SOCIAL JUSTICE AND THE CONSTITUTION – FREEDOMS AND PROTECTIONS

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I Introduction

I am told that the theme for this lecture, in honour of Marylyn Mayo, is a subject which was close to her heart – social justice.

The term social justice has a number of dimensions which change with the times. In the latter part of the 20th century, it came to be associated with equality of opportunity for access to law, education, employment, health and community facilities[1]. In the context of law, social justice may encompass access to the courts and representation in proceedings in them.

Social justice may also encompass the procedural aspects of decision making and refer to rules, practices or norms which govern that process. An example of such a rule is that developed by the common law – to provide natural justice or procedural fairness. Such a rule comes into play where a person's rights, freedoms, entitlements or interests may be affected by a decision.

Yet another aspect of social justice involves the idea that each person should be able to enjoy basic liberties or freedoms[2]. It is the freedoms which the Australian Constitution guarantees that I wish to discuss today. The Constitution does not contain a bill of rights and does not contain express reference to many rights or freedoms. My discussion of those provisions will therefore be brief. Why was more, by way of protection of rights, not provided by those framing the Constitution? What part has the High Court since played in finding implications and drawing inferences from the Constitution and the matters upon which it is framed?

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1 John Fleming, 'Social justice' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 628.

2 John Rawls, *Political Liberalism* (Columbia University Press, 1993) 291.

II Express constitutional rights and freedoms

The few rights or freedoms expressly mentioned in the *Constitution* include: just terms when the Commonwealth acquires our property (s 51(xxxi)); a trial by jury when charged with an indictable offence (s 80); freedom of religion (s 116); and freedom of trade and intercourse between the States (s 92). The High Court has also identified a number of provisions which manifest the notion of legal equality by prohibiting discrimination between persons in different parts of the country in relation to customs and excise duties (ss 86, 88 and 90), taxes (s 51(ii)), and bounties (ss 51(iii), 86 and 90), and by prohibiting the preference of one State over another by a law of trade, commerce or revenue (s 99). Direct suffrage is guaranteed and a resident in any State is not to be subject to a disability or discrimination in another State (s 117). Many of these guarantees were very important to achieve and maintain federation and they remain important to the relationship between Commonwealth and State laws, but they are not personal rights which may be regarded as important by the average citizen.

The rights or freedoms mentioned in *Wong v The Queen (2001) 207 CLR 584, 608 [65]; Green v The Queen (2011) 244 CLR 462, 472-473 [28]* which are closer to human rights or fundamental freedoms are the rights to trial by jury and to freedom of religion. The interpretation of them has been somewhat limited. The right to trial by jury is expressed by s 80 to apply when there is an indictment and the High Court has consistently held that the legislature can determine what is an indictable offence. So construed, s 80 may not be thought to be much of a protection. Dixon and Evatt JJ thought this interpretation of s 80 to be a 'queer intention to ascribe to a constitution'.[3] There is another aspect to s 80 which has not been the subject of much attention. Does it entrench fundamental aspects of the system of trial as at Federation? In *The King v Snow,*[4] Griffith CJ there said that:

> [t]he history of the law of trial by jury as a British institution … is, in my judgment, sufficient to show that [s 80] ought prima facie to be construed as an adoption of the institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England.

Section 116 of the *Constitution* prohibits the Commonwealth from making

[3] *The King v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 581.

[4] (1915) 20 CLR 315, 323.

a law for establishing a religion, imposing any religious observance or prohibiting the free exercise of religion. No religious test can be required as a qualification for any office of the Commonwealth. No-one could doubt the importance of s 116. Justices Mason and Brennan have described freedom of religion as 'the paradigm freedom of conscience' and 'the essence of a free society',[5] but there have been very few cases alleging an infringement of s 116 and in no case has a law been struck down on account of that provision. Most recently, in *Williams v The Commonwealth ('The School Chaplains Case')*,[6] the case for invalidity under s 116 failed because the chaplains employed under the scheme funded by the Commonwealth did not contract with the Commonwealth and were held to hold no office under the Commonwealth.

Some commentators have suggested that the High Court should interpret s 116 broadly in order to promote individual liberty.[7] Some argue that the Court should find an implied right to freedom of thought and conscience.[8] There do not seem to have been many opportunities for such arguments to be ventilated. The statement by Justices Mason and Brennan about the importance of the freedom was made in a judgment concerning payroll tax.

That is about the extent of express textual references in the *Constitution* to rights or freedoms. Why are there not more?

III Implied constitutional rights and freedoms

It is said that the framers of the *Constitution* deliberately chose not to incorporate a bill of rights in the *Constitution* because they believed that the common law and the principle of representative and responsible government, for which the *Constitution* provides, would adequately protect basic rights and freedoms.[9] As Barton J was later to observe, the new Federation assured Australians 'the right of access to the institutions, and of due participation in the activities of the nation'.[10] On the other hand, litigation in the late 19th century,

5 *Church of the New Faith v Commissioner of Pay-roll Tax (Vict)* (1983) 154 CLR 120, 130 (Mason ACJ and Brennan J).

6 (2012) 86 ALJR 713; 288 ALR 410.

7 George Williams, 'Civil Liberties and the Constitution – A Question of Interpretation', (1994) 5 *Public Law Review* 82, 102.

8 Gonzalo Villalta Puig and Steven Tudor, 'To the advancement of thy glory?: A constitutional and policy critique of parliamentary prayers', (2009) 20 *Public Law Review* 56, 66-68

9 See, eg, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ).

10 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 109-110 (Barton J).

when the *Constitution* was drafted, has been described as 'profoundly bourgeois' and concerned with property, and the common law of England was not so much concerned with rights and freedoms at that time.[11]

The framers were of course aware of the constitutional model of the United States and the rights there provided; perhaps we should be grateful that we do not have the dead hand of constitutional provisions which limit our legislative ability, for example, to control firearms. The treatment of that topic in the United States highlights the fact that a right or freedom declared in a constitution is subject to the interpretation of judges. As a result, the right to bear arms has been thus far interpreted in accordance with its historical origins. The approach taken to our *Constitution* is to interpret it as a living document, adaptable to its times.[12]

Alfred Deakin, one of the framers of the *Constitution*, had no doubt about the role of the High Court in interpreting and defining the *Constitution*. It may be seen from his second reading speech in 1902, on the bill which became the *Judiciary Act,* that he was not referring to a literal interpretation of the text of the *Constitution* when he said:

> Owing to the federal *Constitution* introduced by the Commonwealth Act, a new state of affairs has been brought about, in which this court, in the exercise of its ordinary jurisdiction, is given a most potent voice. It will define and determine the powers of the Commonwealth itself, the powers of the States, which subsist within it, and the validity of the legislation flowing from them. All these have to be defined by this new court. Its first and highest functions as an Australian court – not its first in point of time, but its first in point of importance – will be exercised in unfolding the *Constitution* itself. That *Constitution* was drawn, and inevitably so, on large and simple lines, and its provisions were embodied in general language, because it was felt to be an instrument not to be lightly altered, and indeed incapable of being readily altered; and, at the same time, was designed to remain in force for more years than any of us can foretell, and to

11 Fleming, above n 1, 628.

12 See, eg, *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29, 81 (Dixon J); *The Commonwealth v Tasmania* (1983) 158 CLR 1, 126-127 *('The Tasmanian Dam Case'); Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171-173 (Deane J); *Singh v The Commonwealth* (2004) 222 CLR 322, 334-335 [16]-[18] (Gleeson CJ).

> apply under circumstances probably differing most widely from the expectations now cherished by any of us. Consequently, drawn as it of necessity was on simple and large lines, it opens an immense field for exact definition and interpretation. Our *Constitution* must depend largely for the exact form and shape which it will hereafter take upon the interpretations accorded to its various provisions. This court is created to undertake that interpretation.[13]

There was no impetus for the implication of freedoms in the *Constitution* in 1920, when the *Engineers' Case* was decided. There was no social expectation of the recognition of such freedoms as were later found in the *Constitution* and the Court did not appear to be minded to fulfil the expectations of Deakin. The majority in the *Engineers' Case* said that it should read the *Constitution* as it would a statute and that it should 'read the language of the statute in what seems to be its natural sense'.[14] This approach was emphasised as being the 'golden rule', the 'universal rule',[15] and 'the only safe course'.[16] Many saw statements in the *Engineers' Case* as excluding the making of any implications in the *Constitution*.

Dixon J was quick to contradict this notion (well relatively quick in the way of constitutional cases – 17 years later). In *West v Commissioner of Taxation (NSW),*[17] he questioned the contemporary thinking on the subject, which he considered to be contrary to a correct analysis of the *Engineers' Case*. He said:

> Since the *Engineers' Case* a notion seems to have gained currency that in interpreting the *Constitution* no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied. I do not think that the judgment of the majority of the court in the *Engineers' Case* meant to propound such a doctrine.

13 Commonwealth, *Parliamentary Debates,* House of Representatives, 18 March 1902, 10965 (Alfred Deakin).

14 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 149 (Knox CJ, Isaacs, Rich and Starke JJ), citing *Vacher & Sons Limited v London Society of Compositors* [1913] AC 107, 113 (Viscount Haldane).

15 Ibid 148.

16 Ibid 149.

17 (1937) 56 CLR 657, 681-682 (Dixon J).

Eight years later, in *Australian National Airways Pty Ltd v The Commonwealth,*[18] Dixon J reaffirmed his position, stating forcefully that '[we] should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications'.[19] Windeyer J later added his view that it was too sweeping a statement to say that the *Engineers' Case* left no room for implications in the *Constitution*.[20] His Honour said:

> [I]mplications have a place in the interpretation of the *Constitution*. … The only emendation that I would venture is that I would prefer not to say 'making implications', because our avowed task is simply the revealing or uncovering of implications that are already there.

This view was shared by Mason CJ, in 1992, in *Australian Capital Television Pty Ltd v The Commonwealth,* where his Honour drew a distinction between an 'implication' and an 'unexpressed assumption'.[21] The former, his Honour said, 'is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside [it].'

The notion of freedoms and rights gained currency in the years following World War II. The *Australian Communist Party v The Commonwealth,*[22] which was decided in 1951, was and remains significant not the least for Dixon J's statement that the *Constitution* is founded upon the rule of law. In the post-war period, we can see Australia contracting with other countries in recognition of the need to protect people such as refugees. It is worth recalling that Australia remains a party to the Refugees Convention and that this continues to inform the interpretation of statutes concerned with that aspect of migration.[23] As the numbers of international treaties grew over the years, a broader world community, of which Australia was a member, could be seen as engaged in the recognition and protection of basic and fundamental human rights and freedoms, as well as in the creation of economic prosperity. In the 1970s, human

18 (1945) 71 CLR 29, 85 (Dixon J).

19 See also *Lamshed v Lake* (1958) 99 CLR 132, 144 (Dixon J).

20 *Victoria v The Commonwealth* (1971) 122 CLR 353, 401-402 (Windeyer J).

21 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).

22 (1951) 83 CLR 1, 193 (Dixon J) ('*Australian Communist Party Case'*).

23 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) as amended by the *Protocol relating to the Status of Refugees*, signed 31 January 1967, 606 UNTS 8791 (entered into force 4 October 1967).

rights legislation was implemented in Australia.

By the 1980s, a large question emerged about access to justice, but there was also an inevitable tension between the expectation of access to the courts and the ability or willingness of government to fund it. In the late 1980s, there was an effective restriction in legal aid funding as a result of increased demands, with which government budgets failed to keep pace. The High Court decision in *Dietrich v The Queen*[24] was one response, holding that an impecunious person accused of a serious crime was entitled to legal representation at his or her trial.

What else was happening at this time? The validity of the *Racial Discrimination Act* 1975 (Cth) was upheld in 1982, in *Koowarta's Case,*[25] and the principle it enshrined, of equal access to human rights and freedoms regardless of race, applied in *Mabo*.[26]

This may be seen as part of the background to the implied freedom of political communication which was held, in the early 1990s, by the Court to be guaranteed by the *Constitution*.[27] But steps towards those decisions had been taken years earlier. This was not the first occasion on which the Court had interpreted the *Constitution* other than by reference to its express provisions. The Court had had no difficulty, much earlier, in drawing an inference that the Commonwealth was prohibited from exercising its powers in a way which might threaten the continued existence of the States.[28] It did so by drawing upon the federal structure of the *Constitution* and the position of the States within it. In making the implication about freedom of communication, the Court similarly drew upon aspects of the *Constitution* relating to representative government in a democracy.

IV The implied freedom of political communication

In Australia, we take the ability to vote rather for granted, indeed so much so that the question before the Court in *Rowe v Electoral Commissioner*[29] in 2010 was whether persons who had not bothered to register to vote until after the deadline set by the *Commonwealth Electoral Act* 1918 (Cth), should be

24 (1992) 177 CLR 292. See also *McInnis v The Queen* (1979) 143 CLR 575.

25 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ('Koowarta's Case').

26 *Mabo v Queensland* (1988) 166 CLR 186 ('Mabo').

27 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

28 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.

29 (2010) 243 CLR 1.

entitled to vote. The Court, by a majority, held that they were. And in *Roach v Electoral Commissioner,*[30] in 2007 a law that disqualified prisoners from voting was declared invalid. The franchise is regarded as fundamental to the *Constitution*.

Although at federation the grant of the franchise was restricted (it did not extend to women or Aboriginal persons), its width was a remarkable achievement. It broke with the English past and the concentration of political power in the hands of those who had property. It recognised the demands, sometimes violent, for representation by the miners in Victoria, where the franchise was extended in 1854. Thus a central plank of the *Constitution* is the representation of the people by a responsible government in a democratic society. In his text in 1910, Harrison Moore remarked that '[t]he great underlying principle is that the rights of individuals are sufficiently secured by ensuring as far as possible to each a share, and an equal share, in political power'.[31] These principles find expression in ss 7 and 24 of the *Constitution*, which provided the foundation for the later implication of freedom of political communication.

The development of the principles relating to representative democracy and the implication to which they gave rise is readily traced. In 1975 in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*,[32] Stephen J discerned '[t]hree great principles' from s 24 of the *Constitution*: representative democracy (which is to say that the legislators are chosen by the people); direct popular election; and the national character of the lower House. Once this is understood, it does not seem so great a step to recognise that communication between citizens about politics and government is necessary if effect is to be given to those principles. The principles were revisited and given effect in *Nationwide News Pty Ltd v Wills*[33] and *Australian Capital Television Pty Ltd v The Commonwealth.*[34]

Nationwide News concerned a provision of the *Industrial Relations Act 1988* (Cth) which made it an offence to use words calculated to bring the Australian Industrial Relations Commission into disrepute. Nationwide News published an article about the Commission and was charged under the Act. It challenged the constitutionality of the provision. The Court unanimously held the provi-

30 (2007) 233 CLR 162.

31 William Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910) 616.

32 (1975) 135 CLR 1, 56 (Stephen J).

33 (1992) 177 CLR 1.

34 (1992) 177 CLR 106.

sion to be invalid. Three Justices found it to be ultra vires legislative power and four held it to breach the implied freedom of communication about governmental matters.

Brennan J sourced the implication in the principle of representative democracy, itself implied by ss 7 and 24. His Honour considered that the principles of representative and responsible government:[35]

> [A]re constitutional imperatives which are intended – albeit the intention is imperfectly effected – to make both the legislative and executive branches of the government of the Commonwealth ultimately answerable to the Australian people. Under the Westminster model, these principles might be trespassed upon by legislation emanating from an omnicompetent Parliament but the Parliament of the Commonwealth is incompetent to alter the principles prescribed by the *Constitution* to which it owes its existence. It is a Constitution the text of which the people alone can change.

His Honour then said '[t]o sustain a representative democracy embodying the principles prescribed by the *Constitution*, freedom of public discussion of political and economic matters is essential'.[36]

In *Australian Capital Television,* Mason CJ elaborated upon the link between the implied freedom of communication and representative democracy and said that freedom of communication is indispensable to the accountability and responsibility of government, at least in relation to public officers and political discourse. Freedom of communication is so indispensable that it is necessarily implied.[37]

In *Theophanous v Herald & Weekly Times Ltd,*[38] the principle was extended. The Court held that implicit in the *Constitution* is a freedom to publish material:

a) discussing government and political matters;

b) of and concerning members of the Parliament of the Commonwealth, which relates to the performance of their duties as members of Parliament or parliamentary committees; and

35 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47 (Brennan J).

36 Ibid.

37 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 10, 138-140.

38 (1994) 182 CLR 104.

c) in relation to the suitability of persons for office.

The series of cases concerning the freedom culminated in *Lange v Australian Broadcasting Corporation,*[39] where a unanimous Court held that:

> ss 7 and 24 and the related sections of the *Constitution* necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.[40]

Such communications, explained the Court, were central to the system of representative government as it was understood at federation. While the system of representative government is not expressly mentioned in the *Constitution*, it could hardly be doubted that the elections of which it speaks were intended to be free and to involve a choice – that choice requires an appreciation of the available alternatives.

Lange is also important because it laid down a test to be applied to legislation which had the effect of restricting the freedom of communication which was implied in the *Constitution*. A test was necessary because the freedom could not be regarded as absolute.[41] Freedoms, even fundamental freedoms associated with human rights, rarely are. This particular freedom is limited to what is necessary for the effective operation of the system of representative and responsible government for which the *Constitution* provides.

The test which *Lange* provided[42] is one which determines the limits of legislative power. The test, which was slightly modified later in *Coleman v Power;*[43] asks whether the law which restricts the freedom is compatible with the maintenance of representative and responsible government. This is something of a threshold test. If the law's objects are legitimate, it asks whether the restrictions are proportionate to its object. In that respect, the law, by the restrictions it imposes, should go no further than is reasonably necessary to achieve its objective. This test of proportionality, that of 'reasonable necessity', is conformable with that which applies in connection with the freedom granted by s 92 of the *Constitution*, namely freedom of trade and commerce between the States.

The *Lange* test was applied earlier this year in *Monis v The Queen,*[44] which

39 (1997) 189 CLR 520.
40 Ibid 560.
41 Ibid 561.
42 Ibid 567.
43 (2004) 220 CLR 1, 50 [93], 51 [95]-[96], 78 [196].
44 (2013) 87 ALJR 340; 295 ALR 259.

concerned a provision in the *Criminal Code 1995* (Cth) that made it an offence to send offensive communications through the post. The communications in question were mostly directed to the parents of soldiers who had been killed in action in Afghanistan and contained highly personal attacks on the deceased soldiers. But the communications also made comments about the correctness of the war in Afghanistan and some copies of letters were sent to politicians. It had been held in the courts below, and was not challenged on the appeal to the High Court, that the communications were of a political nature. A similar concession was made in *Coleman v Power*. Perhaps the resolution of that issue would have been desirable in both cases. Not every statement containing a political message should necessarily qualify the rest of a communication as political. The freedom could be abused if protection was extended in that way. But the opportunity has not yet presented itself to the Court to determine how this issue is to be dealt with.

In *Monis*, the issue for the Court was whether the offence provision in the *Criminal Code 1995 (*Cth) was valid, which, following *Lange*, raised the question whether it was a disproportionate interference with the implied freedom. The Court divided evenly on the question, a rare event. The Court was constituted by only six Justices because of the pending retirement of a Justice at the time it was heard.

V The Kable principle

In the same volume of the Commonwealth Law Reports which contains the judgment in *Lange*, appears the decision of *Kable v Director of Public Prosecutions (NSW),*[45] which was the forerunner to the Court's development of Chapter III jurisprudence. Provisions of the *Community Protection Act 1994* (NSW) provided that the Supreme Court of New South Wales could make an order for the continued detention of a specified person in prison, after that person had served the term of his sentence, if satisfied on reasonable grounds that he was more likely than not to commit a serious act of violence. The Act specifically named Mr Gregory Kable as its subject. He had served a term of imprisonment for the manslaughter of his wife. Whilst serving that term, he made threats of violence to persons by sending letters through the mail and it was no doubt feared that he would carry out those threats when released.

In *Kable*, it was argued that the Act providing for Mr Kable's detention was invalid because it amounted to a legislative judgment on an individual. *Poly-*

[45] (1996) 189 CLR 51 ('*Kable*').

ukhovich v The Commonwealth[46] had held that a bill of attainder was inconsistent with the separation of judicial power provided for in Chapter III of the *Constitution* because it amounted to a declaration of guilt by the Parliament. The separation of the legislative, executive and judicial powers at a federal level is itself an implication this Court has made, largely by reference to the structure of the *Constitution*.

However, the notion of a court being the only institution which could exercise judicial power was not thought to apply to State courts, in the context of a State constitution. This was overcome in *Kable* because it was recognised that State courts may exercise federal jurisdiction under the *Constitution*. The principle which *Kable* and following cases established was one involving the institutional integrity of all courts which are capable of exercising federal jurisdiction. Any legislation which requires State courts to act in a way which is incompatible with their institutional integrity is invalid.

The courts are not to be used as the mere instruments of the executive. A passage from *Mistretta v United States*[47] has been quoted on a number of occasions in *Kable* jurisprudence. There it was said that:

> The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colours of judicial action.

It was recently observed in argument before the High Court that the *Kable* principle has been invoked – on appeals and on applications for special leave – on some 87-odd occasions.[48] If this is so, it is interesting, since it is also said that even intermediate appellate courts have found it difficult to understand.[49] There may also be something drawn then from the fact that it was also said that of those 87 occasions, the argument has only been successful four times.

The principle has been applied most recently in cases involving legislation which seeks to restrict the ability of persons to associate amongst themselves. The object of such legislation, which has been introduced in most, if not all, States, is to disrupt the activities of criminal groups. Its target is 'biker' organisations, but it is not, in terms, restricted to them. The questions which that

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46 (1991) 172 CLR 501 ('*War Crimes Act Case*').

47 488 US 361, 407 (1989).

48 Transcript of Proceedings, *State of NSW v Kable* [2013] HCATrans 71 (9 April 2013) 1770.

49 *South Australia v Totani* (2010) 242 CLR 1, 95 [245] (Heydon J).

type of legislation raise concern the role it requires the courts to play under it.

The framework of the legislation in these cases involves two principal steps. In the first place, an order is made declaring an organisation to be a 'criminal organisation' on proof of criminal activities undertaken by its members. An order called a 'control order' is then made against an individual, which has the effect that he (or she) is not able to associate with other members of the organisation.

In the legislation considered in *South Australia v Totani,* the Attorney-General, not a court, made the first declaration regarding an organisation.[50] No court had any part in the fact-finding on that matter. A provision of the legislation then obliged the Magistrates Court to make a control order against any person who was a member of a criminal organisation so declared. The only fact required to be proved before the Court was the fact of membership. The Court was in effect rubber stamping the decision of the Attorney-General. The legislation was considered to be an enlistment of the Magistrates Court to implement a decision of the executive. In the words of *Mistretta*, the executive borrowed the reputation of the Court to give the control order the appearance of a judicial decision. It was held to be repugnant to the institutional integrity of the Court.

More recently, and closer to home, in *Assistant Commissioner Condon v Pompano Pty Ltd,*[51] judgment which was handed down earlier this year, the independence of the Supreme Court of Queensland was in issue. The legislation there gave a judicial function, that of making the control order, to the Court. Rather, in challenging the legislation, it was suggested that the Court was not able to provide procedural fairness to a defendant because the legislation denied a defendant, and the defendant's legal advisors, access to certain sensitive information, in the nature of criminal intelligence, yet the Court could have regard to that information in making the order. Essential to the High Court's reasoning in upholding the legislation as valid was that a Supreme Court judge nevertheless retained the power to prevent unfairness to a defendant. The Supreme Court could ensure that the defendant was given particulars of the case against him (or her) as the legislation required. At any point, the Court had the power to stay proceedings to prevent injustice. The integrity of the Supreme Court was not compromised – it had not been conscripted to the work of the executive.

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50 Ibid.

51 (2013) 87 ALJR 458; 295 ALR 638.

VI The rule of law

The remaining unwritten aspect of the *Constitution* I wish to discuss is the rule of law. Dixon J in the *Australian Communist Party Case*[52] said that the *Constitution* is founded upon a number of traditional conceptions. One assumption upon which it is founded is the rule of law. That case was heard during the period of the Cold War. The Federal Parliament passed legislation which dissolved the Australian Communist Party and gave the executive government power to declare other affiliates'unlawful'. The *Constitution* does not give the Commonwealth the power to make laws regarding unincorporated associations, but it does give it powers regarding the defence of the Commonwealth and the States. The preamble to the challenged legislation cited the reasons why the Parliament thought the legislation was necessary for Australia's defence, even though Australia was not at war. The High Court was adamant that only the Court, not the Parliament, could decide whether a law bore the character of a law with respect to military defence. The connection between the concept of the rule of law and the need for an independent judiciary may readily be seen. Were it otherwise, Parliament could pronounce on the validity of its own legislation and 'the stream would rise above its source', to use the maxim adopted by various members of this Court.

Rule of law conceptions are of long standing. Some time ago, Gleeson CJ, writing extra-judicially on the courts and the rule of law,[53] referred to a letter written in 1827 by the Chief Justice of the Supreme Court of New South Wales to the Under-Secretary of State for War and the Colonies concerning the relationship between the Supreme Court and the Governor.[54] The Chief Justice said 'the judicial office … stands uncontrolled and independent, and bowing to no power but the supremacy of the law'. And this, Gleeson CJ observed, was written some 50 years before A V Dicey wrote his treatise on the rule of law.

As an idea of government, the essence of the rule of law is that all authority is subject to, and constrained by, law. So understood, it has been regarded as a fundamental assumption upon which all branches of government operate. It explains the principle of legality, which expects that the legislature does not intend to remove or affect fundamental rights or freedoms. A statutory provision

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52 *Australian Communist Party Case* (1951) 83 CLR 1, 193.

53 Chief Justice Murray Gleeson, 'Courts and the Rule of Law' (Speech delivered at the Rule of Law Lecture Series, The University of Melbourne, 7 November 2001).

54 J M Bennett (ed), *Some Papers of Sir Francis Forbes: First Chief Justice in Australia* (Parliament of NSW, 1998) 143.

will be taken not to have so intended unless it speaks with irresistible clarity.[55] If the intention is to restrict freedoms, it is to be expected that the legislature will be forthright and be prepared to pay any political price.

There are many other aspects to the rule of law. In the aforementioned paper, Gleeson CJ identified a number of areas in which the Court had invoked the rule. They included recognition of the requirements that: there be a minimum capacity for judicial review; citizens have the right to a fair trial and to privileged communications with legal advisers; citizens have access to the courts to seek to prevent the law from being ignored or violated, subject to reasonable requirements as to standing; and citizens are equal before the law. To that list may be added the following, more recent, examples: open justice – that courts sit in public and accord procedural fairness;[56] equal justice – that like cases be treated alike and, where the law permits, that people be treated differently according to the relevant differences between them;[57] feasibility – that obligations imposed by law should not be impossible to comply with;[58] and universality – that the executive has no power to grant dispensation from a statute.[59] The rule of law has been held to confirm the constitutional requirement, expressed in s 75(v), of judicial review of acts of officers of the Commonwealth. It has been held that this cannot be taken away.[60]

VII Conclusion

In summary, features of the *Constitution*, and the assumptions upon which it is founded, have been drawn upon by the High Court to flesh out aspects of it. As Alfred Deakin indicated in 1902, this is what the framers of the *Constitution* intended when they drew the *Constitution* on 'simple and large lines'. It was in order to facilitate flexible and adaptive interpretation that so little, by way of protection of rights, was expressly provided by those framing the *Constitution*.

The High Court has set about performing this task. Drawing upon the provisions respecting representative government in a democracy, the implication of freedom of political communication was made. Chapter III, and its im-

55 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15].

56 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [48].

57 *Wong v The Queen* (2001) 207 CLR 584, 608 [65]; *Green v The Queen* (2011) 244 CLR 462, 472-473 [28].

58 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 587 [120].

59 *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348, 359-360 [13].

60 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 482 [5].

plication of separate and independent courts exercising federal jurisdiction, was used to create a rule of incompatibility of legislation which threatens the institutional integrity of the courts. The rule of law is consistently drawn upon to ensure equality of treatment and access to the courts, and to limit legislative interference with common law rights and freedoms.

Some of the decisions effecting these developments in the law were controversial. Views may differ regarding the extent to which the Court should make implications, draw inferences or state assumptions. Others may say that the Court does not go far enough and that it should pronounce these features to be in the nature of personal rights, capable of vindication in the courts. At present, and consistent with the general approach to the construction of the *Constitution*, the freedom or protections identified are viewed as restrictions on legislative power, rather than as personal rights.

It remains important, in any event, that the implications, inferences and assumptions are capable of offering protection, in the nature of constitutional guarantees, of basic liberties or freedoms, and thus protecting an aspect of social justice. The implied freedom of communication protects the ability of a person to speak reasonably freely on matters of politics and government. The *Kable* principle has been recognised, even by a critic,[61] as having had 'extremely beneficial effects' in that it has influenced governments to include safeguards for the liberty of persons affected by legislation. The rule of law assumptions provide procedural, as well as formal, protection. The expectations of the founders – that the High Court would give the *Constitution* work to do – have, to an extent, been realised.

[61] International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319, 79 [140] (Heydon J).

MABO ORATION