

**Implications of the proposed *Human Rights Act*
for the rule of law as manifested in Australian courts¹**

Richard McHugh²

I had an epiphany watching the evening news one night many years ago when I was living in New York. Two New Jersey surfers, who seemed to be teenagers, were giving an interview. The State had closed their beaches during a storm. The surfers were outraged. They said the State had violated their “constitutional right to surf”.

They certainly had a legitimate grievance. The waves were no more than one or two feet — big surf for New Jersey, but hardly life-threatening. But what amazed me was the language which these two teenagers, who did not appear to have been to law school, chose to articulate their grievance. It struck me that talk about rights can get out of hand.

My topic is the implications of the statutory *Human Rights Act* proposed by Father Brennan’s Committee³ for the rule of law in Australia as manifested in our courts. I should make clear that my topic is not whether or not such an Act would be good policy. For what little it may be worth, my own view is that on balance the potential advantages of such an Act have not been shown to exceed the potential disadvantages.

But that is a different question from the question whether the proposed Act would undermine the rule of law. My expectation is that, at least in the short term, the proposed Act will have little impact on the rule of law as manifested in the day to day work of the courts. But it is possible that the proposed Act could so affect the relationship of the courts with the other branches of government as to undermine the public confidence in our courts which is essential to the rule of law.

The two features of the proposed *Human Rights Act* which are most likely to raise issues about the rule of law in our courts are:

- (a) the proposed general interpretive provision; and
- (b) the proposal to give the High Court power to make “declarations of incompatibility”.

The rule of law

But before turning to the Report’s proposals, it is necessary to give some content to the concept of the rule of law. It would be possible to spend a day on that question alone, but for present purposes I will take as my starting point a paper given by Chief Justice

¹ Paper presented (in abridged form) to conference “Is the Rule of Law under challenge in Australia?” held by The Rule of Law Association of Australia and the New South Wales Bar Association, 20 November 2009

² Senior Counsel, New South Wales Bar

³ *Report on the Consultation into Human Rights in Australia*, Father Frank Brennan AO (Chair), Mary Kostakidis, Tammy Williams, Mick Palmer AO APM (Members), 30 September 2009, Part Four.

Gleeson on “Courts and the Rule of Law”.⁴ The Chief Justice stated that his purpose “was to examine some features of the way in which the principle of the rule of law affects, and influences the role of, the judicial branch of government in Australia at the beginning of the 21st century”. While recognising that various “contestable claims” were made about the substantive content of the rule of law, Chief Justice Gleeson described the core of the concept as follows.

“As an idea about government, the essence of the rule of law is that all authority is subject to, and constrained by, law. The opposing idea is of a state of affairs in which the will of an individual, or a group, (such as a Party) is the governing force in a society. The contrasting concepts are legitimacy and arbitrariness. The word ‘legitimacy’ implies an external legal rule or principle by reference to which authority is constituted, identified, and controlled.”⁵

The Chief Justice gave a number of examples of judgments in the High Court of Australia which assert “practical conclusions said to be required by the principle of the rule of law”. Particularly important for present purposes are the propositions:

“that there must be separation between executive and judicial functions”; and

“that judicial decisions are to be made according to legal standards rather than undirected considerations of fairness”.

It seems to me that the features of the rule of law most relevant to the question whether the proposed *Human Rights Act* is a challenge to the rule of law as it affects the work of Australian courts are:

- (a) legitimacy as opposed to arbitrariness in the exercise of legislative power, in the sense that laws are made by the elected representatives of the people in Parliament;
- (b) legitimacy as opposed to arbitrariness in the exercise of judicial power, in the sense that judicial decisions are to be made according to externally identifiable legal standards rather than idiosyncratic notions of what is just, fair or appropriate; and
- (c) following from (a) and (b), the separation of judicial from legislative and executive powers. The separation of judicial power involves the propositions not only that it is for the courts as opposed to the other branches of government to determine what the law is, but also that the courts’ function is judicial rather than legislative or executive.

Those are three propositions which, expressed at that level of generality, are unlikely to be controversial. The disagreement tends to start as soon as one tries to give the principles practical content or to apply them to specific situations. So, before I turn to the proposed *Human Rights Act* and the question whether it presents a challenge to the

⁴ “Courts and the Rule of Law”, the Hon Murray Gleeson AC, then Chief Justice of Australia, 7 November 2001, available at http://www.hcourt.gov.au/speeches/cj/cj_ruleoflaw.htm#_edn6. Unfortunately, the document in that form lacks page numbers for purposes of further citation.

⁵ Citations omitted

rule of law as it operates in Australian Courts today, I need to say something about what our courts actually do in practice.

There are three bodies of law to consider when considering the work of our courts: the general law, statutes and the Constitution.

The courts and the general law

The courts are responsible for stating, developing and applying the general law, by which I mean the common law and equity. The declaratory theory of the common law is long dead. The general law is not a fixed body of rules. It has evolved over hundreds of years and continues to do so to this day. In that sense, the courts' development of the common law and equity undoubtedly involves a law-making function. But it is not the same as the legislative function of Parliament. As Justices Gaudron and McHugh said in *Breen v. Williams*,⁶ an important decision concerning a patient's right of access to medical records under the general law:

“Advances in the common law must begin from a base line of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must ‘fit’ within the body of accepted rules and principles. The judges of Australia cannot, so to speak, ‘make it up’ as they go along. It is a serious constitutional mistake to think that the common law courts have authority to ‘provide a solvent’ for every social, political or economic problem. The role of the common law courts is a far more modest one.”

Those “conventional methods of legal reasoning” involve recognition of a number of constraints, even in the High Court. These include due regard for precedent and established principle, the necessity for the general law to conform to the Constitution,⁷ the need to retain coherence⁸ in the general law as a whole, the practical reality that any development in the law must be addressed to the particular facts of the case before the court, and, more generally, the need to articulate the courts' reasons for decision in a way that exposes them to public scrutiny. In courts below the High Court these constraints are, at least generally speaking, felt all the more heavily by the judges. There is a further constraint on judges of inferior courts: the need to follow decisions of courts higher in the appellate hierarchy, even if the lower court perceives the decisions to have been decided *per incuriam*.

At the same time, the common law has a long tradition of pragmatic reasoning, by which precedent and principle are adapted to the requirements of justice in the particular case. From a practitioner's standpoint, it often seems that there are more exceptions than rules under the general law. And the High Court has a well-established power to depart from earlier decisions. If it concludes that an earlier case — even one of longstanding authority — was wrongly decided, it is the duty of the Court to say so. Chief Justice Marshall's famous pun on the Latin roots of the word “jurisdiction” — “It

⁶ (1996) 186 CLR 71 at 115 (citations omitted)

⁷ See, e.g., *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566

⁸ See, e.g., *Sullivan v. Moody* (2001) 207 CLR 562 at 580-581

is, emphatically, the province and duty of the judicial department *to say what the law is*,⁹ — remains as true in Australia today as it was in the United States 206 years ago.

Although the constraints on the development of the common law are significant, they should not be over-stated. Advances in the common law have had profound effects on social and economic relations, often being the precursors to, or even provocations for, legislative schemes. One example is the evolution of the action for damages in negligence occasioning personal injury. Law students often seem to think that the action in negligence began in 1932 with *Donoghue v. Stevenson*.¹⁰ Of course, the great impetus which Lord Atkin gave the action for damages was founded on earlier decisions, from which his Lordship drew a “general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances”.¹¹ The outer limits of Lord Atkin’s “neighbour test” continue to bedevil our High Court to this day.

What matters for present purposes is that Lord Atkin, a great system-builder, was able to use “conventional methods of legal reasoning”, particularly inductive reasoning, to establish a general principle from which the outcomes in later cases could be reached by a process of deductive reasoning. This spawned the mass of personal injury litigation which we saw in the 20th Century in this country, and particularly in this State, which changed economic relations in a fundamental way. Most particularly, it led to the necessity for most potential defendants to have liability insurance and, in some areas, to statutory schemes for compulsory third party insurance. A lay person could be forgiven for thinking that, in New South Wales in particular, the system of law governing motor accident cases at times resembled a no-fault liability scheme, so long as the defendant was insured. Once the insurance burden was perceived to be excessive, the courts and the Parliament entered a period of retrenchment, the most notable feature of which has been the various restrictive schemes under the *Civil Liability Acts* and corresponding motor accidents and worker’s compensation legislation.

Nor has the development of the tort of negligence confined itself to personal injury cases. Eventually the tort expanded to include, for example, liability for negligent mis-statements causing pure economic loss.¹² This was a significant encroachment on ground which had formerly been the exclusive province of the law of contract. These developments in the law of negligence to some extent anticipated the development of promissory estoppels¹³ under the general law and the now well-known statutory prohibitions on misleading and deceptive conduct¹⁴. Those developments have had a significant effect on the way in which commerce is conducted in Australia.

On any view, such developments in the general law are a form of law-making: but they have been gradual and their cumulative significance is often apparent only in hindsight.

⁹ *Marbury v. Madison* 5 US 87 at 111 (1803) (emphasis supplied)

¹⁰ [1932] AC 562

¹¹ *Ibid.* at 580

¹² See *Hedley Byrne v. Heller* (1964) AC 465; see generally on the expansion of the law of negligence, John G Fleming, *The Law of Torts*, 9th Edition, Law Book Company 1998.

¹³ *Waltons Stores (Interstate) Limited v. Maher* (1988) 164 CLR 387

¹⁴ Most famously, s.52 of the *Trade Practices Act* 1974 (Cth) and its State analogues such as s.42 of the *Fair Trading Act* 1987 (NSW).

That is not to say that developments in the common law cannot have an immediate and profound, and indeed controversially political, effect. The most notable example in recent years is *Mabo*¹⁵. As Justices Deane and Gaudron said, the resolution of the issues raised by the case required “a consideration of some fundamental questions relating to the rights, past and present of Australian Aborigines in relation to lands on which they traditionally lived or live”¹⁶. It would be difficult to think of a more politically contentious issue in this country other than, perhaps, immigration policy. The outcome of the case was that the common law of Australia “recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands”, but that “extinguishment of native title by the Crown by inconsistent grant” did not give rise to a claim for compensatory damages¹⁷.

What is striking about the reasons for judgment, which occupy 200-odd pages of the Commonwealth Law Reports, is that the mode of legal reasoning in both the majority and the dissenting judgments proceeds essentially by “conventional methods”. By my count, the judgments contain over 450 footnotes giving references to statutes, cases, learned dissertations and authorities such as Blackstone’s *Commentaries* and Holdsworth’s *History of English Law*.

Many in the community were disturbed by the practical outcome of the case and its implications for the pursuit of economic activities on and under lands occupied by indigenous people. Others objected that, as a matter of principle, the recognition of native title was a step too far for an unelected judiciary. And there is something to be said for the proposition that the language in which some of their Honours expressed themselves was more emotive than may have been strictly necessary.¹⁸

However, it does not seem to me that the Court’s reasoning was fundamentally at odds with the rule of law as it has generally operated in Australian courts. The nature and mode of the reasoning upon which the majority relied — particularly in the judgment of Justice Brennan with whom Chief Justice Mason and Justice McHugh agreed — could hardly be described as arbitrary.

It is true that some features of the reasoning in *Mabo* are controversial. Justices Deane and Gaudron, for example, held that:

“If this were any ordinary case, the Court would not be justified in reopening the validity of fundamental propositions which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than one hundred and fifty years. ... *Far from being ordinary, however the circumstances of the present case make it unique.* As has been seen, the two propositions in question [i.e., ‘that the territory of New South Wales was, in 1788, terra nullius in the sense of

¹⁵ *Mabo v. Queensland* (1992) 175 CLR 1

¹⁶ *Ibid* at 77

¹⁷ *Ibid* at 15 per Mason CJ and McHugh J, stating the effect of the decision on behalf of all members of the Court

¹⁸ See, e.g., per Deane and Gaudron JJ at 175 CLR 104: “An early flash point with one clan of Aborigines illustrates the first stages of the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame.”

unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants’^{19]} provided the legal basis for the disposition of the Aboriginal people of most of their traditional lands. *The acts and events by which that disposition in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation.* The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices. In these circumstances, the Court is under a clear duty to re-examine the two propositions. For the reasons which we have explained, that re-examination compels their rejection. The lands of this continent were not terra nullius or ‘practically unoccupied’ in 1788.”²⁰

Many will contest the premise of that passage: that *Mabo* was no ordinary case *because* “the acts and events by which that disposition in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation”. But as a process of reasoning, what their Honours said was not wholly unrecognisable as part of the pragmatist common law tradition.

It follows, in my opinion, that to the extent that *Mabo* made law, the nature and mode of the Court’s reasoning makes it difficult to differentiate the decision from other cases in which the High Court has overturned earlier precedents.

What was truly unusual about *Mabo* was not the nature of the reasoning but the political sensitivity of the subject matter. The same volume of the Commonwealth Law Reports in which *Mabo* is reported also contains the decision in *David Securities v. Commonwealth Bank of Australia*.²¹ In that case the Court overturned what had been understood as a rule of the common law which had stood for nearly 200 years:²² that a plaintiff could not recover money paid under a mistake of law, as opposed to a mistake of fact. I do not recall reading about that case in the *Daily Telegraph*. To the best of my recollection, *David Securities* did not lead to public attacks on the High Court asserting that it was undermining the rule of law. But the reasoning in the joint judgment involved explicit policy analysis and overt law-making: “Having rejected the so-called traditional rule denying recovery in cases of payments made under a mistake of law, it is necessary to consider *what principle should be put in its place.*”²³

It is true that one feature of the rule of law in Australia is that highly-charged political questions are usually decided by the democratically-elected legislature and by the executive which is answerable to it. But that is not always so.

In any event, to the extent that some of the reasoning in *Mabo* is properly seen as undermining the rule of law — which I accept is an arguable position — that case is nevertheless an example of the way in which our courts actually function. The extent to which the proposed *Human Rights Act* would involve a departure from the rule of law as it presently exists in this country has to be measured against that background.

¹⁹ 175 CLR at 108

²⁰ 175 CLR at 109 per Deane and Gaudron JJ (emphasis supplied)

²¹ (1992) 175 CLR 353, especially at 376

²² *ibid.* at 370, citing *Bilbie v. Lumley* (1802) 102 ER 448

²³ *ibid.* at 376 (emphasis supplied); see generally at 370-378 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.

The courts and statutes

The second body of law which our courts interpret and apply consists of statutes and regulations made by the Parliament and its delegates. Although statutory interpretation forms an ever-growing part of the work of the courts, the courts are still more constrained in this area than in cases under the general law.

At common law there are, broadly speaking, two general approaches to the interpretation of legislation: the literal approach and the purposive approach.²⁴ What the two approaches have in common is the aim of discovering the intention of Parliament. Where the two approaches diverge is that, at the most general level, the literal approach assumes that Parliament's intention is to be found solely in the natural and ordinary meaning of the statutory language (read in the context of the whole statute), whereas the purposive approach strives to interpret the statute in a way that achieves Parliament's purpose in enacting the law, even if that intention cannot be divined from the ordinary meaning of the statutory language.

Each approach has its difficulties. The principal difficulty with the literal approach is that the ordinary meaning of words is very often ambiguous, such that resort must be had to some further criterion in construing the statute. A second problem with the literal approach is that, particularly in complex statutory regimes, it can produce absurd or capricious results.

On the other hand the purposive approach, which arose out of the "mischief rule", suffers from the difficulty that it is not always possible to determine the purpose of legislation, particularly in complex statutory schemes, in a way that is practically useful in interpreting the statute. A related problem is that the level of generality at which one identifies the statutory purpose can have a radical effect on the construction at which the court arrives.

For present purposes, the important point is that both approaches aim to give effect to the intention of the Parliament which made the law. As a matter of legal theory, both approaches are consistent with our conception of the rule of law.

For the better part of 30 years, provisions in the Commonwealth, State and Territory Interpretation Acts have provided:

"In the interpretation of provisions of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."²⁵

This is not the place to discuss the wide-ranging effects of such provisions or their outer reach.²⁶ It suffices for present purposes to note that the purposive school of statutory interpretation is now the dominant force in statutory interpretation in Australia. Of course, many statutes do not expressly record their object, and those which do tend to express the object at a very high level of generality which may not be applicable to

²⁴ See DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, 6th Edition 2006, pp.25-29

²⁵ See, e.g., s.15AA of the *Acts Interpretation Act 1901* (Cth)

²⁶ For an overview, see Pearce and Geddes pp.29-38

every section of every Division of every Part of every Chapter of complex legislation. In the search for the “purpose or object underlying the Act” courts will have regard to a range of factors, including the ordinary meaning of the words in the context of the statute as a whole, the history of the statutory scheme and predecessor schemes and a wide range of extrinsic materials.²⁷ The uncertainty of the task leaves room for debate in particular cases about the particular construction of the statute which the court arrives at. But that is not to say that the courts, in construing statutes, are engaging in law-making. To the contrary, even in those extreme cases where it is necessary to depart from the clear literal or grammatical meaning of the words used in order to avoid an absurd result,²⁸ the whole rationale of the exercise is that the court is endeavouring to give effect to the true legislative intention of the Parliament which made the law.

The outer limits of what courts can do in construing statutes are revealed in cases construing the effect of “reading down” provisions in interpretation statutes.²⁹ It is well-established that pursuant to such provisions, the court cannot undertake “the legislative task of making a new law from the constitutionally unobjectionable parts of the old”³⁰.

That is fundamentally a consequence of the separation of powers and the rule of law itself.

The courts and the Constitution

The third body of law relevant for present purposes is the Constitution, which is at the centre of our conception of the rule of law. Only the will of the people expressed in a referendum has greater legitimacy under our system than the Constitution. As the rule of law operates in Australia, the Parliament, the Executive and the Judiciary draw not only their formal powers, but also their legitimacy, from the Constitution as the supreme law of the land.

Yet it is our “unelected judges” who decide the limits of the powers of all three branches of government. Judicial review of the constitutional validity of legislation is, thus, both the occasion of frequent political controversy and also one of the essential features of the rule of law as we know it.

In his 2001 paper on the rule of law, Chief Justice Gleeson noted that “[w]hen our constitution was being framed, the principle of judicial review ... was taken for granted.” His Honour described the *Communist Party Case*³¹ as a “powerful example of the rule of law, and judicial review of legislative action, at work”. No doubt the circumstances of that case are very familiar to most Australian lawyers. It concerned an attempt to dissolve the Australian Communist Party and other bodies pursuant to the Commonwealth’s power to make laws with respect to the naval and military defence of the Commonwealth and the States. The High Court held the law invalid, notwithstanding a preamble in the legislation which recited Parliament’s assertions as to why the law was necessary for defence, even though Australia was not then at war. Of

²⁷ See Pearce and Geddes pp.71 and 82

²⁸ Of which perhaps the best known example is *Cooper Brookes (Wollongong) Pty Limited v. FCT* (1981) 147 CLR 297, especially at 320-321 per Mason and Wilson JJ.

²⁹ See, e.g., s.15A of the *Acts Interpretation Act 1901* (Cth)

³⁰ *Bank of New South Wales v. The Commonwealth* (1948) 76 CLR 1 at 371-372 per Dixon J

³¹ *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1

the majority, Justice Dixon referred both to the separation of powers and to the rule of law in giving his reasons. His Honour refused to accept that the legislature could state a conclusion in the preamble which would then be “the measure of the operation of its own power”.³²

Chief Justice Gleeson summarised the effect of the decision as follows:

“The Constitution marked out the territory for each branch of government. The only deference required of each was to keep out of the other’s territory. That meant that judicial decisions were for the Court; and political decisions were for Parliament. The Court did not engage in any dialogue with the Parliament. It held that the legislation was invalid and therefore not part of the law. The final say was with the people of Australia. They rejected a proposal for a constitutional amendment. That was not deferential dialogue. That was due process of (constitutional) law.”³³

As Chief Justice Gleeson’s reference to the famous referendum reminds us, the case was highly politically charged. This was at the height of the Cold War. Allegations of communist infiltration of the Labor movement were at the heart of the Split which saw federal Labor spend two decades in the political wilderness.

It is not hard to think of other highly-charged political controversies which have come up in the course of judicial review of the constitutional validity of legislation. Of course, it was only three years before the *Communist Party Case* that the High Court had held Labor’s own bank nationalisation scheme invalid.³⁴ In 1983 the *Tasmanian Dam Case*³⁵ was instrumental in the fulfilment of the Labor government’s promises made to the environmental movement in the course of that year’s Federal election campaign. In 2006 the High Court upheld the validity of the Coalition government’s Work Choices legislation³⁶ — the very legislation which many commentators blame for that government’s loss at the 2007 Federal election.

The political and constitutional significance of the courts’ powers of judicial review goes far beyond the results of particular cases. The *Tasmanian Dam Case* and the *Work Choices Case* were merely steps in a series of cases over the last century which have consolidated Commonwealth legislative power, most notably with respect to taxation, corporations and external affairs. With that legislative power has come vast economic power. Hindsight tends to mask the significance of judicial review in that process because of the last century’s great social and economic changes and developments in transport and communications, which make the centralisation of power seem inevitable. But try to imagine what the division of economic powers between the Commonwealth and the States would look like today if the *Engineers’ Case*³⁷ had never been decided.

In discussing the rule of law as it actually operates in Australia today, it is important to consider the tests applied in the course of judicial review under the Constitution. The

³² (1951) 83 CLR 1 at 193

³³ Citations omitted

³⁴ *Bank of New South Wales v. The Commonwealth* (1948) 76 CLR 1

³⁵ *Tasmania v. The Commonwealth* (1983) 158 CLR 1

³⁶ *New South Wales v. The Commonwealth* (2006) 229 CLR 1

³⁷ *Amalgamated Society of Engineers v. The Adelaide Steamship Company Limited* (1920) 28 CLR 129

process of determining whether a Commonwealth law should be characterised as falling within the legislative powers enumerated in section 51 of the Constitution is, for the most part, a relatively straight-forward one. But the test for invalidity under section 92 of the Constitution, which provides that “trade, commerce, and intercourse among the States ... shall be absolutely free”, involves the questions not only whether the legislation disadvantages inter-state trade in competition with intra-state trade, but also, if it does, whether the legislation is nevertheless “appropriate and adapted” to some “rational and legitimate” object and whether the burden on interstate trade is “reasonably necessary”³⁸ to the achievement of the object. A similar test applies when the question is whether the implied constitutional freedom of speech about government and political matters has been infringed.³⁹

In such cases, in the course of the very process of judicial review upon which our rule of law is predicated, the courts are necessarily entering into evaluative judgments about the proper scope of legislation on particular topics. As I will endeavour to show, the courts’ power and duty to declare laws constitutionally invalid is far greater than any power proposed to be vested in the courts under the *Human Rights Act*.

The proposed *Human Rights Act*

The Brennan Committee’s Report makes very many recommendations, only a handful of which seem relevant to the rule of law as it operates in our courts. And one of the difficulties in assessing the implications for the rule of law of the Committee’s proposed *Human Rights Act*, particularly from a practitioner’s point of view, is that the Report is not accompanied by any draft legislation. But the Committee has made a series of specific recommendations, the most relevant⁴⁰ of which are in my opinion the following.

Three classes of rights

First, the Committee proposes three classes of human rights to be included in a *Human Rights Act*.

One class, described as “economic, social and cultural rights”, would apparently not be justiciable at all.⁴¹ For present purposes this class can be put to one side.

A second class, described as “non-derogable civil and political rights”, would be treated as “so fundamental” that “government cannot derogate from its obligation to protect

³⁸ See *Betfair Pty Limited v. Western Australia* (2008) 234 CLR 418. A test that was perhaps still more evaluative had been adopted in *Castlemaine Tooheys Limited v. South Australia* — that the legislation had to be “not disproportionate to the achievement of” a legitimate object: see (1990) 169 CLR 436 at 473-474 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

³⁹ *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562 and 567-568

⁴⁰ I have not separately considered in this paper the Committee’s proposals to create “an independent cause of action [sounding in damages] against a federal public authority for breach of human rights” (Report, p.377) or to require “Commonwealth public authorities to act in a manner compatible with human rights ... and to give proper consideration to relevant human rights ... when making decisions” (p.376). Although the courts would have to adjudicate upon those rights in the course of giving judgment on the cause of action and in judicial review of administrative decisions, neither proposal strikes me as having any significant implications for the rule of law beyond those canvassed in this paper in relation to the proposed interpretive provision and the proposal for declarations of incompatibility.

⁴¹ See the recommendations at, e.g., Report pp. 366, 373, 377. Compare, however, at 376.

these rights, even in times of national emergency”.⁴² The proposed rights in this category are “the right to life”, “protection from torture and cruel, inhuman or degrading treatment”, “freedom from slavery or servitude”, freedom from “retrospective criminal laws”, “freedom from imprisonment for inability to fulfil a contractual obligation”, “freedom from coercion or restraint in relation to religion and belief” and “the right to a fair trial”.⁴³

While the content of such rights would be open to debate, that does not mean that their content would be so open-ended that judicial decisions construing them would be so arbitrary as to undermine the rule of law. Some of the concepts, such as the idea of a fair trial, are very familiar. And the other concepts do not seem to me to be any more inherently uncertain than now-familiar statutory concepts such as “unfair” contracts or “unconscionable conduct”.⁴⁴

It is true that some of these proposed rights raise potentially controversial political issues, particularly the “right to life”. But, as I have endeavoured to show, the mere fact that the courts might have to address controversial issues is not itself inconsistent with the way in which the rule of law has operated in our courts. And, at least generally speaking, it seems unlikely that these “non-derogable” rights would often come into conflict with each other.

The third class of rights is rather more problematic. These are described simply as “other civil and political rights”. The Committee acknowledges that these are rights which, of their nature, “are regularly limited in a free and democratic society — to accommodate other people’s rights or to promote the common good, the public interest, national security or public morality.”⁴⁵

Some examples of rights in this class which would readily come into conflict with each other are “the right to privacy and reputation” and “the right to freedom of expression”; “the right to liberty and security of person” and “the right to humane treatment when deprived of one’s liberty”; “the right to freedom of movement” and “the right to property”.⁴⁶ Other rights in this class are potentially internally contradictory: how would the proposed “right of children to be protected by family, society and the State” operate where the State claimed that it was necessary to protect a child from her family? Or what if the family, asserting the proposed “right to manifest one’s religion or beliefs”, sought to protect a child from the State’s educational requirements?

The rights in this class are at least as uncertain in their content as those in the non-derogable class. And rights in this class are, again, at least as politically controversial as those in the non-derogable class. But for the reasons I have already given, those features would not, of themselves, necessarily undermine the rule of law as it operates in our courts today.

The larger question for present purposes is how the Committee proposes that courts should deal with rights in this class which, although expressed in absolute terms, are somehow to be limited by the requirements of “a free and democratic society”?

⁴² Report, p.366

⁴³ Report, p.367

⁴⁴ See, e.g., *Trade Practices Act 1974* (Cth), sections 51AB and 51AC (as opposed to 51AA).

⁴⁵ Report, p.368

⁴⁶ Report, p.369

The Committee's proposed solution is "a limitation clause for derogable civil and political rights" similar to those contained in the Victorian and A.C.T. human rights legislation.⁴⁷ The Committee cites section 7 of the Victorian *Charter of Human Rights and Responsibilities Act* 2006, which provides that:

"A human right may be subject under law only to such *reasonable limits* as can be *demonstrably justified* in a *free and democratic society* based on human dignity, equality and freedom, and taking into account *all relevant factors* including —"⁴⁸

and there follows a list of factors which include "the relationship between the limitation and its purpose" and "any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve".

For my part, I very much doubt that it is good policy to have courts adjudicating on such questions. The content of the statutory language — "reasonable limits", "demonstrably justified", "taking into account all relevant factors" — will necessarily involve the courts in an evaluative process, and the rights in question will often involve controversial political issues.

But, from the point of view of the rule of law, I do not think that a "limitation clause" of the sort proposed by the Committee would operate relevantly differently from the tests which the courts apply when deciding whether a law infringes the implied constitutional freedom of communication on government and political matters, or the express constitutional guarantee in section 92, to which I referred earlier. Although the court's decision under the proposed "limitation clause" would necessarily be evaluative, it could not be arbitrary. The court would have to give detailed reasons by reference to the statutory criteria. I do not think that a *Human Rights Act* which required the courts to carry out such a function would be giving our judges some new power which inherently undermined the rule of law as we know it.

On the other hand, the proposed *Human Rights Act* would undoubtedly increase the number of cases in which the courts have to perform that evaluative exercise. It seems to me that while the nature of the judicial tasks proposed by the Committee is not novel, the volume of cases in which the courts would be required to perform evaluative functions would be very large. In this respect at least, it could be argued that the proposed Act would undermine the rule of law.

Before coming to a conclusion on this issue, it is necessary to consider the specific ways in which the Committee proposes that the courts adjudicate on these so-called "derogable civil and political rights".

The proposed interpretive provision

The second relevant feature of the proposed Act is the Committee's interpretive provision. The proposal is confined to the interpretation of Commonwealth laws.⁴⁹ It would not directly affect the operation of State or Territory laws.

⁴⁷ Report, p.372

⁴⁸ Report, p.372 (emphasis supplied)

⁴⁹ See Report pp. 364 and 373

“The Committee recommends that any federal Human Rights Act contain an interpretative provision ... that requires federal legislation to be interpreted in a way that is compatible with the human rights expressed in the Act *and consistent with parliament’s purpose in enacting the legislation*. The interpretative provision should not apply in relation to economic, social and cultural rights.”⁵⁰

In my opinion, the nature of the judicial function required by this proposal is essentially consistent with the rule of law as it operates in Australian courts today. The proposed provision contains a crucially important limitation: the interpretation must be “consistent with parliament’s purpose in enacting the [particular] legislation”. As the Committee noted in its recommendation, this limitation makes the proposed provision “more restrictive than the [corresponding] UK provision”.⁵¹

Section 3(1) of the United Kingdom’s *Human Rights Act* 1988 contains an interpretive provision which makes no reference to parliament’s purpose in enacting the principal legislation: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” That provision has itself been given a far-reaching interpretation. As Lord Nicholls said in *Ghaidan v. Godin-Mendoza*:⁵²

“In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, *depart from the intention of Parliament* which enacted the legislation.”

His Lordship went on to observe that section 3 is “apt to require a court to read in words which *change the meaning of the enacted legislation*, so as to make it Convention-compliant.”⁵³

There is little doubt that a court carrying out the function required by section 3 of the UK Act would be seen in Australia to be exercising legislative power. Not only would the conferral of such power almost certainly be unconstitutional,⁵⁴ it would also involve a serious departure from the rule of law as we know it. It would amount to a delegation to the courts of “the power to make laws involving ... a discretion or, at least, a choice as to what the law should be”.⁵⁵ It would fundamentally deprive the law of the legitimacy which it derives from the democratic parliamentary process.

It is not hard to see why those opposed to a *Human Rights Act* would be particularly concerned about such a provision. But it is not what the Brennan Committee has proposed. The Committee’s insistence that any interpretation be “consistent with

⁵⁰ Report, p.373 (emphasis supplied)

⁵¹ Report, p.373

⁵² [2004] UKHL 30 at [30] (emphasis supplied)

⁵³ [2004] UKHL 30 at [32] (emphasis supplied)

⁵⁴ See the opinion of the Solicitor-General of the Commonwealth, Mr Gageler SC, and Mr Burmester QC, “In the matter of constitutional issues concerning a charter of rights”, 15 June 2009 at [13] (annexed to the Brennan Report); see also the Hon M.H. McHugh AC, QC, “A Human Rights Act, the courts and the Constitution”, presentation given at the Australian Human Rights Commission, 5 March 2009 at 27-29.

⁵⁵ *The Native Title Act Case* (1995) 183 CLR 373 at 486.

parliament's purpose in enacting the [particular] legislation" brings the nature of the task under the proposed interpretive provision back within the rule of law as we know it.

A court construing legislation in light of the Committee's proposed interpretive provision would have at least three issues to address, although the order in which the court addressed the issues would not necessarily be fixed.⁵⁶

First, the court would need "to ascertain the meaning of [the relevant statutory provisions] according to accepted common law principles of interpretation as supplemented by any relevant statutory provisions."⁵⁷ In light of the common law principles and section 15AA of the existing *Acts Interpretation Act*, that inquiry would necessarily focus on Parliament's purpose in enacting the legislation.

Secondly, the court would need to determine whether that meaning was "compatible with the human rights expressed in the Act". That task would be relatively straightforward in relation to the so-called "non-derogable civil and political rights". It is true that the court would have to give specific content to, for example, "the right to a fair trial" and the right to "protection from torture and cruel, inhuman or degrading treatment". And it is true that the effect of those rights might often arise in criminal cases or cases dealing with the powers of the police and the security agencies. But the question whether the meaning of the statute as first construed was "compatible with" the class of non-derogable rights should not then be difficult.

The question of "compatibility" would be much more difficult with the other relevant class, the so-called "derogable civil and political rights". These are the rights which the Committee proposes be subject to a "limitation clause". The court would need to determine whether its initial interpretation of the statute infringed the human right at issue, and, if so, whether that infringement was nevertheless no more than a "reasonable limit" on the human right that could be "demonstrably justified in a free and democratic society based on human dignity, equality and freedom".

Given the large number and wide scope of the proposed class of "derogable civil and political rights", it seems to me inevitable that they would arise in litigation very often indeed. That will involve the courts, at all levels, right down to the Local Court, engaging in an evaluative process in the course of construing statutes on a day to day basis. As I have said earlier, I do not think that that evaluative process is necessarily different in kind from the process involved in deciding certain constitutional issues. It is probably not so different from the question whether a contract is "unfair", or conduct falls within the statutory concept of "unconscionable conduct". The difference will be one of degree, in the sense that the number of cases and the courts in which these issues will be decided will, I think, dramatically increase.

The most important point for present purposes, however, is what the courts would be required to do as a result of that evaluative process. If the court found its initial construction of the statute to be compatible with the human right at issue, then that

⁵⁶ See, e.g., *Application under Major Crime (Investigative Powers) Act 2004; DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381 at [50]-[53] per Warren CJ. Judicial application of the Victorian and A.C.T. interpretive provisions is in its early days.

⁵⁷ *ibid.* at [53], citing Mason NPJ in *HKSAR v Lam Kwong Wai* [2006] HKCFA 84.

would be the end of the matter. The court would apply the initial construction to the facts of the case. There is nothing revolutionary in that outcome.

It would only be if the court found its initial interpretation to be incompatible with the right at issue that the court would have to go on to address the third issue, namely, whether the statute could be “re-interpreted” so as to be “compatible with” the human right at issue in a way that remained “consistent with parliament’s purpose in enacting the legislation”.

My own view is that this step would, or at least should, not give the courts much room to move. The initial construction will have been a purposive one and yet, by this stage in the analysis, that initial construction will have been held not to be compatible with the human right at issue. That would not appear to leave the court much scope to depart from the initial construction and “re-interpret” the statute so as to be compatible with the human right while remaining consistent with the purpose of the legislature. Justice Besanko, giving the judgment of the A.C.T. Court of Appeal, has suggested that under the A.C.T. interpretive provision a court could:

“adopt an interpretation of a legislative provision compatible with human rights which did not necessarily best achieve the purpose of that provision or promote that purpose, providing the interpretation was consistent with that purpose. On the other hand, I do not think section 30 authorises and requires the Court to take the type of approach taken by the House of Lords in *Ghaidan*.”⁵⁸

A practical example in this context is the notorious case of Mr Al-Kateb,⁵⁹ who was in immigration detention because the Minister would not grant him a visa and no country would agree to receive him if he was deported. This led to the possibility that he might remain in immigration detention indefinitely — in other words, forever. The High Court held, by majority, that sections 196 and 198 of the *Migration Act* required his continued detention. One of the members of the majority has recently expressed doubts whether *Al-Kateb* would have been decided any differently under a *Human Rights Act* model in which “a person’s human rights ... cannot prevail if they would conflict with the purpose of the legislation”.⁶⁰ He argues that the majority might well have held that giving effect to any right in Mr Al-Kateb of liberty or freedom from arbitrary detention would have been “inconsistent with the purpose of the *Migration Act* which was to detain a person such as Mr Al-Kateb in custody until he was removed from the country or given a visa.” Interestingly, the Committee’s Report appears to contemplate the same possibility, that is, that the High Court might hold that “a law providing for indefinite detention of a stateless asylum seeker ... could not be interpreted consistently with ... the right not to be subjected to arbitrary detention.”⁶¹

It seems to me that the scope given to a court to re-interpret statutes compatibly with human rights would, or should, not be very large. To some extent, it would turn on the specificity with which the court identifies the statutory purpose.

⁵⁸ *R v Fearnside* (2009) 165 ACTR 22 at [89]

⁵⁹ *Al-Kateb v. Godwin* (2004) 219 CLR 562

⁶⁰ The Hon M.H. McHugh AC, QC, “A Human Rights Act, the courts and the Constitution”, presentation given at the Australian Human Rights Commission, 5 March 2009 at at p.33.

⁶¹ Report, p.375

In the result, although I would not consider an interpretive provision of the kind proposed itself to involve a challenge to the rule of law as we know it, these are largely questions of definition and degree. In particular, I do not suggest that a requirement that “federal legislation ... be interpreted in a way that is compatible with the human rights expressed in the Act” would have no effect on the interpretation given to statutes: plainly it would. My proposition is the rather smaller one that, so long as any such interpretation was “consistent with parliament’s purpose in enacting the legislation”, the interpretive process would not itself undermine the rule of law as we know it.

Declarations of incompatibility

The third and final major feature of the Committee’s proposed *Human Rights Act*, which is central to its so-called “dialogue model”, is the proposal that the High Court have a power to make a “declaration of incompatibility”.⁶²

The essential idea⁶³ is that if, in the course of construing a law in accordance with the *Human Rights Act’s* interpretive provision, the Court concluded that it was impossible to construe it compatibly with the human right at issue and in a manner that was also consistent with the purpose of the law, the Court could issue a declaration of incompatibility. The effect of the declaration would be that the law remained valid, but that the executive was required to provide Parliament with a justification of the law. Parliament would then have the opportunity to reconsider the legislation in the light of the declaration. Although “dialogue” seems an inapposite term to describe this process, that is the name given to the model.

A few points may be made about the potential of this model to challenge the rule of law as it operates today in our courts.

The first is that the Committee recognises the practical problems which would follow from empowering the Federal Court and all the State and Territory Supreme Courts to issue declarations of incompatibility.⁶⁴ The power to make formal declarations of incompatibility would be confined to the High Court. But the Committee also recognises the practical problems in conferring the power exclusively on that Court.⁶⁵ Appeals to the High Court are only by special leave to appeal, and there are (to say the least) practical limits to its original jurisdiction. So the Committee recommends that, should its recommendation that only the High Court have power to issue formal declarations of incompatibility prove impractical, no court should have the power.⁶⁶

It seems to me unlikely that this recommendation will ever get off the ground. If that is correct, it is no threat to the rule of law at all.

The second point about the proposed dialogue model is that the Committee’s particular recommendation is not to give the High Court jurisdiction to make declarations of incompatibility at large, as advisory opinions. Such a jurisdiction would almost certainly be unconstitutional. Instead, the Committee appears to have adopted advice given by the Solicitor-General and Mr Burmester QC, to the effect that a declaration

⁶² Report, p.376

⁶³ See Report, p.371. For discussion of the model, see generally pp.326-330 and 373-376.

⁶⁴ Report, pp.374-375

⁶⁵ Report, pp.374, 375

⁶⁶ Report, p.376

“could be made only in proceedings for some other relief or remedy” and “only if a court were satisfied that a Commonwealth law is incompatible with a right or freedom” set out in the proposed *Human Rights Act*.⁶⁷ The Committee also seems to have accepted the Solicitor-General’s advice that the prospects of constitutional validity would be enhanced “if there were a requirement that the declaration be binding as between the parties and a requirement that the Attorney-General be joined as a party to such a proceeding” before the declaration was made.

I have read the Solicitor-General’s advice. The arguments which it canvasses are, with respect, certainly available. Whether they are, to use the Committee’s phrase, “constitutionally watertight”,⁶⁸ in the sense that they would actually persuade the High Court of constitutional validity, may be a different question. For present purposes I will assume validity of the proposed dialogue model, at least insofar as it concerns the role of the Court.

The High Court would only have occasion to issue a declaration of incompatibility once it had gone through the process of construing the statute in light of the *Human Rights Act’s* interpretive provision. It would not get to the point of issuing a declaration unless it had already concluded, in the course of that process, that the statute could not be construed compatibly with the human right at issue. The declaration would not appear to require any further step in the Court’s processes of reasoning about the statute or the human right at issue. The declaration would simply give a particular form to a conclusion which the Court had already reached in any event.

So it seems to me that, at least in terms of the Court’s *internal* workings in the particular case, the proposal for declarations of incompatibility would add little of relevance to the rule of law. Any damage done to the operation within the Court of the rule of law as we know it would already have occurred in the course of the proposed *Human Rights Act’s* interpretive process.

There is a serious question, though, about the extent to which a declaration of incompatibility could affect the High Court’s *external* relationships with the Parliament, the Executive and the people. The concern is that the declaration of incompatibility mechanism might draw the Court into the political fray and so undermine the rule of law in at least two ways. It could amount to an interference by the judiciary in the affairs of Parliament: a kind of “judicial ultimatum”.⁶⁹ And it could politicise the judiciary itself.

On the face of it, these arguments have a certain appeal. The model is, after all, intended to promote a “dialogue” among the three branches of government. On its face, that seems rather different from the existing form of judicial review of validity of legislation. As Chief Justice Gleeson said of the *Communist Party Case* in his paper, it did not involve the Court engaging in a “dialogue” with the Parliament.

While I do not entirely discount these concerns, I think they are probably overstated. My own view is that it is naïve to describe the proposed model as involving any real “dialogue”. The courts often enough point out deficiencies in the common law or

⁶⁷ Report, p.373; see also p.329

⁶⁸ Report, p.373

⁶⁹ Report, p.374.

statutes which only Parliament can correct. From time to time the courts expressly call for law reform. Sometimes the Parliament takes up the issue; sometimes it does not. That does not strike me as a “dialogue”, much less a threat to the rule of law.

The role of the High Court under the Committee’s proposal is an even narrower one. A declaration of incompatibility would involve the Court in doing no more than declaring formally what it had already concluded in its reasons for judgment: that the statute was incompatible with the right at issue. It is true that, in most cases,⁷⁰ the conclusion of incompatibility would necessarily involve the Court in holding, under the so-called “limitation clause”, that the statute was not a “reasonable limit” on the human right which could be “demonstrably justified in a free and democratic society”. And it is true that under the proposal the Attorney-General would be joined to the proceedings, and that the making of a declaration would then give rise to obligations in the Executive to take steps vis-à-vis the Parliament.

But the making of the declaration would not involve the Court in telling the Parliament what it should do about the incompatibility. The fact is that the prevailing judicial culture, shared by all but a handful of judges, is conservative, not adventurous when it comes to contested political questions.

And, as a matter of politics, I doubt that our politicians would simply succumb to such a “judicial ultimatum” in any event. I would hope they are made of sterner stuff. To continue the example of Mr Al-Kateb’s case, when elections are being won on the promise of tough measures for border protection, including mandatory detention, it seems unreal to think that the Parliament would automatically change the law simply because the High Court had said it was an unreasonable restriction on individual liberty. The fact is that the man was exposed to the risk of indefinite detention. For a court to say that that breached his “right to liberty” — and even to say that that was “unreasonable” — would not seem to add much to the underlying politics of his problem.

What concerns me more is the converse proposition: that declarations of incompatibility could inspire, and in a practical sense even require, political attacks on the Court. I do not think there is any room to doubt that the proposed *Human Rights Act* would increase the occasions on which the courts’ decisions are the subject of political debate. The proposed declaration of incompatibility mechanism would only add to the political significance of the High Court’s decisions under such an Act. Whatever else one might think about the *Mabo* decision, it became a political football. I doubt that current levels of public confidence in the courts, which is essential to the rule of law, could survive a *Mabo* every year. Taking the long view, I think the real risk which the proposed *Human Rights Act*⁷¹ presents for the rule of law as we know it is that it could ultimately lead to greater conflict between the judicial and the political branches, and perhaps to more widespread judicial adventurism.

While I doubt that this would occur in the short term, who can say what the future holds?

⁷⁰ That is, in cases other than those involving the non-derogable civil and political rights.

⁷¹ Not only the declaration of incompatibility mechanism, but also the proposed interpretive provision.