High Court about the effect of a privative clause in Federal legislation concerning judicial review of administrative decisions in immigration cases[43]. Privative clauses also may appear in State legislation, where a similar issue may arise without the constitutional dimension that exists federally. Legislation of this kind, on its face, takes away or limits the jurisdiction of courts to review the acts of public officials or tribunals for the purpose of deciding whether they comply with the law by which the power, or jurisdiction, of the officials or tribunals is conferred. Read literally, it may involve what the first Chief Justice of Australia described as "a contradiction in terms"[44], that is to say, a grant of limited power or jurisdiction, coupled with a declaration that the power or jurisdiction shall not be challenged. This has been treated in Australia as a problem of statutory interpretation, requiring reconciliation of potentially contradictory provisions, a process that may involve the identification in the legislation of some limitations on power or jurisdiction as indispensable[45]. In the application of Federal legislation, arguments involving the so-called *Hickman* principle also must accommodate at least two aspects of the Australian Constitution. First, s 75(v) of the Constitution confers upon the High Court, in a manner unalterable by the Parliament, jurisdiction in all matters in which a writ of mandamus, or prohibition, or an injunction, is sought against an officer of the Commonwealth. Its purpose, at the time of Federation, was said to be to enable a person who "wishes to obtain the performance of a clear statutory duty, or to restrain an officer of the Commonwealth from going beyond his

duty, or to restrain him in the performance of some statutory duty from doing some wrong"[46], to obtain curial relief. It was seen as an important protection of the interests of the States, but it was not limited to that, and secures a basic element of the rule of law. Secondly, the Constitution embodies a separation of powers, and Parliament cannot confer on an administrative tribunal the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction, because that is judicial power[47].

International law, and the provisions of treaties and international conventions, which may contain declarations of fundamental human rights and freedoms, do not of their own force have effect as part of the law of Australia. They may become part of Australian law by legislation, and in this respect the width of the power given by the Constitution to the Federal Parliament to make laws with respect to external affairs, coupled with the paramountcy of Federal over State law, is of large practical importance. Furthermore, "it has been accepted that a statute of the Commonwealth or of a State is to be interpreted and applied, so far as its language permits, so that it is in conformity and not in conflict with established rules of international law"[48]. More specifically, where legislation has been enacted pursuant to the assumption by Australia of international obligations, in cases of ambiguity a court will favour a construction which accords with those obligations[49].

In the United Kingdom, Canada and New Zealand, but, so far at least, not in Australia[50], statements of human rights and freedoms, largely based on international instruments, have been given direct legal effect by domestic legislation. In his Inaugural Lecture, Lord Irvine gave an account of the development of the international human rights movement during the twentieth century, and especially after World War II. Explaining the enactment of the *Human Rights Act* 1998 (UK), he said[51]: "The Government recognised in the UK context that the common law alone could not meet the demands of the modern age, and in particular the demands of our international obligations in Europe". The European Convention for the Protection of Human Rights and Fundamental Freedoms is the basis of the Act. Legislation is to be interpreted and applied in a manner that is compatible with the Convention, so far as that is possible. Public authorities, including courts and tribunals, must not act in a manner that conflicts with rights declared by the Convention. Legislation of the United Kingdom Parliament incompatible with Convention rights is not on that account void, but a court may make a declaration of incompatibility. In that last respect, the power of the courts in the United Kingdom is substantially different from that of, say, the United States Supreme Court, or the High Court of Australia, where legislation is found to be unconstitutional. This reflects the sovereignty of the United Kingdom Parliament; an attribute that has never been shared by its United States or Australian counterparts. In the case earlier mentioned[52], Lord Hoffmann said that much of the European

Convention reflects the common law, and that the adoption of the text as part of domestic law was unlikely to involve radical change in United Kingdom notions of fundamental human rights. Even so, it is only necessary to consider recent English litigation concerning the right of privacy declared in Art. 8 of the Convention[53] to see the potential significance of this change in the legal landscape[54].

The *Bill of Rights Act* 1990 of New Zealand affirms certain rights and freedoms, and provides, in s 6, that wherever an enactment can be given a meaning that is consistent with the rights and freedoms affirmed, that meaning shall be preferred to any other meaning. That section has been said by the New Zealand courts to adopt the rule that basic rights cannot be overriden by general or ambiguous words in a statute[55]. As in the United Kingdom, legislation is not void for inconsistency with the Bill of Rights. However, it has been held that a breach of affirmed rights can result in a liability in the State to pay compensation[56]. The Bill of Rights applies to acts of courts, and influences the exercise of judicial discretion[57]. It has also influenced the development of the common law[58].

The *Canadian Charter of Rights and Freedoms* is part of the Canadian Constitution. The rights and freedoms are not absolute, being subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Subject to that and one other qualification, inconsistent legislation is invalid to

the extent of the inconsistency. The other qualification is that the legislature may expressly declare in an Act that it shall operate notwithstanding the rights and freedoms in the Charter. Such a declaration ceases to have effect after five years, but may be re-enacted (s 33).

This brief survey shows that there are important differences in the ways in which common law countries have responded to the idea of legality; but there are even more important similarities.

First, the idea involves, but goes beyond, the requirement that all authority be constituted, and all power be exercised, lawfully. It extends to the effective limitation of power. As to legislative power, in democratic societies, it extends to the limitation, more or less directly, and more or less effectively, of the law-making capacity of Parliament. In federations, to some extent this is a matter of necessity resulting from the division of power inherent in any federal agreement. In some common law countries, and to a varying extent, it reflects a felt need to restrict the ability of an electoral majority to disregard human rights and freedoms, especially of minorities. And, increasingly, it involves an appeal to internationally accepted norms as a direct or indirect restraint upon domestic authority. In some respects, this process is taking place alongside an explicit or implicit re-defining of democracy and representative government. It is a long way removed from an idea that the only fundamental law is one which ensures that, at any given time, the will of the majority, as

represented in Parliament, (which itself involves some contestable assumptions), will prevail. To the extent to which the power of the majority is frustrated, it can only be justified by a more refined conception of democracy than simple majority rule. Such a conception itself must be justified theoretically and, in addition, it must have political credibility.

Secondly, the principle of legality is not only reduced in practical content, but also at risk of being subverted, if it is not sustained in spirit. This raises the political problem connected with the first matter. Although the issues differ with time and place, in a democracy theory can never outdistance, by too great a margin, what is acceptable to the community in practice. There are limits to the extent to which democracy and representative government can be re-defined. There comes a point at which the imposition of external constraints upon the power of Parliament, other than constraints which flow from the very source of that power (a written Constitution), may constitute such an affront to those whom representative democracy is supposed to represent that their acceptance of the spirit of legality will be endangered. This is one of the problems of securing the effective limitation of power. If the source of the power to be limited is the will of the people, public acceptance of the limitation may depend upon a certain level of public virtue. The people express their will through the political process. That process is not always a model of self-restraint.

Thirdly, there are times, and circumstances, which place a community's commitment to legality under particular stress. Threats to security, private or public, provide an example. At times of internal or external conflict, people look to governmental power for their protection, and limitations on that power may be represented as dangerous, and even intolerable. War, terrorism, or internal instability, may create conditions in which there is pressure for the rule of law to yield to necessity. This is an old problem; and one with which all mature democracies have had to deal on occasions. If the public understand, and value, the rule of law, then that is the best safeguard against excessive use of power. The best way to encourage people to value the rule of law is to point out the alternative, which is a society in which the strong do what they can, and the weak suffer what they must.

Fourthly, it should be acknowledged that governments and parliaments themselves value legality. After all, it is the ultimate foundation of their own authority and stability. The rule of interpretation, earlier discussed, which requires courts to assume that it is extremely improbable that Parliament would overturn fundamental human rights and freedoms without expressing its intention to do so in the clearest terms is not based upon a fiction, but upon a working assumption about the legislature's respect for the law, reinforced by electoral accountability. It would be unfair, and naive, to suppose that member of parliament merely follow, and never lead, popular opinion, or that they are not committed to

fundamental values. The overthrowing of established legal safeguards of rights and freedoms may or may not involve a political cost. Sometimes it might involve a political gain. There have been occasions when, on issues concerning security, or law and order, parliaments in Australia have shown restraint, and respect for human rights and freedoms, contrary to the wishes of powerful elements in the electorate. If governments, and parliaments, did not respect the law, and merely measured political gain or cost, then it would be impossible for a spirit of legality to survive in the community. The existence of such a spirit is in part due to the leadership, shown on all sides of politics, by people in public life.

Finally, legality involves courts in the exercise of a capacity to declare and enforce limits on governmental, and legislative, authority. The nature of that responsibility varies between common law jurisdictions. Its existence inevitably exposes judges to the complaint that they are usurpers, and that their function is undemocratic and illegitimate. As the example of Jefferson shows, such complaints have been made for at least 200 years. They are not to be ignored, and most judges are sensitive to the concerns they reflect. But they have not deflected the courts from their task.

---

* The Hon Murray Gleeson AC, Chief Justice of Australia. I am grateful for the assistance of my Associates, Michael Izzo and Ben Doyle.

1 Lord Irvine of Lairg, The Spirit of Magna Carta Continues to Resonate in Modern Law", (2003) 119 LQR 227 at 228.

2 Ibid at 240.

3 Ibid at 243.

---

[4] Thucydides, *The Peloponnesian War* (New York, Random House), 1951 at p 331-332.

[5] Op cit at 228.

[6] Kern, *Kingship and Law in the Middle Ages*, trans SB Chrimes (1939) at 151, cited in Hayek, *Law, Legislation and Liberty* (1973), vol 1 at 83-84.

[7] Hayek, *Law, Legislation and Liberty*, (1973), vol 1 at 128.

[8] Bennett, *Lives of the Australian Chief Justices: Sir Francis Forbes*, (2001) at 83-89.

[9] Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* (1977) at 156.

[10] Scalia, "Federal Constitutional Guarantees of Individual Rights in the United States of America" in Beatty (ed) *Human Rights and Judicial Review: A Comparative Pesrspective* (1999) at 67.

[11] 5 US (1 Cranch) 137 (1803).

[12] 1 Annals of Congress, 448-459, quoted in Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* (1977) at 95-100.

[13] *The Federalist Papers*, No 78.

[14] Burton, "The Cornerstone of Constitutional Law: The extraordinary Case of *Marbury v Madison*" (1950) 36 *American Bar Association Law Journal* 805 at 807.

[15] Tribe, *American Constitutional Law* (2000, 3rd ed) vol 1 at 209, fn 5.

[16] Swisher, *The Growth of Constitutional Power in the United States* (1946) at 55.

[17] Simon, *What Kind of Nation: Thomas Jefferson, John Marshall and the Epic Struggle to Create a United States* (2002) at 189.

[18] See White, *The Marshall Court and Cultural Change* 1815-1835 in *The History of the Supreme Court of the United States* (1988), vols III-IV at 186-189.

[19] Quoted by White, ibid, at 188.

[20] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 262.

[21] Dixon, "Marshall and the Australian Constitution" in *Jesting Pilate* 166 at 174.

[22] *AMS v AIF* (1999) 199 CLR 160.

[23] *Cole v Whitfield* (1988) 165 CLR 360 at 394.

---

[24] See, for example, *Street v Queensland Bar Association* (1989) 168 CLR 461.

[25] Constitution, s 116.

[26] Constitution, s 51(xxxi).

[27] In s 75(v).

[28] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 136.

[29] eg *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-28, 36-37, *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 706-707.

[30] *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

[31] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

[32] *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70-71.

[33] *Kingswell v The Queen* (1985) 159 CLR 264 at 300.

[34] *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 161.

[35] *Leeth v The Commonwealth* (1992) 174 CLR 455 at 485 per Deane and Toohey JJ.

[36] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559.

[37] *Reg v Home Secretary; Ex parte Pierson* [1998] AC 539.

[38] [1998] AC 539 at 587-589.

[39] *Cross, Statutory Interpretation* 3rd ed.

[40] *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454 at 462 [30]; *Coco v The Queen* (1994) 179 CLR 427 at 437.

[41] *Potter v Minahan* (1908) 7 CLR 277 at 304.

[42] [2000] 2 AC 115 at 131.

[43] *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454.

[44] *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114 at 131.

[45] *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598; *R v Murray; Ex parte Proctor* (1949) 77 CLR 387.

46 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898, vol 2 at 1884-1885.

47 *R v Coldham; Ex parte Australian Workers Union* (1983) 153 CLR 415 at 419.

48 *AMS v AIF* (1999) 199 CLR 160 at 180 [50].

49 *Plaintiff S157/2002 v Commonwealth* (2002) 77 ALJR 454 at 462 [29].

50 Except in the Australian Capital Territory where, at time of writing, the Human Rights Bill 2003, containing legislation similar to the United Kingdom and New Zealand models, based on the International Covenant on Civil and Political Rights, has been introduced into the Legislative Assembly.

51 (2003) 119 LQR 227 at 238-239.

52 *Reg v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131-132.

53 Art 8(1) provides: "Everyone has the right to respect for his private and family life, his home and his correspondence".

54 eg *Wainwright v Home Office* (2003) 3 WLR 1137; cf Phillipson, "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 *Modern Law Review* 726.

55 *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659 at 675.

56 *Simpson v Attorney-General* [1994] 3 NZLR 667.

57 eg *R v Shaw* [1992] 1 NZLR 652.

58 eg *Lange v* Atkinson [1998] 3 NZLR 424; [2000] 3 NZLR 385.