Principle and Independence: The Guardians of Freedom

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I begin this lecture by paying my respects to the jurist in whose honour this series of lectures has been established. My acknowledgment of Sir Ninian Stephen is more than the ritual courtesy of a lecturer in the series, for I had the honour of sitting with Sir Ninian in his last year and my first year as a member of the High Court bench. I witnessed the working of an incisive and cultivated mind responding with seeming ease to an unrelenting caseload. There were moments of apprehension when, immediately before walking through the court door to take his seat on the bench, Sir Ninian would tuck a fuming pipe into the pocket of his bar jacket. A sense of relief grew only with the passing minutes, although there was never a sign of conflagration.

Collegiality in a numerically small court can be a fragile thing, especially when issues of great moment fall for decision. Sir Ninian's scholarship and experience, his urbanity and especially his openness of mind made professional association as easy and agreeable as personal friendship. We missed Sir Ninian and Lady Stephen greatly when a wise Government cast upon him the duties of Governor General. Our consolation was the appointment of his successor in both judicial and vice-regal offices, Sir William Deane. Both jurists and their wives have contributed to the building of a free and confident nation and it is no diminution of their personal contributions to examine this evening the foundations of our freedom.

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A satisfactory definition of freedom, or of its synonym liberty, is as elusive as the means of securing it. Abraham Lincoln told the American people[1] that –

> "The world has never had a good definition of the word liberty, ... We all declare for liberty; but in using the same word we do not all mean the same thing. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor."

The term may connote both liberty of the individual and liberty in the exercise of power, yet these meanings are not only different – they are opposed. There is and will always be a tension between these two types of liberty. The ambiguity of the term appears in modern debates. In a free market, the exercise of market power by some persons, some corporations or some nations can result in a widespread restriction or destruction of freedom. The free exercise of majoritarian power in a democracy may trample on the freedom of minorities. And, at the individual level, the exercise of our own freedom can sometimes impair a neighbour's freedom to act as he or she would otherwise choose to act.

If the essence of freedom is the absence of control, freedom can never be absolute. In the long years of controversy over the meaning of "absolutely free" in s 92 of the Constitution, there was never any dissent from Sir Samuel Griffith's dictum[2] that "We boast of being an absolutely free people, but that does not mean that we are not subject to law." A P Herbert's fictitious litigant, Albert Haddock,[3] learned that freedom can never be absolute when he lost his appeal. He had jumped into the Thames in front of a regatta and was convicted of sundry offences, including endangering the lives of mariners. He had good grounds of appeal against each conviction but he foolishly added the tendentious ground that England "is a free country and a man can do what he likes if he does nobody any harm". This led Lord Chief Justice Light to dismiss all grounds of appeal, observing that that ground was "like the thirteenth stroke of a crazy clock which not only is itself discredited but casts a shade of doubt over all previous assertions."

Freedom cannot be absolute, but no limitations need to be imposed on the freedom of thought or action that has neither impact on society nor threat to our own safety; it is the freedom to exercise power which must be amenable to control. In an insightful article, RWM Dias pointed out[4] -

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1 At Baltimore in 1864, printed in Basler R (ed), *The Collected Works of Abraham Lincoln*, New Brunswick: Rutgers University Press, 1953, 301.

2 Duncan v State of Queensland (1916) 22 CLR 556, 573.

3 "Rex v Haddock - Is it a Free Country?" in Herbert AP, *Uncommon Law* 3rd ed. London: Methuen & Co., 1937 pp 24-29.

4 Dias, RWM, "Götterdammerung - Gods of the law in decline" (1981) 1(1) *Legal Studies* 3, 5.

> "It is the exercise of power that matters. Therefore, one aspect of the problem is that behind every form of power lies the freedom of power-holders to exercise it or not, which makes the abusive exercise of this freedom the crux of the matter, not simply possession of power."

Once we acknowledge that freedom to exercise power can never be absolute and that controls of one sort or another are essential to social peace and order, the problem of guarding my freedom focuses on the nature and extent of the controls which limit the freedom of those who have power to affect me or my interests. To the extent that their power is controlled, I am free to think and to act as I choose. The guarantors of freedom are to be found in the mechanisms by which the possessors of power are controlled in its exercise. Before we look at those mechanisms, we should be clear about the reasons why we value freedom.

The value of freedom can be appreciated most vividly if we contemplate its absence. We are distressed by the memory of Hitler youth conditioned to think and act as the Nazi propaganda machine decreed, or of the children sent to work in the pits in 19th Century England, or of the Aboriginal mothers whose children were taken from them, or of the political dissenters in the hands of Pinochet's torturers – men, women and children who were denied their humanity, their capacity to be themselves, to develop and to reach their true potential. Or, to take examples more familiar to ourselves: the drug addict dependent on the supplier; the young prisoner enslaved to the hardened criminal in the gaol; the untrained and unemployed without prospect of employment. These are but some of the instances we can call to mind of those whose dignity is suppressed by their loss of freedom. The freedom we seek is not absolute. If it were, it would degenerate into licentiousness or even tyranny. It would destroy our own dignity. Freedom is needed to allow us to be ourselves – to allow us to develop and to express ourselves truly; to live in the dignity which comes from autonomy of thought and action.

As our autonomy can be enjoyed only in the society in which we live, it must be limited to allow a due measure of autonomy to others. We are social beings, so we cannot seek a freedom which poses a substantial risk of destroying the freedom of others and, if we are truly egalitarian, we would not want the freedom of others to be reduced below the freedom which we enjoy. So we can define the freedom we seek as the maximum degree of autonomy of thought and action consistent with the enjoyment of a corresponding degree of autonomy by others. The implications of this definition are stated by Joseph Raz[5]:

> "Three main features characterize the autonomy-based doctrine of freedom. First, its primary concern is the promotion and protection of ... the capacity for autonomy, consisting of the availability of an adequate range of options,

[5] Raz J, *The Morality of Freedom*, Oxford: Clarendon Press, 1986, p 425.

> and of the mental abilities necessary for an autonomous life. Second, the state has the duty not merely to prevent denial of freedom, but also to promote it by creating the conditions of autonomy. Third, one may not pursue any goal by means which infringe people's autonomy unless such action is justified by the need to protect or promote the autonomy of those people or of others."

How is freedom in that sense to be secured? What controls on power are needed? A preliminary question is whether we always need mechanisms of control to protect our freedom. In a pluralist, multi-cultural society, tolerance is essential to allow others to think and act in ways with which we disagree. Albert Einstein said[6] -

"Laws alone cannot secure freedom of expression; in order that every man may present his views without penalty there must be a spirit of tolerance in the entire population."

Tolerance is a virtue for it respects the dignity of others without requiring an adoption of others' thoughts or actions or an abandonment of one's own. It facilitates that social intercourse, peace and order in which individual personalities can develop and express themselves. It can diminish the need for the introduction of controls designed to protect personal freedom. It is only when there is some risk to social peace and order, or some risk of offence to personal dignity that we need to think in terms of mechanisms to control the exercise of power.

Mechanisms to Control Power

It is tempting for a lawyer to propose that the law be regarded as the chief mechanism for the control of power but a moment's reflection will show us that that is the solution of last resort. If all conduct were regulated by law, our society would be anything but free; equally, of course, if there were no laws to regulate conduct, untrammeled force and power would destroy our freedom. The fabric of the law is essential to freedom, but it cannot be the sole or ordinary guarantor. Indeed, the ultimate sanction of the law is required only when other mechanisms of control fail. The real assurance of a free society comes from the people's spirit of freedom, informing their customs and their institutions.

Power comes in various forms. A submissive wife may be cowed by a dominant husband; a powerful intellect may tower over those around him; a campaign by the media may change the opinions of a community. The control of one kind of power may not be suited to the control of another and there are some powers, of a socially private or familial kind, which are properly exercised only by self-control. In the relationships of a family or a group of friends, affection or the lack of it or good manners

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[6] Einstein A, *Out of My Later Years* (1950) p 12, 13.

or the want of them have the greatest effect on the autonomy of a member of the family or group. In the ordinary, day-to-day intercourse of the family or group, no external intervention is needed and none would be appropriate to control any power possessed by one member over another. Generally speaking, it is unacceptable that an external control should intrude into the relationship of parent and child, in the relationship of siblings, in the social discourse of a group of friends. It is only when those relationships become dysfunctional and when individuals need external authority to protect their interests against those who have neglected or oppressed them that it is legitimate for any external mechanism to intervene.

Just as there are various forms of power, so there are various mechanisms for its control. Some can be exercised by the possessor of the power, others only by an external authority exercising a countervailing power. The paradigm instance of an external authority exercising a power to control the exercise of another's power is the court in its enforcement of the law. The principles found in the law are applied to the particular facts and the exercise of the court's power follows in the judgment pronounced. That is the way in which freedom under the law is secured in judicial proceedings. Therein lies the key to the control of all forms of power, whether the control is exercised by the possessor of the power or by an external authority exercising its supervening and countervailing power. Power should be exercised according to principle. Principles encapsulate values and can govern the way in which power is exercised by its possessor. Principles do govern the way power is exercised if the possessor is independent of influences which would induce the possessor not to act in accordance with the principles he or she espouses. Principles are susceptible of rational evaluation and, whether or not articulated, they develop in the religious, social and economic environment in which we live. So in a free society, it is reasonable to expect that principles which govern the exercise of public power will themselves reflect the spirit of freedom and that the people in general assent to principles which reflect that spirit. Provided those principles are faithfully implemented – a function of independence - the maximum autonomy of thought and action for all members of the society should be assured.

In considering the various mechanisms of power control, it must be remembered that the law has a significant limitation: it cannot directly abridge freedom of thought. That is because, as Oliver Wendell Holmes correctly observed, "[a]ll law is directed to conditions of things manifest to the senses"[7]. Thoughts can be translated into action and the law can constrain action but it cannot control thought. This was the point which Thomas More made at his trial when he repelled the charge of treason based on his non-acceptance of the King's ecclesiastical supremacy. "I answer that", he said,

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[7] Holmes OW, *The Common Law*, London: MacMillan & Co, 1881 p 49.

> "For this my taciturnity and silence, neither your law nor any law in the world is able justly and rightly to punish me unless you may besides lay to my charge either some words or some fact in deed."[8]

Freedom of thought depends on our education (in the broadest sense), our social and financial situation and the environment in which we live. These are variables. If we leave aside the effects of mind altering drugs, of torture, of some psychiatric therapies and of brainwashing by cults or like groups – all of which receive some attention from the law – the peril to freedom of thought comes chiefly from deception which distorts the individual's understanding of reality. The protection of freedom of thought therefore depends in part on the control of conduct and substances which might overpower the mind and in part on the control of conduct which is likely to deceive.

The most basic and important mechanism for the control of power is the moral sense of the possessor of the power. I will not exercise the power that I possess over another if I do not think I ought to exercise it. Oftentimes it is said that law is the force which governs and secures acceptable conduct. It is not. The law can always be disobeyed, even if the offender must suffer some penalty in consequence. The law provides an incentive to socially acceptable conduct and it can have a valuable educative effect, but the most immediate and coercive force affecting the conduct of men and women is the force of conscience. Conscience is the voice which sums up the values which we embrace and the influences we have experienced in life.

If the Biblical injunction to "love one another as I have loved you" were fully appreciated and fully implemented, power would be exercised not for the benefit of the possessor of the power but for the benefit of others. But that counsel of moral perfection is seldom seen, much less emulated. However, although religious belief as the mainspring of a moral system has diminished in our society, Judaeo-Christian moral values which respect the dignity of others have become part of the secular culture. They are esteemed as humanitarian values and inform many of the judgments that we make.

Each of us lives by a moral code. It may be good, bad or indifferent, but we act out of the principles which we accept[9]. The principles of morality by which most people govern their thoughts and actions are not necessarily articulated; it is often times a matter of "what one does" rather than the reason why one does it. Those principles, whether articulated or not, determine whether and in what circumstances and in what manner any power we possess will be exercised. We describe a person of fine moral calibre as "highly principled" by which we mean that his or her thoughts and acts are informed by moral standards which are not

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[8] Ackroyd P, *The Life of Thomas More*, London: Chatto & Windus, 1998, p 383

[9] Rokeach M, *Beliefs Attitudes and Values*, San Francisco: Jossey-Bass, 1980, p 161.

abandoned for expediency or under pressure.

In a stable community, the moral principles of individuals govern the exercise of private power, and the entirety of their individual principles produces a moral consensus to govern the exercise of public power. In a stable community, the moral consensus may support the exercise of public power to serve the common good[10]. The common good, as it is understood in a free society, seeks to achieve a maximum and equal degree of autonomy for its members. But how it is achieved is, in large measure, a matter for political opinion, judgment and action. Some find in the economics of laissez-faire the greatest stimulus to the general population's initiative, independence and wealth; some think it essential to provide a welfare state with a tightly controlled economy to prevent the less fortunate from a loss of human dignity; some again find the political and economic solution somewhere between these two extremes. Generally speaking, it is impossible to determine for every society, at all times and in all circumstances, the precise form of government and economic control which yield the optimum benefits. That is why we repose political and other public powers in a Parliament and a Government that is democratically elected. Provided the political will of the majority of the people is reflected at the polls, we obtain as best we can, a political assurance of the maximum autonomy of thought and action - for at least that majority.

The system has some weaknesses. Those who possess or seek political or other public power engage the media to disseminate their particular policies and viewpoints and provide the media with selected material for that purpose. That is an inevitable phenomenon in an elective democracy. And, as the acquisition and retention of political power requires only majority support, the power may be exercised to advantage the majority at the expense of a minority.

Mechanics needed to safeguard democracy

An effective democracy depends on an informed electorate. Democracy is a charade if the electorate is ignorant of or deceived about the matters that are relevant to the exercise of power purportedly to achieve the common good. The chief sources of political education are political parties and the media. The freedom of each group is important – the political parties so that they may devise and advocate for popular consideration the course which they invite the people to endorse; the media so that they can convey the information and make the comments that can assist the public in evaluating the options before them.

We expect political groups to lay out their policies – the practical steps

[10] Beetham D, *The Legitimation of Power*, Atlantic Highlands: Humanities Press, 1991 pp 22, 46-47, 59.

to implement the principles they espouse. Those principles determine the frames of political reference, the options open to the people to endorse. Those principles must be open to public debate; otherwise the public lack the understanding which would allow them to pass judgment on a proposed or past exercise of political power. Nor, without public debate, can a political party obtain a true picture of political sentiment.

The necessity of publicity and free discussion in a democracy is obvious. In recent times it has been affirmed repeatedly in the High Court.[11] Public discussion is the mechanism by which public morality emerges to define the principles which should govern the exercise of power. Dennis F Thompson, an American academic[12] reminds us that –

> "It was Kant who first emphasized the deep connection between morality and publicity. He presented the criterion of publicity as a fundamental test of morality...'All actions which relate to the right of other men are contrary to right and law [if their] maxim...does not permit publicity.' That a principle can be made public is not sufficient to make the principle moral, but it is necessary. If a principle must be kept secret, it is because the principle cannot be generally and freely accepted on its merits ... . A legislator could not legitimately act on the principle that he will tell the truth except when it could jeopardize his reelection. Making that principle public would defeat its purpose."

But how are principles made public? By the media. The vitality, even the continuing legitimacy, of our constitutional institutions depends in no small measure on the media. It has long been so. Thomas Carlyle[13] tells us that Edmund Burke said –

> " ... there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or a witty saying, it is a literal fact - very momentous to us in these times.... Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority."

Now if the media enjoy that power, they too must be under an obligation to declare the principles which govern their exercise of it. The media assert a right to publish freely in service to the community and that is a right which can be readily acknowledged – indeed, which provides the raison d'être of a free press. But there is no freedom that is absolute and

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[11] Australian Capital Television Pty Ltd v Commonwealth (1992) 186 CLR 168; Theophanous v Herald & Weekly Times Ltd (1994) 185 CLR 243; Nationwide News Pty Ltd v Wills (1992) 186 CLR 168; Lange v Australian Broadcasting Corporation (1997) 189 CLR 596.

[12] Thompson D.F *Political Ethics and Public Office*, Cambridge: Harvard University Press, 1987, pp 116-117.

[13] "The Hero as Man of Letters" published in Carlyle T, *On Heroes, Hero-Worship and the Heroic in History*, London: OUP, 1904, p 219, first published in 1840.

the freedom to publish is no exception. I am not speaking here of the limitations imposed by the law relating to defamation and contempt of court; I am speaking of the obligation of the media to apply the principle that matter be published to serve the community. It is not sufficient for the media in a free society to publish material merely to entertain or to titillate a passing interest; their function in disseminating information accurately, explaining it adequately and commenting on it fairly is critical to a free, democratic society

The need for accurate, informed reporting and incisive comment has perhaps never been greater. Governments, political parties and other organizations equip themselves with public relations consultants, speechwriters and others whose function it is to obtain the best possible media coverage for their employers. The spin doctors may feed the media with selected information and slanted comment and it becomes the function of the media to evaluate what they are given, to correct or amend it as needed, or to reject it. To publish media handouts without evaluation or without identifying them as handouts from the originating source impedes the flow of information to the public or falsifies its significance.

It is inevitable that media comment will be influenced by media ownership, and that influence can be patently acknowledged without departure from the principle of community service. What is unacceptable, and a real danger to freedom, is undisclosed bias which affects the matter published. If reporters, news editors, producers or publishers cede their independence, whether to a proprietor, to a political party, to a commercial interest or even to a friend, the principle of community service which ought to be a guardian of the people's freedom becomes an instrument of deception and a danger to their autonomy.

Deception attacks autonomy of thought by denying the individual the material to be thought about. Our laws insist, and rightly, that trading and financial corporations and some other categories of persons should refrain from deceptive and misleading conduct in trade or commerce but, in elections, our law imposes no sanction on the politician who engages in deceptive or misleading conduct designed to induce the voters to favour that politician with their vote. In Evans v Crichton-Brown[14], the High Court acknowledged that –

> "In a campaign ranging over a wide variety of matters, many of the issues canvassed are likely to be unsuited to resolution in legal proceedings; and a court should not attribute to the Parliament an intention to expose election issues to the potential requirement of legal proof in the absence of clear words."

No doubt the disparity in our law between deception in trade or commerce on the one hand and deception in elections on the other simply

[14] *Evans v Crichton-Brown* (1981) 147 CLR 169 at 208. The High Court was sitting as the Court of Disputed Returns under the *Electoral Act s 19.*

acknowledges the hyperbole and suppression which are characteristic of democratic elections. We console ourselves with the notion that the good sense of the people will ultimately arrive at the principle best suited to serve the common good as they see it. At all events, subject to an important qualification relating to human rights, there are no better principles by which a legislature and a government should act than the principles openly stated by a party seeking government and endorsed by the majority of the people. That is sometimes called "the mandate" and it is not to be departed from by a government after the compact is made with the people unless there be unexpected, supervening circumstances which warrant the departure. The bleak cry of broken promises alienates the people from the political process.

Provided the people are adequately informed about the principles by which political power is to be, and is being, exercised and provided the majority approve of those principles, their implementation will not trespass upon the freedoms of the majority unless it is to secure the common good as the majority understand it. Of course, in a perfect society which rejoices in a culture of freedom, the common good would be seen to include the good of minorities as well as the good of the majority and political power would be so confined as not to trespass on the freedom of minorities. But no society is perfect and, as the Founding Fathers were confident of the liberal spirit of the Australian people and declined to follow the American precedent of a constitutional Bill of Rights[15], the protection of minority rights is a responsibility of the parliamentary process.

Democracy by itself does not assure the freedom of all members of the community. The tyranny of a majority may need to be controlled.[16] It is the risk of that tyranny and perhaps a growing mistrust of the political process that has stimulated interest in an Australian Bill of Rights. The warrant for such a measure is the potential of democratic power to be used tyrannically over a minority. The common good, if it were represented to be the interests or will of the majority, would oftentimes be secured only by the oppression of a minority. Majoritarian benefit is likely to be the result of an exercise of legislative or executive power in a democracy: benefits are conferred on some, while others either go without or are made to bear corresponding burdens. But the burden which a majority might impose on a minority is exceeded then the human rights of the minority are infringed. This is, or ought to be, the boundary beyond which State power must not trespass. Human rights prescribe the minimum conditions in which an individual can live in society with his or her dignity respected. The infringement of human rights is a refusal to recognize the dignity of the person. And with the loss of that dignity is the loss

[15] Dixon Sir O, *Jesting Pilate*, Sydney: LBC, 1965, p 102; Menzies Sir R, *Central Power in the Australian Commonwealth*, London: Cassell & Company Ltd, 1967, p 54.

[16] See Mill JS in Tannenbaum D & Schultz D (eds), *Inventors of Ideas*, New York: St Martin's Press, 1998, p 232.

of freedom. That was the truth proclaimed by the United Nations in its Universal Declaration of Human Rights in 1948, the first recital of which declared that –

> "Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

Two factors have combined to expose human rights and fundamental freedoms to danger from an exercise of power by the political branches of Government. First, our society has become more diverse in its ethnic, cultural, religious, and economic composition. Or, to put it another way, there are more minority groups whose particular interests are liable to be overreached by the exercise of legislative or executive power. The control of the political process by political parties favours the creation of poll-driven policies which will appeal to the majority of the electorate whether or not they unjustifiably discriminate against minority groups or against the weak. There is a consequent risk that factors which justify special consideration of the position of a minority or special support of the weak will be disregarded.

A Bill of Rights is seen by many as a necessary protection of minorities and the weak. Lord Scarman[17] advances this as the chief political argument for a Bill of Rights in the United Kingdom:

> " ... if you are going to protect people who will never have political power, at any rate in the foreseeable future (not only individuals but minority groups with their own treasured and properly treasured social customs, religion and ways of life), if they are going to be protected it won't be done in Parliament – they will never muster a majority. It's got to be done by the Courts and the Courts can only do it if they've got the proper guide-lines."

A further danger to human rights and fundamental freedoms is posed by the dominance of the executive Government, supported by its bureaucracy, over the Parliament. This dominance has undermined the theory that the Westminster model of responsible Government effectively guarantees democratic control of Executive power. Indeed, the influence of a Cabinet, itself substantially under the influence of the Prime Minister of the day, over the Parliament substantially justifies Lord Hailsham's comment[18] that "[w]e live under an elective dictatorship, absolute in theory if hitherto thought tolerable in practice".[19] A Bill of Rights is seen as a protection against the oppressive exercise of this enormous mass of power. As Sir Anthony Mason[20] put it:

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[17] Lord Scarman, "Britain and the Protection of Human Rights", (1948) *New Zealand Law Journal* 175 at 177.

[18] Though some media commentators deny the proposition.

[19] *Elective Dictatorship*, Dimbleby Lecture (1976).

[20] "A Bill of Rights for Australia" (1989) 5 *Australian Bar Review* 79 at 79-80.

> "Human rights are seen as a countervailing force to the exercise of totalitarian, bureaucratic and institutional power – widely identified as the greatest threats to the liberty of the individual and democratic freedom in this century. One result has been the wide-spread entrenchment of fundamental rights in Constitutions throughout the world."

The various international instruments which declare human rights and which have been ratified by Australia can provide us with a set of principles observance of which would be effective to safeguard the freedom of minorities. For example, in *Minister for Immigration and Ethnic Affairs v Teoh*[21] the High Court affirmed the setting aside of a deportation order on the ground that the maker of the order had not taken account of the obligation to protect the interests of an alien's child under the International Convention on the Rights of the Child.

We can apply these principles to the controversy over mandatory sentencing. It is, so far as we know, valid law in Western Australia and the Northern Territory. What were the principles which led their respective Parliaments to enact such legislation? Clearly, that the law should provide a deterrent to the commission of particular kinds of offences, even minor property offences. And it is asserted that a majority of the respective electorates support these laws. So the problem for the legislatures and governments of Western Australia and the Northern Territory was whether the laws trespass on human rights. If so, the laws were inappropriate in a free society. The better view seems to be that those laws do trespass on human rights. Moreover, they deny the courts the ability to do justice and thereby strike at one of the foundations of a civilised society.

Then there arises the question whether Commonwealth legislative power should be exercised to protect human rights. A question of principle arises: is it right for the Commonwealth Parliament to override the laws of a State or self governing Territory? If so, in what circumstances? Minds may differ on this issue. In my respectful opinion, the autonomy of States and self-governing Territories in matters of domestic concern should generally be maintained. Yet, when human rights of life and liberty are trampled on, albeit with the consent of an electoral majority, I would contend that no Parliament and no Government ought to stay its hand. Freedom at so basic a level is not to be forfeited to satisfy the demands of any group, whether a majority in an electorate or not. Political expediency offers no reason for refraining from ensuring basic human rights, for the power to rectify is conferred in order to maintain fundamental freedoms and the basic institutions of a society.

Of course, there is an argument for the constitutional entrenching of the Bill of Rights and thereby remitting to the courts the protection of the human rights which the Bill would declare. That would certainly bring

[21] (1995) 183 CLR 273.

the courts into play as an element in the political process but, in entering the process, there would be a risk to the courts themselves of becoming politicized. This is not the occasion to debate the desirability of a constitutionally entrenched Bill of Rights but it is instructive to consider why there should be any movement to transfer into the hands of an unelected judiciary a highly political power. Of all the institutions of government, the courts retain – and need to retain – the greatest public confidence. It is a commonplace that the freedom of a society depends on a free and competent judiciary, so we can examine the judicial method in order to discover what are the features on which that reputation is built.

Principle and independence in the judicial method

The judiciary resolves the controversies of litigants by finding the facts, applying the law, sometimes exercising discretions within narrow and definable limits and then and thereby pronouncing judgment[22]. The courts act according to established principles: the principles of the law. Generally speaking, those principles are in existence before they are to be applied in a particular case. The rule of law has at its core the "principled faithful application of the law"[23]. As Lord Bridge of Harwich has observed[24]:

> "The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law."

The common law is the basis of our legal system and it encapsulates the values of a free society. These values include the dignity and integrity of every person, substantive equality before the law, the absence of unjustified discrimination, the peaceful possession of one's property, the benefit of natural justice, and immunity from retrospective and unreasonable operation of laws.

In applying the law, there are occasions when the circumstances of a particular case show that the literal application of some rule or precedent would be productive of injustice. The court must then re-examine the rule or precedent and, if the court is not constrained by the authority of a superior court or by a statutory text, the court may think it right and

[22] See per Kitto J in R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd (1969-1970) 123 CLR 361, 374-375.

[23] Raz J, Ethics in the Public Domain: Essays in the morality of law and politics, Oxford: Clarendon Press, 1994, p 357.

[24] X Ltd v Morgan-Grampian Ltd [1991] 1 AC 1 at 48.

timely to reformulate the rule or precedent to accord with the enduring values of the contemporary community.[25]

As the basic principles of the common law are protective of freedom[26], those principles govern the approach of the courts to the construction of statutes. The High Court has said that the courts do "not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language."[27] In the Cambridge Law Journal, Dr TRS Allan[28] lauded this approach of the courts, proclaiming that: -

> "Properly articulated and developed, the basic constitutional principle of the rule of law provides a powerful breakwater, if not an impenetrable dam, against encroachment on important rights and liberties by means of statutory authority. Nor can the scope of the principle be limited to those liberties and interests – chiefly liberty of the person and property interests – which have received the most assiduous judicial attention in the past .
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> The traditional political liberties, especially freedoms of speech and assembly, which constitute important features of modern bills of rights, fall equally naturally within its compass."

It would read too much into this comment to assume that the courts can or would defy statutory law, but the approach is right and the endeavour to preserve freedom by application of the rule of law is a continuous element in curial decisions. In developing the law, the courts are not set loose on the acquisition of discretionary powers by leaving new principles so open textured as to allow judges to decide cases according their idiosyncratic notions of justice. The law should state principles capable of application to the case in hand and to future cases arising the same issue. The point was made dramatically by Geoffrey Robertson in criticism of an aspect of the genius of Lord Denning who, I might add, was one of his, and one of my, legal icons of the past century. Robertson wrote that his generation had been –

> " ... taken in by a most charismatic and controversial judge, Lord Denning, whose slogan was "I must do justice, whatever the law may be". His invitation to tear up the rulebook in order to reach popular results suited the iconoclasm of the time. That it was dangerously simplistic only became evident years later, as I sat in courtrooms in Singapore and Kenya and South Africa, listening to his idiosyncratic judgments being quoted by State prosecutors as warrant for locking up dissidents without trial, as threats to national security;

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[25] Mabo v Queensland [No.2] (1992) 175 CLR 1.

[26] Zweigert K & Kötz H, *An Introduction to Comparative Law* 2nd ed, Oxford: Clarendon Press, 1992 202.

[27] Per Mason CJ, Brennan, Gaudron, McHugh JJ in *Coco v The Queen* (1994) 179 CLR 427 at 437

[28] "Legislative Supremacy and the Rule of Law" [1985] 44(1) *Cambridge Law Journal* 111 at 133.

> Denning played Prospero to lawyers of his generation, creating the result his own opinionated mind believed 'just' through the alchemy of obscure precedents he found in the common law: his prejudices were his principles. 'Trust the judges' became his motto, and although my cases show that judges usually favour liberty more than governments do, they need advocates to push them and principles to protect them."

The judicial method reduces any antinomy between justice and law to a minimum. This is the method which gives effect to the rule of law. Dias[29] comments that –

> " ...it is commonplace that in this task [the judges] are guided by their sense of values according to which they balance the interests in dispute. This explanation, brief as it is, makes it possible to relate judicial independence to the 'rule by law'/'rule of law' dichotomy. Where 'rule by law' obtains, the judiciary is a tool of government, which, along with others, reflects and implements official policies and interests. Where 'rule of law' obtains, judges are free to decide on values of their own, and the check on power derives from their being able to hold governmental interests in balance against others. In this way the British judiciary has built up its tradition of independence over the centuries. By and large judges have contrived to preserve as much balance of power in society as they could by siding with the weaker side whenever the balance tilted against it."

In exercising their power according to principle, the courts must, of course, be independent. The purpose of independence is the maintenance of the rule of law. Without independence the rule of law would be destructive of the interests which the law must protect. Chief Justice Gleeson[30] has pointed out that the law is not the instrument of the popular but the protector of the unpopular:

> "Those for whose rights we need to be zealous are the unpopular, those against whom campaigns of public vilification may be waged, those whose activities, even though lawful, are sought to be made the object of public disapproval."

To ensure that effect is given to the values of the common law when they stand in the way of an exercise of power, especially the power of governments, a judiciary of unquestioned independence is essential. The judge stands in the lonely no-man's-land between the government and the governed, between the wealthy and the poor, the strong and the weak. She or he can identify with neither, for partisanship robs the judge of the authority essential to discharge the judicial office. Independence has been the characteristic of the judiciary for 300 years since the Act of Settlement.

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[29] Dias RWM, "Götterdammerung - gods of the law in decline" (1981) 1(1) *Legal Studies* 3, 13.

[30] "The Rule of Law and the Independence of the Judiciary" (1989) 1 *Judicial Officers' Bulletin* No.10 p.2

And it assures the impartial application of the principles of law in every case. It is the ultimate guarantee of a free society.

The freedom of society generally and the autonomy of each of its members require the legislature, the executive, the judiciary and the media – the great repositories of public power – to exercise their respective powers according to principle and to be independent of the influences that tend to divert them from that duty. Whether an entrenchment of human rights with its consequent transference of power to the judiciary is expedient to protect the human rights of minorities is a question that should receive more public examination and debate. But as the ultimate guarantor of freedom is our sensitivity to the dignity and autonomy of others as well as ourselves and our vigilance in insisting on the patent adherence to principle by the great repositories of public power, the future of a free society is in our hands.