Human Rights and the Rule of Law

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Thirty-seven years ago a highly respected judge wrote:

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.[1]

The judge was Justice Blackburn describing the evidence which had been given in the first real native title claim litigated in Australia, brought by members of the Rirratjingu and Gumatj clans challenging mineral leases for the extraction of bauxite granted to Nabalco Pty Ltd by the Commonwealth over the lands of their clans in East Arnhem Land in the Northern Territory. The clans, although without an identifiable sovereign, a law-making body such as a parliament, a system of courts and a bureaucracy, lived under what his Honour aptly described as the "rule of law". That finding did not

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* Judge of Appeal, Supreme Court of New South Wales, Court of Appeal. This article is an edited version of the 2008 Sir Ninian Stephen Lecture. The Sir Ninian Stephen Lecture was established to mark the arrival of the first group of Bachelor of Laws students at the University of Newcastle in 1993. It is an annual event that is delivered by an eminent lawyer at the commencement of every academic year.

1 See *Milirrpum v Nabalco Pty Ltd* (1970) 17 FLR 141, 267 (Blackburn J).

allow them to win the case, but Justice Blackburn's careful and sensitive assessment of the evidence provided the basis for the statutory regime which has allowed some 40% of the Northern Territory to be returned to its traditional owners.[2] A vibrant photograph of Milirrpum Marika, the named plaintiff in the proceedings, may be found in a book by Professor Nancy Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for its Recognition*.[3]

Although the traditional owners were unsuccessful in *Milirrpum* in having their title under traditional law recognised in our courts, no appeal was taken from that decision; but had it been it would have come to the High Court shortly after Sir Ninian Stephen's appointment in 1972. It is intriguing to speculate as to how that Court, and Sir Ninian in particular, might have dealt with the arguments. In fact history took a different turn and Woodward QC, senior counsel for the unsuccessful plaintiffs, and later a Federal Court judge, was appointed to inquire into means to recognise and return to the Aboriginal owners parts at least of their traditional lands. The result was the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). Over the years, that Act gave rise to much litigation in the High Court, but little of it reached the Court before Sir Ninian's retirement in 1982. Although his early retirement deprived Australian jurisprudence of much that he might have contributed, his appointment in 1982 as Governor-General allowed him to participate in the symbolic return of Uluru to its traditional owners in 1985.

Those who have preceded me in this lecture series have spoken eloquently of Sir Ninian's great contribution, both to the public life of this country and in international affairs. Those who knew him personally, including Sir Gerard Brennan and Justice Michael Kirby, have spoken with great warmth of his collegiality, urbanity and openness of mind.[4] I can do no more

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2 Under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

3 (1986) opposite page 32.

4 The Hon Sir Gerard Brennan, 'Principle and Independence: The Guardians of Freedom' (2000) 4(2) *Newcastle Law Review* 1 and The Hon

than echo the accolades and acknowledge the honour in being invited to deliver a lecture in the series honouring Sir Ninian Stephen.

I confess to some ambivalence about the title of this talk. "Human rights" is an amorphous term, which covers a broad area of discourse, but it is one with which lawyers are comfortable. That is not self-evidently true of the "rule of law", a term which may be used in various fields of discourse. It is not often used by judges because it is a protean concept which provides little assistance in deciding specific cases.[5] Indeed, its connotations are sufficiently imprecise and unpredictable to cause some lawyers, used to greater precision, to be uncomfortable with its deployment. Nevertheless, it encapsulates aspects of our legal, indeed constitutional, structures which are important in protecting human rights in a country which has no constitutional bill of rights. It places in the courts the power and obligation to superintend, through the mechanism of judicial review, the conduct of government. An understanding of why that is so reveals both the significance and one important limit on judicial authority to protect human rights.

The rule of law is not a concept which finds express recognition in our Commonwealth Constitution. Rather, it is seen as one of those broad principles which describe various aspects of our constitutional framework of government. Where, as at a

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Justice Michael Kirby, 'The Constitutional Centenary and the Counting of Blessings' (1997) 2(1) *Newcastle Law Review* 1.

5 Since choosing the title, I have realised that I may have subconsciously plagiarized Chief Justice Spigelman: see The Hon JJ Spigelman, 'Rule of Law – Human Rights Protection' (1999) 18 *Australian Bar Review* 29. The Chief Justice's paper focussed on statutory interpretation. See also his Honour's 2008 McPherson Lectures entitled 'Statutory Interpretation and Human Rights'. Since preparing the paper in draft I have discovered that the content reflects in part the views of Sir Gerard Brennan as set out in 'The Constitution, Good Government and Human Rights' (Paper delivered at the Human Rights Law Resource Centre, Melbourne, 12 March 2008).

Commonwealth level, we have a written Constitution, there is a strong temptation for the courts to identify basic constitutional principles as having their source in the written document. That no doubt provides a source of legitimacy for the exercise being undertaken, which will commonly involve a court declaring executive action invalid. Yet similar principles underlie the constitutions of our States, which contain little in writing to support such an approach, but are derived from the common law constitutional framework of the United Kingdom. The *Constitutional Reform Act 2005* (UK) expressly recognised such an underlying structure, noting in s 1 that 'this Act does not adversely affect ... the existing constitutional principle of the rule of law'. However, in true British style, it did not define that principle.

What the principle requires, in essence, is an understanding of what is meant by "law", together with the mechanism by which the law is enforced, the idea being that conduct is to be regulated by established rules and principles and not according to the whim of individuals exercising otherwise unregulated power.

Surprisingly, principles which can only be described as forming part of the unwritten charter according to which our system of government operates are widely applied by lawyers on a daily basis. Two examples may illustrate the point. First, it is well-understood that much, indeed an increasing proportion, of our law is to be found in statutes enacted by the various parliaments, or in regulations made pursuant to statute.[6] Much of our public law, in particular, requires the application of statute.[7] However, it is also well-understood that there are general law principles which are not to be found in the statutes but are to be derived from the judgments of the

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[6] The Hon Michael McHugh, 'The Growth of Legislation and Litigation' (1995) 69 *Australian Law Journal* 37.

[7] But cf *Ruddock v Vadarlis* (2001) 110 FCR 491 in relation to the interrelationship between the intricacies of the *Migration* Act *1958* (Cth) and the "prerogative" power to control entry of aliens to Australia.

courts. Principles of tort law, contract and equity can readily be seen as falling within that category, which is not to say that they are in any way immune from statutory variation. Indeed, it is an essential principle of a parliamentary democracy that the Parliament can at any time change the unwritten general law.

As we know, disputes commonly arise as to whether and, if so, the extent to which a statute has indeed effected a change of the general law. Those disputes are to be resolved in accordance with established principles of statutory interpretation. Yet despite the fact that we have had Interpretation Acts in all Australian jurisdictions for a long time, many of the basic principles of statutory interpretation are not to be found in those Acts, but are themselves, perhaps ironically, part of the unwritten general law which must be derived from the cases. Principles of statutory interpretation are thus part of a meta-law, being one which does not directly affect rights of individual citizens, but identifies the way in which the arms of government interrelate and operate.

The way in which principles of statutory interpretation may in turn be seen as protective of human rights has been the subject of a lengthy and enlightening exposition by Chief Justice Spigelman in the recent 2008 McPherson Lectures and I do not intend to trespass on that territory.

Rather, I want to turn to a second area in which we find unwritten general law principles operating as meta-law and governing the interrelationship of arms of government, namely judicial review. As explained by Brennan J in *Church of Scientology Inc v Woodward*:[8]

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

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[8] (1980) 154 CLR 25, 70.

In this sense, the judiciary may be seen as patrolling the boundaries of lawful executive action, as defined by the legislature.

The operation of this principle is illustrated by an early case under the *Northern Territory Land Rights Act* dealing with an attempt by the Northern Territory Administrator to prevent a land claim to unalienated Crown Land on the Cox Peninsula ("The Kenbi Land Claim") by purporting to declare the area part of the town of Darwin. The declaration, which extended Darwin, a town with a population of about 50,000 people, to cover an area of 4,350 sq kilometres, larger than greater London, was manifestly done for the purpose of defeating the land claim and not for planning purposes. As stated by Gibbs CJ:[9]

> It is incontestable that the power is not intended by the Act to be conferred for the purpose of defeating the traditional land claims of Aboriginals. If it was used for that purpose the exercise of the power was invalid, unless the Administrator enjoys some privilege that enables him to transcend and disregard the limitations which the statute on its proper construction imposes. It would be surprising in principle if this were so. It seems fundamental to the rule of law that the Crown has no more power than any subordinate official to enlarge by its own act the scope of a power that has been conferred on it by the Parliament.

In the same case, Sir Ninian Stephen considered whether it made any difference to the power of judicial review that the administrative or executive decision was made not by a Minister of the Crown but by the representative of the Crown upon the advice of his Ministers. He answered the question with an emphatic 'No'.[10]

Although the traditional owners were successful in defeating the declaration of extended town boundaries which would

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[9] *The Queen v Toohey; Ex parte Northern Land Council* (1980) 151 CLR 170, 187.

[10] Ibid 204.

have precluded their claim, the finalisation of the claim continued over a lengthy period, with numerous subsequent court challenges, only being resolved favourably to the traditional owners more than 25 years after the claim was first made.[11]

In the famous case of *A v Hayden (No 2)*[12] the High Court upheld the principle that '[n]o agency of the executive government is beyond the rule of law',[13] rejecting a claim by the Commonwealth that the officers of the Australian Secret Intelligence Service, known as ASIS, were immune from liability for damage inflicted at the Hilton Hotel in Melbourne, as a result of a bungled training operation. Brennan J quoted Clark J in the United States Supreme Court in *Mapp v Ohio*:[14]

> Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

The question remains however, where does one find the charter of a State government's existence and what is the charter's content? As the High Court stated in *Lange v Australian Broadcasting Corporation*:[15]

> To say of the United Kingdom that it has an 'unwritten constitution' is to identify an amalgam of common law and statute and to contrast it with a written constitution which is rigid rather than fluid. The common law supplies elements of the British constitutional fabric.

The Court then noted the statement of Sir Owen Dixon[16] that the British conception of 'the complete supremacy of

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[11] Office of the Aboriginal Land Commissioner, *The Kenbi (Cox Peninsula) Land Claim No 37 - Report and Recommendation of the former Aboriginal Land Commissioner, Justice Gray, to the Minister for Aboriginal and Torres Strait Islander Affairs and to the Administrator of the Northern Territory* (2000).

[12] (1984) 156 CLR 532.

[13] Ibid 588 (Brennan J).

[14] 367 US 643, 659 (1961).

[15] (1997) 189 CLR 520, 562.

[16] 'Sources of Legal Authority', in *Jesting Pilate* (1965) 198, 199-200.

parliament' had developed under the common law and indeed derived its authority from the common law. In Australia, their Honours noted, that supremacy was subject to constitutional limitations. The Court continued:[17]

> The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature. It placed upon the federal judicature the responsibility of deciding the limits of the respective powers of State and Commonwealth governments.

As the Court accepted, however, the Constitution itself is informed by the common law. Thus the constitutional guarantee of judicial review, found in s 75(v), operates by vesting in the High Court original jurisdiction to grant writs of mandamus and prohibition, and injunctions against "an officer of the Commonwealth". The basis upon which such relief may be granted is assumed: it can only be derived from the general law.[18]

It is easy to replicate other statements to similar effect: their importance extends beyond federal jurisdiction; because these principles arise from the general law of the United Kingdom, they also form part of the constitutional fabric of the States. And it is to the States that I wish to turn in order to see how these principles operate and the extent to which the rule of law provides a degree of protection for the human rights and fundamental freedoms of individuals living in Australia.

Although we have been blessed in Australia to have enjoyed freedom from internal revolution and external invasion for a greater period than any but a handful of other countries in the world, it is nevertheless true that the settlement of this country has long been the subject of legal controversy, a controversy which was addressed in *Milirrpum* and, some 20 years later, in *Mabo v Queensland (No 2)*,[19] in the *Native Title Act 1993*

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[17] (1997) 189 CLR 520, 564.

[18] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

[19] *Mabo (No 2)* (1992) 175 CLR 1.

(Cth) and in extensive subsequent litigation, which continues to this day in the Federal Court and the High Court.[20] The resolution of this controversy has revealed important aspects both of the extent and the limits of the protection for basic rights available under the general law. Prior to *Mabo (No 2)* it was widely believed that 'when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands'.[21] This, as Brennan J noted, 'would be a curious doctrine to propound today'. As his Honour continued:[22]

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

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[20] Eg *Risk v Northern Territory of Australia* [2007] FCAFC 46 (special leave to appeal to the High Court was refused: [2007] HCA Trans 472); *Minister for Lands, Planning and Environment v Griffiths* (2004) 14 NTLR 188; *Gumana v Northern Territory of Australia* (2007) 158 FCR 349 (in relation to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)).

[21] *Mabo (No 2)* (1992) 175 CLR 1, 39.

[22] Ibid 42.

Lord Bingham has urged that the rule of law may be understood as having a number of sub-rules, one of which is that 'the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation'.[23] This may be seen to be consistent with the language in which Sir Gerard Brennan sought to identify a 'fundamental value of the common law'. The non-discrimination principle is a central tenet of human rights law. But at what level does this language operate? Does the non-discrimination principle bind the courts in their application of the general law? Does it bind a parliament? To state a substantive principle as part of the rule of law is to highlight a question as to the interrelationship between a particular element of the rule of law so defined and the principle of parliamentary supremacy.

That parliament may vary principles of the general law is not in doubt. The question is whether parliament has an unlimited power to interfere with arrangements of government which concern the basic operation of one of the three arms of government. As noted in *Lange*, a federal system in which legislative power is divided between a Commonwealth and State parliaments requires modification of the supremacy principle, with the result that the court may declare invalid legislation of one parliament which is beyond its constitutional powers. In the United Kingdom, the supremacy principle meant that a court had no power to declare an enacted law invalid: see *Pickin v British Railways Board*.[24] However, in *Regina (Jackson) v Attorney General*,[25] the House of Lords was called upon to determine the validity of the *Hunting Act 2004* (UK) which made unlawful the hunting of wild animals with dogs. It was designed to put an end to the ancient pastime (one hesitates to call it a sport) of fox hunting. The Bill was controversial. While it was passed by the House of Commons, it did not receive the consent of the House of Lords. It was,

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[23] See Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 73 (the third subrule).

[24] [1974] AC 765, 798 (Lord Simon of Glaisdale).

[25] [2005] UKHL 56; [2006] 1 AC 262.

nevertheless, presented for Royal assent, which it received. The challenge to its validity was in substance a challenge to the *Parliament Act 1911* (UK) and the *Parliament Act 1949* (UK). The 1911 Act permitted a Bill to become law after certain preconditions were met, including the presentation of the Bill to the House of Lords in three successive sessions. Despite the fact that the Lords had in each of those sessions rejected the Bill, it might nevertheless become law after the lapse of two years from its initial introduction. The 1949 Act reduced the requirement for consideration from three to two successive sessions and reduced the time requirement from two years to one year. A critical feature of the 1949 Act was that it in turn was passed pursuant to the 1911 Act, that is, without the consent of the House of Lords.

The *Fox-hunting Case* was challenging for the UK courts because it sought to question the validity of legislation on constitutional grounds. However, their Lordships decided that there was no constitutional principle which prevented the Parliament altering its own constitution nor one which prevented a valid law to that effect being used to change itself. The appeal was entertained, despite some apparent discomfort, but was dismissed. However, the potential ramifications of upholding the law were not lost on their Lordships. Lord Steyn, in particular, was concerned at the proposition that the House of Lords itself could be abolished without its consent, thus changing the Parliament from a bicameral to a unicameral legislature. Lord Steyn stated:[26]

> Strict legalism suggests that the Attorney General may be right. But I am deeply troubled about assenting to the validity of such an exorbitant assertion of government power in our bicameral system. It may be that such an issue would test the relevant merits of strict legalism and constitutional legal principle in the courts at the most fundamental level.
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> But the implications are much wider. If the Attorney General is right the 1949 Act could also be used to introduce oppressive and wholly undemocratic legislation. For example, it could

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[26] Ibid [101]-[102].

> theoretically be used to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and citizens. This is where we may have to come back to the point about the supremacy of parliament. We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. ... The settlement contained in the *Scotland Act* 1998 also points to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the *Human Rights Act* 1998, created a new legal order. ... The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is [a] constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.

If such questions can be asked in the United Kingdom, they can be asked in relation to the State parliaments in Australia.

With respect, Lord Steyn was correct to identify judicial review as a 'constitutional fundamental'. It is the mechanism by which an independent judiciary is able (and obliged) to rule upon the validity of acts of the executive arm of government. Absent judicial review, there would be no effective mechanism by which an individual could complain of an abuse of governmental power. Is the mechanism vulnerable to statutory removal?

This, as administrative lawyers will recognise immediately, is not an entirely theoretical question. Parliaments, both in Australia and elsewhere, have not infrequently adopted privative clauses which seek to limit, if not preclude entirely, judicial review of particular decisions or classes of decisions, and thus to restrict an important mechanism for the protection

of human rights. If such laws were effective in an unqualified sense, there would seem to be at least a coherent basis for contemplating the abolition of judicial review generally, with the consequent dramatic reduction in the protections available from abuse of public power.

To assess this possibility further, it is necessary to step back in order to view it in context. In effect, the scope of judicial review needs to be considered from two perspectives. The first is that of the courts, which have been responsible for articulating the grounds for review. In so doing, the courts have effectively defined the proper boundary between their role and that of the executive. The general law grounds of review require that the executive exercise power only within its legal limits. The courts have thus defined both the extent and the necessary limits of their jurisdiction. As explained by Brennan J in a well-known passage from *Attorney General (NSW) v Quin*:[27]

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

Looked at from the perspective of the parliament, the scope of judicial review in a particular case will depend upon the legal limits on the executive imposed by the parliament in conferring a statutory power. To the extent that the preconditions to a valid exercise of power are reduced, so the area within which the decision-maker can validly operate is expanded and the scope for review by an aggrieved individual is diminished. Thus, when parliament seeks to interfere with the grounds of review, it moves that boundary.

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[27] (1990) 170 CLR 1, 35-36.

All of that is entirely consistent with constitutional theory. However, there may be limits on the extent to which the parliament can in practical terms expand the power of its executive officers. First, any power, including a prerogative power existing under the general law rather than under statute, will be constrained by its purpose. The Kenbi Land Claim was a paradigm example of such a case. A power conferred for a particular purpose could not be used for an entirely extraneous, and thus improper, purpose. This ground provides an interesting example of how a principle may not change, but its application will change. A classic statement of the principle may be found in *Water Conservation and Irrigation Commission (NSW) v Browning*.[28] Pursuant to legislation in force in 1947, an irrigation-farm lease in an area within the Murrumbidgee Irrigation Scheme could only be transferred with the consent of the Commission. The established principle, as stated by Dixon J, was that the court could intervene only 'if it is made to appear that the body acted upon grounds outside the purposes for which it was entrusted with a discretionary power or duty'.[29] The Commission, in refusing to consent to the transfer of the lease to a naturalized Australian of Italian ethnic origins, stated that such farmlands should be kept for "Australians"; that 'as a general rule' Italians are not good farmers under irrigation methods and also that it was 'most undesirable that any further aggregation of Italians be built up on an irrigation area'.[30] (Adopting a more enlightened approach, according to our standards, the Full Court of the Supreme Court, in a judgment delivered by Sir Frederick Jordan CJ, took an entirely different view of the matter.)[31]

Another illustration, drawn from UK experience, was the 1926 decision of *Short v Poole Corporation*,[32] a case involving a discriminatory dismissal of a married woman, in which

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[28] (1947) 74 CLR 492.

[29] Ibid 504.

[30] Ibid 503.

[31] See *Browning v The Water Conservation and Irrigation Commission* (1947) 47 SR (NSW) 395.

[32] [1926] Ch 66.

Warrington LJ stated the principle in acceptable if somewhat constrained terms:[33]

> It may be also possible to prove that an act of the public body, though performed in good faith and without the taint of corruption, was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore inoperative. It is difficult to suggest any act which would be held ultra vires under this head, though performed bona fide. To look for one example germane to the present case, I suppose that if the defendants were to dismiss a teacher because she had red hair, or for some equally frivolous and foolish reason, the Court would declare the attempted dismissal to be void.

Red hair was seen to be in a different category to marital status. The case was referred to recently by Spender J in *Haneef v Minister for Immigration and Citizenship*[34] his Honour noting:[35]

> It is perhaps anachronistic to note that *Short v Poole Corporation* ... concerned the termination of a married woman's engagement as a teacher, because of the adoption by the respondent corporation of a general policy against the employment of married women teachers.

This view was not entirely anachronistic. Romer J, at first instance, had concluded that the object of the defendants in attempting to dismiss the plaintiff because she had married was in pursuance of motives in no way connected with the efficient maintenance of the schools, or of education in their district, but for motives alien and irrelevant to the discharge of their statutory duties.

Demonstrating perhaps the important interrelationship between the development of the general law and statutory changes, it is apparent that in matters of sex and race, the general law proved ineffective to protect basic human rights, until the

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[33] Ibid 91.
[34] (2007) 161 FCR 40, [44].
[35] Ibid [45].

parliament or, as demonstrated in *Mabo (No 2)*, international conventions ratified by the Executive, showed the way. These examples, however, demonstrate two points. The first is that the content of the judicial review turns on general law principles relating to statutory interpretation. Recent caselaw suggests that as the scope of statutory powers increases, the courts have become more rigorous in their attempts to define the relevant statutory purposes and thus to confine the area of legitimate operation of statutory powers.

Secondly, it is often parliaments, whether by identifying more specifically its objects and statutory purposes, or by legislating generally with respect to racial, sex or other forms of discrimination, that have provided the basis for an analogous development of general law principles with respect to statutory construction.

Similar lessons may be drawn from the modern emphasis on procedural fairness as an essential precondition to the valid exercise of a power. A statement of that principle in terms which ring true to modern ears may be found in 1911 in *Board of Education v Rice*[36] where the Lord Chancellor stated:

> In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything.

Furthermore, the idea that 'although there are no positive words in a statute requiring that the parties shall be heard, yet the justice of the common law will supply the omission of the legislature' was a statement of principle dating back to 1863.[37]

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[36] [1911] AC 179, 182.

[37] See *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, 194 (Byles J).

Nevertheless, the modern scope of the doctrine of procedural fairness in Australia is frequently dated from 1985 and the decision in *Kioa v West*.[38] Although it imposed no duties, the *Administrative Decisions (Judicial Review) Act 1977* (Cth), providing for judicial review on grounds such as procedural unfairness, in relation to a very broad range of decisions under Commonwealth enactments, induced an approach to judicial review which, whilst the principles did not vary, allowed for a significantly broader application of those principles, with ramifications for the application of the general law. This was to be seen particularly in the migration area, somewhat to the frustration of those responsible for decisions as to whether an alien should be allowed into Australia or not. Governments of various hues responded to the mounting volume of decisions and challenges to decisions in a number of ways. One was to improve the opportunities for merits review of the decisions; a second was to prescribe procedures in detail, and a third was to seek to limit the available grounds of judicial review. This is not the time to reflect on those developments: my present purpose is to take an amendment to the *Migration Act 1958* (Cth) as an example of the government seeking to curtail drastically judicial review by a privative clause and note the response of the High Court.

Section 474 of the *Migration Act*, which commenced on 2 October 2001 (not coincidentally, less than a month after the events in America on September 11)[39] stated that any decision of an administrative character made 'under this Act':

> (a) is final and conclusive; and
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

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[38] (1985) 159 CLR 550.

[39] See *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth); it had originally been proposed, but not enacted, in 1997 and again in 1998.

Read literally and alone, the statutory purpose was clear enough: the provision excluded all forms of judicial review of decisions taken under the *Migration Act*. However, as I hope you recall, I mentioned earlier that in federal jurisdiction judicial review is entrenched by s 75(v) of the Constitution. How could the Parliament hope that a privative clause expressed in such absolute terms could survive a constitutional challenge? The answer to that was twofold, each limb reflecting part of the context of judicial review to which I have referred. First, it was said that the effect of such a provision, although it purported to exclude judicial review, was, properly understood, an expansion of the powers of the decision-maker. In other words, to the extent that he or she was required to take certain steps or take particular matters into account in reaching a decision, the consequence of a failure to do so was not invalidity of the decision. In other words, the Parliament was not preventing a court from determining that a decision exceeded the legal limits of the statutory power, but rather had expanded the statutory limits so that they would not be exceeded in any case. That, it was said on behalf of the government, was the approach which the High Court had adopted in relation to a similar (though not identical) privative clause in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd.*[40]

However, like many broad principles, when pressed too far that approach revealed itself to contain the seeds of its own limitations. In *Plaintiff S157/2002 v The Commonwealth*,[41] the case challenging the validity of the s 474, Gleeson CJ explained:

> In a federal nation, whose basic law is a *Constitution* that embodies a separation of legislative, executive, and judicial powers, there is a further issue that may be raised by a privative clause. It is beyond the capacity of the Parliament to confer upon an administrative tribunal the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction, because that would involve an exercise of judicial power ...

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[40] (1995) 183 CLR 168.

[41] (2003) 211 CLR 476, [9], [10].

> A provision that defines and limits the jurisdiction of a tribunal may be difficult to reconcile with a provision that states that there is no legal sanction for excess of jurisdiction.

The second basis on which the government sought to support the validity of the section was that, in accordance with established authority in the High Court, and in particular *The King v Hickman; Ex parte Fox and Clinton*[42] these clauses were not to be read literally but rather as protecting the decision of an authority so long as 'its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body'.[43] These limits arguably did not breach the separation of powers, nor trench unconstitutionally on judicial review.

This argument also failed, the High Court rejecting the suggestion that Dixon J in *Hickman* had laid down some general understanding of the operation of privative clauses, and explaining that his Honour had in fact proffered a principle of statutory construction, allowing the court in a particular case to resolve the apparent conflict between requirements laid down by an Act and the terms of the privative clause. For the clause to operate in that way, the particular requirements in question must be seen as not essential to the validity of a decision. The clause was ineffective, because it only protected decisions "under" the *Migration Act* and a decision which did not conform to essential requirements of the Act was therefore not so protected.

The result was by no means counter-intuitive. *Hickman* had involved limited constraints in a national security regulation (although even then the privative clause was not entirely effective). The *Migration Act* required reconciliation of the privative clause with a plethora of apparently mandatory statutory conditions, including ones requiring procedural fairness.

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[42] (1945) 70 CLR 598.

[43] Ibid 615; see also Ibid 618 (Dixon J).

Conclusions

I will conclude with a number of propositions, First, as I have suggested, although without any detailed justification, it may fairly be said that courts in common law countries, including Australia, have been slow to provide protection for substantive civil and political rights within the general law. *Milirrpum*, with which I started, pre-dated the *Racial Discrimination Act* 1975 (Cth) by several years; *Mabo (No 2)* post-dated it. It is at least arguable that an appeal from *Milirrpum* in 1971 would not have achieved the result that Eddie Mabo obtained in 1992.

Secondly, although the High Court, through many of its most eloquent voices and incisive minds, has recognised the importance of the constitutional principles which existed in England when the Australian colonies, and indeed the Commonwealth, were formed, it has been reluctant to give effect to those principles as imposing a limit on parliamentary sovereignty, unless it could rely upon the federal Constitution, for example for establishing a separation between the legislative, judicial and executive arms of government.

Thirdly, even in legal discourse, the "rule of law" operates at different levels. At the constitutional level it may ensure the continued existence of an independent judiciary with essential judicial review functions. It does not, however, by the imposition of a substantive principle of non-discrimination, limit the legislature in its law-making functions at a non-constitutional level. Does it, nevertheless, control the content of the general (court-made) law? Again the answer must be no, although it provides a "fundamental value" to which the general law should conform. Perhaps ironically, it was the application of that constrained approach in *Mabo (No 2)* which nevertheless led to controversy.

Fourthly, it is clear that the courts will go to significant lengths to avoid articulating principles which could result in a confrontation between two arms of government. Where the fact that parliament has overstepped the limits of its legislative power can be shown by reference to a provision in

a written constitution, courts will declare the statute invalid and no issue of legitimacy arises. However, there would appear to be real, though ill-defined, limits on the extent to which a parliament, whether state or federal, can redefine the role of the judiciary. It may be that these limits will never be explored in Australia. The structure of judicial power provided in Chapter III of the Constitution recognises the existence of State Supreme Courts and identifies them as repositories of federal jurisdiction. Accordingly, any hypothetical attempt to remove the supervisory jurisdiction of a State Supreme Court might be found to be inconsistent with Chapter III.

Further, there are no doubt pragmatic considerations of a political kind which make it unlikely (though not of course impossible) that there would be a major constitutional confrontation between a State legislature and its courts. Our constitutional structures provide not only a degree of separation of powers but also an inter-dependence between the three arms of government. It is not seen as inconsistent with the independence of the judiciary that its members are appointed by the executive government, that there may be opportunities for promotion of existing judges to higher offices and that their salaries and facilities are paid by the executive government and by the parliament through budgetary allocations. To similar effect, the courts and litigants depend upon the executive to provide the means for enforcing judgments. The system involves not merely checks and balances, but a high degree of co-operation.

It may thus be seen that an effective system of judicial review provides a critical element in the protection of human rights and fundamental freedoms in Australia. Complaints that we do not have a Bill of Rights sometimes ignore the extent to which controls over executive action exist and are enforced through the present judicial system. On the other hand, concerns that a Bill of Rights would confer far greater powers on the judiciary, having broad political ramifications, also ignore the extent to which the judiciary is currently involved in the protection of such rights. There are a number of countries which provide stable government and a high level of protection of human

rights, of which Australia without a Bill of Rights is one, which may be compared with a larger group of countries, many of which have constitutional protections for human rights, but which provide lesser protection in practice. None of that is to say that the Australian system of government could not be improved, but it is an attempt to reflect upon the extent to which we have recognised protections under the general law. Those principles, which include principles of statutory interpretation, have been effectively used in the past to avoid a confrontation of the kind foreshadowed by Lord Steyn should a legislature seek to abolish judicial control over unlawful executive action.

To finish by returning to the quotation from *Milirrpum* with which I opened, it is notable that a judge steeped in the traditions of British constitutionalism and the common law, should be able to recognise with great clarity the operation of the rule of law in an Aboriginal society without the structures of government to which we are accustomed and without any hint of contact with systems of government with which other Australians generally are familiar.

In a way, it is less surprising that judicial opinion, such as that of the Privy Council in an appeal from the then colony of Southern Rhodesia in 1919, held that 'some tribes are so low in the scale of social organisations that their usages and conceptions of rights and duties are not to be reconciled with the institution or legal ideas of civilized society'.[44] Judicial opinion is never entirely divorced from the attitudes of the times. Nevertheless, there is a very real sense in which the protection of human rights depends upon a culture of tolerance and open-mindedness and on careful inquiry as to the facts, an approach inconsistent with submitting too readily to the easy answers provided by prejudice or populist views. To approach the law in this spirit is undoubtedly to give continuing life to the standards and values by which Sir Ninian Stephen has lived and worked for many years. It is to

[44] See *In Re Southern Rhodesia* [1919] AC 211, 233-234 (Lord Sumner).

such models that we must all look for inspiration, recognising that the legal culture of commitment to the rule of law is itself an important, though amorphous, element in the protection of human rights. In continuing and preserving this tradition we must all play a part, not merely judges, but practicing lawyers, academic lawyers and students.

Finally, I would like to record that I for one have found inspiration closer to your home. When I commenced practice at the Bar more than 25 years ago, I became steeped in the principles of human rights and anti-discrimination law as a result of a long collaboration with your former Dean, Professor Neil Rees. I first met Neil at the University of New South Wales where he came to establish a clinical legal education program, which resulted in the Kingsford Legal Centre. When he left for Newcastle he continued that commitment to clinical legal education and it should be a matter of great pride to the Faculty that you have maintained an excellent legal centre through times which are not always friendly to such resource intensive activities. I am sure many of you will benefit greatly from involvement in its programs.