The Promise of Law: Essays marking the retirement of Dame Sian Elias as Chief Justice of New Zealand

Simon Mount and Max Harris, Editors

LexisNexis NZ Limited
Wellington
2020

21

Human Rights Without an Enacted Statement of Rights

Susan Kiefel[1]

It is well known that Australia has no enacted statement of human rights and freedoms. The Parliaments of New Zealand, Canada and the United Kingdom have passed legislation that recognises and protects human rights,[2] as have one state[3] and one Territory[4] in Australia, but the Australian Parliament has remained seemingly unmoved from the position favoured by the framers of the Constitution.

The framers expected the Commonwealth Parliament and the courts to provide the necessary protection of rights, although they did not perhaps envisage the nature and extent of the human rights that would take centre stage internationally after World War II, such as those stated in the International Covenant on Civil and Political Rights ("the ICCPR"). The Parliament has given effect to some rights and passed legislation protective of others. But many fundamental rights, such as freedom of expression and freedom from arbitrary detention, have received no legislative attention.

The focus of this paper is on the role the courts in Australia, and the High Court in particular, have assumed with respect to human rights. Some rights have been found to arise from the Constitution itself and others have been held to have been recognised by the common law which of course operated antecedently to the Constitution. The protection of rights and freedoms is achieved principally through the courts being able to determine the limits of Commonwealth legislative and executive power and to review executive action, the interpretative principles applied to the Constitution and to statutes, and the maintenance and development of the Australian common law.

---

1 Chief Justice of Australia.

2 New Zealand Bill of Rights Act 1990 (NZ); Canadian Charter of Rights and Freedoms (Canada); Human Rights Act 1998 (UK).

3 Charter of Human Rights and Responsibilities (Vic).

4 Human Rights Act 2004 (ACT).

The Framers' Vision

The Australian Constitution, which entered into force in 1901, contains a few express rights or guarantees but no formal guarantee of life or liberty as had been adopted in the United States. Although the United States Constitution had been studied by the framers of the Australian Constitution, there were important aspects of it that they rejected.

As explained by that eminent jurist, Sir Owen Dixon, to the American Bar Association in 1942,[5] the framers could not accept the principle by which the executive government is made independent of the legislature and they were not prepared to place fetters on legislative action. With one exception — being the guarantee of religious freedom — they refused to adopt any part of the Bill of Rights of 1791 or the 14th Amendment to the United States Constitution.

The framers had a strong belief in a system of government by which Ministers are responsible to the Parliament and must leave office if they lose its confidence. Equally important to them, and a central plank of the Constitution they wrote, was representative democracy. The framers were confident that the Parliament would be responsive to the will of the people whom its members represent. The theory of a constitutional historian, which has gained general acceptance, is that it was believed that "the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power".[6] (Of course at this time that power was not shared with women or Aboriginal persons.) This is perhaps seen most clearly in the provision made in the Constitution by which it may only be amended by the people.[7]

The vision of the framers included a distinct role for the High Court and other courts established under the Constitution. The Constitution displaced any notion of an unqualified parliamentary supremacy and gave the responsibility of deciding the limits of state and Commonwealth powers to an independent judiciary[8] and gave to the High Court a power to review executive action. The provisions of the Constitution are framed in the language of the common law and are to be read in the light of the common law's history.[9] The anterior operation of the common law[10] was a historical fact when the Constitution was written. Its framers would have understood the protections the common law provided and the role of the courts in developing the common law.

---

5 Sir Owen Dixon *Jesting Pilate: And Other Papers and Addresses* (2nd ed, 1997) 101–102.

6 Harrison Moore *The Constitution of the Commonwealth of Australia* (1902) 329.

7 Constitution s 128.

8 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

9 *Cheatle v The Queen* (1993) 177 CLR 541 at 552.

10 As described by Sir Owen Dixon "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 ALJ 240; Address to the American Bar Association (1943) 17 ALJ 138 at 139.

Constitutional, Statutory and Common Law Rights

Before turning to consider the steps taken by the courts in expressing and protecting rights and freedoms it is perhaps as well first to identify what rights are given, recognised or protected by express provisions of the Constitution, by legislation and by the common law.

Notwithstanding the absence of a Bill of Rights, the Australian Constitution does contain some express provisions granting rights and freedoms or protecting them. It contains a right to trial by jury for offences against any law of the Commonwealth at least where they are brought on indictment;[11] a protection against the Commonwealth making laws with respect to the acquisition of property other than on "just terms";[12] the aforesaid protection of the free exercise of religion;[13] a protection of residents of one state from discrimination in other states on the basis of residence;[14] and a guarantee of freedom of trade, commerce and intercourse amongst the states[15] which might be understood to protect an individual's freedom of movement.

Some of the rights referred to in the ICCPR and found in enactments such as the New Zealand Bill of Rights Act 1990 have been the subject of Commonwealth legislation. The Commonwealth has legislated with respect to the right not to be deprived of life;[16] the right not to be tortured or subjected to cruel treatment;[17] and the right to freedom from discrimination on grounds of race, gender, disability or age.[18]

My predecessor and former colleague, Chief Justice Robert French, writing extra-judicially,[19] produced a non-exhaustive list of rights and freedoms that are considered by the common law to be fundamental: the right of access to the courts; immunity from deprivation of property without compensation; 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; the right to access legal counsel when accused of a serious crime; immunity from deprivation of liberty except by law; the right to

11 Constitution s 80.
12 Constitution s 51(xxxi).
13 Constitution s 116.
14 Constitution s 117.
15 Constitution s 92.
16 Death Penalty Abolition Act 1973 (Cth); Extradition Act 1988 (Cth) s 22(3)(c).
17 Criminal Code (Cth) div 274.
18 Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Disability Discrimination Act 1992 (Cth); Age Discrimination Act 2004 (Cth).
19 Chief Justice French "Human Rights Protections in Australia and the United Kingdom: Contrasts and Comparisons" (Speech delivered to the Anglo-Australasian Lawyers Society and Constitutional and Administrative Law Bar Association, London, 5 July 2012) 19–20.

procedural fairness when affected by the exercise of public power; and freedom of speech and movement. To this it may be added that the common law of Australia recognises: the right to open justice; freedom from retrospective criminal laws; and *mens rea* as an element of crimes enacted by statute. It recognises: the right to know the nature and cause of a charge; the presumption of innocence; the right to silence; the right to examine witnesses; and the right to a fair trial. The latter are aspects of the system of criminal justice that the common law protects.

The common law — in particular spheres such as tort law — may be seen to recognise some rights, or at least aspects of them. The law of torts recognises that non-consensual medical or scientific experimentation[20] may constitute a trespass to the person and it recognises the right to refuse medical treatment,[21] subject to some qualifications involving the supervisory jurisdiction of the courts with respect to children. The law relating to trespass, to an extent, is protective of unreasonable search and seizure.

It has been suggested that a "catalogue of rights, freedoms and principles" such as this constitutes a "common law bill of rights".[22] It should not be overlooked that an important aspect of the common law is its ability to change, which may result in the removal of rules that are contrary to human rights, thereby ensuring greater protection of particular rights.

Constitutional Approaches to Rights and Freedoms

The problem respecting common law rights is of course that they are subject to change by statute. Here the courts can have an important role, within the limits of their power, by the use of interpretive principles as applied to statutes, as I shall later discuss. But the starting point for a consideration of judicial activity in the context of human rights should be the Constitution.

The High Court's approach to the recognition and protection of rights and freedoms by reference to the Constitution is essentially a negative one: one consistent with its non-legislative and non-executive function. It seeks to ensure that legislation is strictly within power and authorised. However, as a former justice of the Court observed, limits on federal legislative power may also "incidentally promote individual liberty".[23]

20 Cf New Zealand Bill of Rights Act 1990 (NZ), s 10.

21 Cf New Zealand Bill of Rights Act 1990 (NZ), s 11.

22 Dan Meagher "The Principle of Legality and a Common Law Bill of Rights — Clear Statement Rules Head Down Under" (2016) 42 Brooklyn Journal of International Law 65, referring to James Spigelman "The Common Law Bill of Rights" in (2008) Statutory Interpretation and Human Rights 1.

23 Justice John Toohey "A Government of Laws, and Not of Men?" (1993) 4 Public Law Review 158 at 169.

The Australian Constitution contains express limits on legislative powers by reference to the subject matters there stated, upon which the Commonwealth Parliament can legislate. Limits on Commonwealth legislative power may also be found in the structure of the Constitution and in the assumptions on which it is founded. And limits are effected by the provisions of the Constitution respecting judicial power.

The separation of federal judicial power

Chapter III of the Constitution vests the judicial power of the Commonwealth in the High Court and other federal courts created by the Parliament. The judicial power of the Commonwealth includes jurisdiction to determine questions arising under the Constitution or involving its interpretation and questions arising under any laws made by the Commonwealth Parliament.[24] Importantly, Chapter III provides for a separation of federal judicial power.

The landmark case involving the Communist Party of Australia explains the nature of that power and its exclusivity.[25] The legislation in question purported to declare the Communist Party unlawful, to dissolve it and to confiscate its property. To be valid, the legislation relevantly had to be made within the Parliament's legislative power to make laws with respect to defence. The legislation proclaimed that communism was a threat to the defence of Australia. This was rejected by the High Court as an attempt on the part of the Parliament to "recite itself" into power. It said that the courts have exclusive authority to determine the validity of legislation, including whether it serves a defence purpose.

In that case, Sir Owen Dixon described the Constitution as "framed in accordance with many traditional conceptions",[26] one of which is the separation of judicial power. Another assumption on which he said the Constitution is based is the rule of law.

The separation of federal judicial power has provided a basis for preventing or limiting legislation or executive action that may infringe rights such as those provided for in the ICCPR[27] — the rights to liberty, a fair hearing and freedom from arbitrary arrest or detention.

The leading case on detention of persons by the executive concerned Cambodian nationals who arrived by boat in Australia. Their applications for refugee status were rejected by the Minister but the decisions were set aside by the Federal Court. The Parliament amended the statute in question by the introduction of provisions which required "designated persons" to be kept in custody unless removed from

24 Constitution s 76.

25 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

26 Ibid at 193.

27 Articles 9 and 14.

Australia or given an entry permit. It prohibited the courts from ordering their release. The majority explained[28] that it was beyond the legislative power of the Parliament to invest the executive with an arbitrary power to detain citizens because the involuntary detention of a citizen in custody by the state is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging or punishing criminal guilt. Subject to some qualifications, such as where a person is held in custody pending trial or the detention of persons suffering from mental illness or infectious disease, it was said that, at least in times of peace, citizens enjoy a constitutional immunity from being imprisoned other than by a court. So far as concerns non-citizens, Parliament may confer power on the executive only as incidental to its power to exclude, admit and deport aliens.[29]

Chapter III was also invoked where legislation gave the Supreme Court of a state the power to order the detention of a prisoner following the expiration of his sentence.[30] As this principle ("the Kable principle") developed, the foundation for it came more clearly to be understood as directed to the institutional integrity of the courts. Generally speaking, this means that a court cannot be conscripted by the legislature and the executive to undertake a task that is repugnant to the judicial process.[31]

The principle has been applied to hold invalid legislation requiring a court to issue an order which effectively required the ex parte sequestration of property, on suspicion of wrongdoing, for an indeterminate period and for which there was no process for review.[32] It was applied to hold invalid legislation (directed principally to biker gangs) by which the court was required to make a control order if satisfied that a person was a member of a "declared organisation", which was a condition effectively satisfied solely by the Attorney-General's declaration.[33]

In each of these cases, the court was impermissibly enlisted to implement decisions of the executive in a manner inconsistent with its institutional integrity. The judiciary refused to allow the other branches of government to "cloak their work in the neutral colors of judicial action".[34]

---

28 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27–29, 53.

29 Ibid at 33, 53.

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

31 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 366–367 [97]–[98].

32 Ibid at 366–367 [97]–[98].

33 *South Australia v Totani* (2010) 242 CLR 1.

34 Ibid at 172 [479] citing *Mistretta v United States* 488 US 361 (1989) at 407.

Implied freedoms

Another structural aspect of the Constitution has assumed significance: that which concerns freedom of expression. It derives from the provision it makes with respect to representative democracy.

A series of earlier cases culminated in one to which a former Prime Minister of New Zealand was a party — *Lange v Australian Broadcasting Corporation*.[35] It was there held that there is implied in the Constitution a freedom of communication concerning matters of politics and government. Such an implication is necessary in order to ensure that the people may exercise a free and informed choice as electors.[36]

The implication was found, somewhat controversially at the time, in the system of representative government for which the Constitution provides and the political power given to the people. That system and the choices to be made by electors could only be maintained if there were such a freedom. A freedom of association has been recognised to operate as a corollary to this freedom.[37]

But the freedom is not a personal right.[38] It cannot be, given the basis upon which the Constitution was framed, which was to deny the need for personal rights. Rather it is to be understood as operating as a restriction on the exercise of legislative power. Where a legitimate legislative provision restricts or otherwise burdens the freedom it may be invalid unless it is justified.

The implied freedom of communication has been invoked in recent years in challenges to legislation restricting the sources and amounts of political donations and the amounts that may be spent on electoral campaigning, with varied success.[39] It was the basis more recently for a successful challenge to legislation that prohibited political protests in areas where forestry operations were being conducted.[40]

The voting cases

Although there is no right to vote expressed in the Constitution, such as there is in the ICCPR and Universal Declaration of Human Rights ("UDHR"),[41] some restrictions on voting have been held to be invalid where they are inconsistent with the system of representative government. The first such case involved legislation

35 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

36 Ibid at 560.

37 *Wainohu v New South Wales* (2011) 243 CLR 181 at 220 [72], 230 [112], 251–252 [186]; *Tajjour v New South Wales* (2014) 254 CLR 508.

38 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

39 *Unions NSW v New South Wales* (2013) 252 CLR 530; *McCloy v New South Wales* (2015) 257 CLR 178.

40 *Brown v Tasmania* (2017) 261 CLR 328.

41 UDHR, art 21; ICCPR, art 25.

which disqualified prisoners from voting;[42] the second the removal of a seven-day grace period within which voters could regularise their enrolment.[43]

Approaches to Statutory Construction

Considerable importance is attached to the process undertaken by courts in construing statutes in order to determine their validity. This is especially so where there is a constitutional context. The body of jurisprudence which has developed in relation to statutory construction contains a number of principles, often cast as presumptions, which are rights-protective in purpose or effect.

The presumption of conformity with international law

Treaties, conventions and other international instruments can only be applied by Australian courts when they are incorporated as part of the domestic law.[44] This does not prevent such instruments being touchstones in the interpretation of statutes. Statutes are interpreted in Australia and are applied, so far as their language admits, so as not to be inconsistent with the comity of nations or established rules of international law.[45] This principle was first stated by the High Court in 1908 and it has been reaffirmed on many occasions since.[46] The presumption applied is that Parliament intends to give effect to Australia's obligations under international law.[47]

It must however be acknowledged that the examples of the application of this principle are not numerous. It has not enjoyed the same prominence in Australia as the principle of legality.

The principle of legality

Even though the common law recognises many rights, they are of their nature vulnerable to abrogation or curtailment by statute. Here the principle of legality and the presumptions upon which it operates may be seen as important to the protection that can be afforded to such rights in Australia.

This interpretive rule was applied in a case before the High Court in 1908. The case involved the construction of the term "immigrant". A citizen had been born in Australia but was then taken to China by his father and remained there for 26 years.

42 *Roach v Electoral Commissioner* (2007) 233 CLR 162.
43 *Rowe v Electoral Commissioner* (2010) 243 CLR 1.
44 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286–287.
45 *Jumbunna Coal Mine, NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363.
46 *Polites v Commonwealth* (1945) 70 CLR 60 at 68, 74, 77, 79, 80–81.
47 *Zachariassen v Commonwealth* (1917) 24 CLR 166 at 181.

On his return to Australia he was charged with being a prohibited immigrant.[48] The Court adopted the presumption[49] that the legislature would not infringe rights, overthrow fundamental principles or depart from the general system of the law without expressing its intention with "irresistible clearness".[50] The Court construed "immigrant" as not extending to "persons who are returning to an Australian home".[51]

The principle, that courts should not impute to the legislature an intention to interfere with fundamental rights, requires that the legislature express any such intention clearly, unmistakably and in unambiguous language.[52] The observation by Lord Hoffman in *Simms*[53] that "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost" is apt to the Australian constitutional context and has been widely accepted in judgments of the High Court.

The presumption which gives meaning to the principle of legality should not be understood as a unilateral statement by the court about judicial method. Rather, as has been observed,[54] it is a "working hypothesis", the existence of which is known both to Parliament and the courts according to which statutory language will be interpreted. It may be regarded as an aspect of the rule of law.

The principle has been applied from the 1980s to hold that legal professional privilege applied to documents within the scope of a search warrant because the statute under which the warrant was issued did not evince any intention to oust the privilege[55] and to hold that a provision which provided for the arrest of deserters or absentees from a visiting force did not, in the absence of express words, abrogate the right to liberty and to seek a writ of habeas corpus.[56] One justice in that case observed that:[57]

> The law of this country is very jealous of any infringement of personal liberty ... and a statute ... which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right.

48 *Potter v Minahan* (1908) 7 CLR 277 at 290.
49 *Maxwell on the Interpretation of Statutes* (4th ed, 1905) 121; *United States v Fisher* 6 US 358 (1805).
50 *Potter v Minahan* (1908) 7 CLR 277 at 304.
51 Ibid at 290.
52 *Coco v The Queen* (1994) 179 CLR 427 at 437.
53 *R v Secretary of State of the Home Department, ex parte Simms* [2000] 2 AC 115 at 131.
54 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21]. See also, for example, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 520 [47]; *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 619 [43]; *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at 622 [182].
55 *Baker v Campbell* (1983) 153 CLR 52; [1983] HCA 39.
56 *Re Bolton; Ex parte Beane* (1987) 165 CLR 514.
57 Ibid at 523.

More recently it has been held that the principle is not confined to legislation which may affect individual rights. It also protects systemic values such as those which inhere in the Australian criminal justice system.[58] This was said in the context of legislation that purported to authorise the compulsory examination of a person charged with, but not tried for, an indictable Commonwealth offence. In the case in question[59] it was accepted that legislation is "not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or necessary implication to that effect".[60] A majority of the Court held that upon its proper construction, the legislation did not authorise the compulsory examination of a person charged with an offence because that would "fundamentally alter the accusatorial process of criminal justice".[61]

The Adaptability of the Common Law

The principle of legality may protect common law rights, freedoms and immunities but sometimes a human right is protected by courts changing the common law or providing a historical interpretation of old rules of the common law.

The most well-known example of a change effected to the common law of Australia in recent times is the decision in the *Mabo* case.[62] The historical application of the common law rule of *terra nullius*, despite the occupation of the land by Indigenous Australians, was held to have been wrong.[63]

In another case a husband to a marriage who was charged with the rape of his wife invoked what he claimed to be the common law rule that by marriage a wife gave irrevocable consent to sexual intercourse with her husband.[64] The Court did not accept that the common law had stated such a rule, although it acknowledged that some commentators had wrongly thought that it had. In the joint judgment[65] it was said:

> ... [i]n any event, even if the respondent could, by reference to compelling early authority, support the proposition that is crucial to this case, namely, that by reason of marriage there is an irrevocable consent to sexual intercourse, this Court would be justified in refusing to accept a notion that it is so out of keeping with the view society now takes of the relationships between the parties to a marriage.

58 *X7 v Australian Crime Commission* (2013) 248 CLR 92.
59 Ibid; see also *Lee v The Queen* (2014) 253 CLR 455 at 471 [46].
60 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 108 [21].
61 Ibid at 131 [85].
62 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
63 Ibid at 58, 109, 180–182.
64 *The Queen v L* (1992) 174 CLR 379.
65 Ibid at 390 (Mason CJ, Deane and Toohey JJ).

In a subsequent case[66] it was argued that a husband could not be guilty of the rape of his wife in 1963 because it was not unlawful at common law at the time the offence which he was charged was enacted, in 1935. In rejecting that argument it was pointed out that by 1935 the local statute law in Australia had removed any basis for that proposition, which was said to have formed part of the English common law received by the Australian colonies. It followed that at common law marriage provided no defence to nor immunity from prosecution for rape.

Judicial review

An important provision of the Constitution[67] so far as concerns the Court's power respecting executive action is that which provides that the High Court has original jurisdiction in all matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". The provision has been interpreted as entrenching a "minimum provision of judicial review" of executive action.

A former justice of the High Court, Mary Gaudron, once described that provision as demonstrating a "peculiar genius" which, like lamingtons and Australian Rules Football, is uniquely Australian.[68] I appreciate that some New Zealanders may not agree with the claim regarding the provenance of lamingtons.

The provision has been held to render invalid legislation purporting to exclude judicial review by the Court[69] and to require that a privative clause in legislation, by which a decision was deemed to be final and conclusive and unable to be challenged, is to be construed as not ousting the jurisdiction of the Court to review decisions involving jurisdictional error.[70] It was there said that:[71]

> ... the conferral upon [the] Court of an irremovable jurisdiction to issue [writs] to an officer of the Commonwealth constitutes a textual reinforcement for what [had been] said about the significance of the rule of law for the Constitution in [the *Communist Party Case*].

More recently it has been held that state parliaments cannot remove the jurisdiction of state Supreme Courts to grant relief for jurisdictional errors. To do so would be to deprive such courts of a "defining characteristic": the capacity to supervise the

66 *PGA v The Queen* (2012) 245 CLR 355.
67 Constitution s 75(v).
68 Mary Gaudron, 3 March 2006 (Address, Jessie Street Trust, Parliament House Sydney) quoted in Burton *From Moree to Mabo: The Mary Gaudron Story* (2010) 387.
69 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
70 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
71 Ibid at 513.

limits on the exercise of state executive and judicial power.[72] It was noted that the Constitution establishes a federal judicial structure, with the High Court at its apex, which depends upon the exercise of such supervision by state courts.[73] In a speech given in the High Court last October, Chief Justice Elias reminded us that unitary systems regard federal systems as rather mysterious. So I shall simply explain that the supervisory jurisdiction of the state courts was seen as inextricably linked to the effective functioning of the High Court's power of review. Importantly, one of the strongest protections of citizens' rights and freedoms against the unauthorised exercise of both federal and state executive power is constitutionally entrenched.

Conclusion

Some may argue that the framers of the Australian Constitution ought to have provided more by way of protection of fundamental rights and freedoms. Nevertheless, it is the duty of the judiciary to expound the Constitution which has been enacted. The judiciary does so in ways which are rights-protective in effect: in determining the limits of legislative power; in protecting the implied freedom of political communication; in asserting the exclusivity of judicial power; in maintaining a minimum standard of judicial review; in the use of interpretive principles; and in the maintenance and development of the common law.

The source for much of what the Court is able to do is the Constitution itself — not only its express provisions but also its foundations and its structure. The Australian Constitution was founded upon certain assumptions. It may be observed that in interpreting the Constitution and legislation made under it and in developing the common law, the Court draws upon and utilises those very assumptions.

72 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580–581 [98]–[99].
73 Ibid at 580–581 [98].