

## **Constitutional Law Conference 2015**

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Melbourne Law School

### **Constitutional Dimensions of Statutory Interpretation**

John Basten<sup>1</sup>

A statute is the product of the legislative arm of government; principles of statutory interpretation govern the exercise undertaken by a court in construing and applying a statutory provision. To give principles of statutory interpretation a constitutional dimension is, potentially, to do two things. First, it provides a principled basis for a particular judicial function; secondly, it imposes a constraint on the ability of the government to change those principles. However, both those propositions are pregnant with internal incoherence and are potentially inconsistent.

So far as the first is concerned, courts seek an extraneous justification for the exercise of State coercive power. That is appropriate: the exercise of coercive power demands a constitutional justification. However, for State judges, there is an artificiality in seeking that constitutional justification in the Commonwealth Constitution of 1901. State courts operated long before 1901; the 1901 Constitution did not purport to create State courts. That invites the question whether there is a common law constitutional compact? If so, we are entitled to inquire as to its source and as to whether it is entrenched beyond statutory or judicial alteration.

The answers to these questions are not capable of derivation from self-evidently correct premises, and they demonstrate that the law is not a complete and coherent system, with fixed boundaries. Ultimately, the justification for the exercise of judicial power may need to be located in a socio-political system which has no ultimate grundnorm. In one sense, judicial power may depend, like other elements of a socio-political system described as a representative democracy, on the confidence it engenders in the citizenry and in other arms of government. The rule of law (being the label used to describe the role of law and the courts in our society) cannot

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<sup>1</sup> Judge of Appeal, Supreme Court of New South Wales.

effectively operate absent a level of that social stability which it is designed to produce.

With respect to the second question, a constitutional principle is sought because it is, or appears to provide, a secure and stable framework beyond variation by the legislature or the courts. However, if that framework is not to be sourced in a written document, how can continuity and coherence be guaranteed? Even if it is sourced in a written document, it is likely to depend on such general language as to lead to very similar levels of uncertainty.

Bearing these cautions in mind, it is difficult to find any clear constitutional justification for particular rules of statutory interpretation. It is not difficult to accept that principles of statutory interpretation (not rules) identify or reflect key aspects of the relationship between the legislature and the judiciary. However, that is a statement operating at a high level of generality and says little about the detail of that relationship, or about the respective functions of each arm of government. Indeed it begs an important question as to whether principles of statutory interpretation perform the constitutional role of helping to define the functions of each arm, or whether they reflect functions defined elsewhere, or indeed play a dual role.

This is not an idle or academic exercise: it invites attention to what we assume is a basic constitutional element of our governmental system, namely the doctrine of the separation of powers. Without that doctrine, operating at both state and federal levels, the conventional restraints, for example, on judicial review of administrative action would need to find a new justification. Can we, without resolving this dilemma, determine whether principles of statutory interpretation can be varied by the legislature, the courts, neither or both?

Consider first the role of the legislature. It has long been accepted, described by the principle of the sovereignty of parliament, that the legislature can abolish or vary the common law, meaning by that phrase, legal principles derived from the judgments of superior courts. That raises the question as to whether some common law principles are beyond legislative variation, because they are properly described as constitutional, in the sense of being part of a higher level of regulation which confers

and identifies the functions of the various arms of government. The doctrine of parliamentary sovereignty must form part of that metastructure.

If that analysis were to be accepted, one would need to inquire as to the operation of statutes which themselves purport to set principles of statutory interpretation, usually known as Acts Interpretation Acts or simply Interpretation Acts. Can their provisions be invalid if they fail to give effect to common law principles of statutory interpretation, just as they would be invalid if they contravened the written Constitution?

Again, if principles of statutory interpretation have a constitutional quality, can they be varied by courts? In a statement now treated as canonical, Marshall CJ wrote in *Marbury v Madison*:<sup>2</sup>

“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expand and interpret that rule.”

Absent any conflicting statement in the Constitution, one may assume that, in undertaking a unique function, the institution concerned may adopt rules deemed by it to be appropriate to effect that function. On the other hand, that could equally be seen as ancillary to the legislative function.

In a practical sense, does any of this matter? Unfortunately it does. To explain why that is so it is necessary to separate four sets of variables, in increasing levels of particularity. First, there is the structural or institutional framework created by the Constitution. That involves the conferral of power on the three arms of the federal government, carrying with it conventional implications as to the separation of the core functions. Further, the Constitution delineates those powers and functions conferred on the federal government from those enjoyed by state governments. That is conventionally described as federalism. One of the side effects of a recent focus on Chapter III has been to divert attention from the federalist implications of the Constitution.<sup>3</sup>

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<sup>2</sup> *William Marbury v James Madison, Secretary of State of the United States* 5 US 137 (1834) at 177.

<sup>3</sup> Brendan Lim, “Attributes and Attribution of State Courts – Federalism and the *Kable* Principle” (2012) 40 Fed L Rev 31.

The second way in which the Constitution has a direct impact on rules of statutory interpretation derives from the federal judicial structure imposed by Chapter III.<sup>4</sup> The crux of the argument is that the scope and limits of statutory interpretation are to be found in the concept of federal judicial power, because even state laws might have to be applied in federal jurisdiction and their meaning could not be different depending on whether a court was exercising federal or state jurisdiction. The most obvious case is that of an appeal to the High Court from a state Supreme Court, involving the construction of a state statute. Whether or not the argument is accepted, it provides a particular example of the potential interaction of the two structural issues identified above, namely separation of powers and federalism.<sup>5</sup>

Thirdly, it is necessary to identify the potential impact of constitutional principles by reference to different kinds of statute or provisions within a statute. This is an inherently imprecise exercise and for those who consider taxonomy an aspect of toxicology it is no doubt to be decried. Nevertheless, it cannot be avoided: conventional rules of statutory construction adopt that approach, and correctly so. A statute criminalising specific conduct will be approached differently from a provision protecting executive action from judicial review.

Fourthly, whatever constitutional effect is identified in considering the first three variables, the final step is to focus on the principles of statutory interpretation themselves. In his famously sceptical critique of the traditional canons of statutory interpretation, Karl Llewellyn<sup>6</sup> distinguished “referential” canons (or principles) (identifying legitimate and illegitimate extraneous sources) and “linguistic” canons (covering principles of semantics and grammar). A third category may be described as “substantive” canons because they reflect substantive values drawn from the common law, statute or the Constitution itself.<sup>7</sup>

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<sup>4</sup> I am indebted for this analysis to the submissions of the then Solicitor-General, Stephen Gageler SC, in *Momcilovic v The Queen* [2011] HCA Trans 17 at 187ff. I am also indebted to Brendan Lim for drawing this material to attention: op cit, at 66.

<sup>5</sup> Lim, correctly in my view, seeks to expose the lack of attention to federalism in discussion of the *Kable* principle.

<sup>6</sup> KN Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed” (1950) 3 Vand L Rev 395.

<sup>7</sup> William N Eskridge Jr, “Public Values in Statutory Interpretation” (1989) 137 U Pa L Rev 1007; William N Eskridge Jr and Philip P Frickey, “Quasi-Constitutional Law: Clear Statement Rules as Constitutional Law Making” (1992) 45 Vand L Rev 593 at 595.

It is this last category of principles of interpretation which is the most intriguing because it provides much of the substance for so-called common law constitutionalism. It is the foundation for the so-called “principle of legality”<sup>8</sup> which purports to derive from fundamental values of the common law, seen to underpin the Constitution, as a basis for imposing a manner and form control over legislative power.

This is not the place, nor is there time, to say more directly about the structural or institutional framework created by the Constitution. Suffice it to say that what follows will have implications for the separation of powers concept and the concept of federalism.

It is necessary, however, to say a little more about the concept of judicial power. As Lim noted, the Solicitor-General’s arguments in *Momcilovic* were not reflected in the judgments because the majority held that s 32(1) of the Victorian Charter of Human Rights,<sup>9</sup> requiring that all statutory provisions be interpreted in a way that is “compatible with human rights”, being subject to the qualification, “[s]o far as it is possible to do so consistently with their purpose”. This was not held to impose a function inconsistent with federal judicial power, but rather a statutory form of the clear statement principle, with reference to identified human rights and responsibilities. However, at least for Gummow J, the constitutional context had significance. He stated:<sup>10</sup>

“No doubt the Parliament of the Commonwealth cannot delegate to courts exercising the judicial power an authority conferring a discretion or choice as to the content of a federal law. Further, a law of a state, such as the Charter, is not readily construed as conferring such a power upon state courts. This is because such a state law would require the state courts to act in a fashion incompatible with the proper discharge of their federal judicial responsibilities and with their institutional integrity.”

This approach left unresolved a question as to whether this constituted the limit of state legislative power. There were at least suggestions that the approach adopted

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<sup>8</sup> In the United States it is known as the “clear statement rule” which, if described as a principle rather than a rule, is an accurate and helpful label which will be adopted in this paper.

<sup>9</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

<sup>10</sup> *Momcilovic* at [169].

by the House of Lords in *Ghaidan*<sup>11</sup> permitting a court “to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant” was to travel beyond the limits of the principle of legality and may thus have rendered an equivalent provision in the Victorian Charter invalid. However, it is not entirely clear why that should be so. Resolving conflicts between apparently inconsistent laws of a single legislature is an exercise which arises with a degree of frequency.<sup>12</sup> Further, as the Commonwealth Solicitor noted in *Momcilovic*, the scope of the judicial function in this regard was by no means constrained, a point illustrated by reference to the reasoning in *Hickman*. Finally, as will be seen shortly, the clear statement principle is neither constrained, nor precisely defined in its scope and operation.

The core of constitutional law is the creation of institutions and the distribution of governmental power between those institutions. Some two years ago Professor Peter Cane speculated that there were two distinct models of the role of constitutional courts, which he described as the subordinate judiciary model and the co-ordinate judiciary model. His thesis was that the High Court had, since 1986, tended to move from the former to the latter. However, if the courts not only interpret the laws made by the parliament, and decide whether they fall within their constitutional powers, but also fix the rules by which statutes will be interpreted, there is a sense in which we have a superordinate judiciary. While I do not wish to make too much of an heuristic device, recent history tends to support a shift or at least an incipient shift in this aspect of the constitutional framework. That appearance is revealed in part by an apparent ambivalence on the part of some judges who may be conscious of the process. In a liberal democracy, the legitimacy of particular court decisions may depend upon the court playing a role as a subordinate arm of government. There will therefore be a tendency to portray its exercise of functions in that way and, where necessary, to explain as exceptional any departure from that role.

The point can be illustrated by reference to two recent developments: (a) authority dealing with provisions which seek to protect decisions of courts and executive

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<sup>11</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

<sup>12</sup> See generally Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011).

officers from judicial review (which may be called “protective clauses”), and (b) the rise of the so-called principle of legality.

For a century, the High Court struggle with the basis on which protective provisions (specifically privative clauses) could be kept within constitutional limits. Thus, in an early case Griffith CJ noted the apparent contradiction between a provision conferring limited jurisdiction and another declaring an exercise of that jurisdiction to be beyond challenge.<sup>13</sup> It took almost 40 years to crystalize an approach which recognised that a tribunal could go wrong in many respects so long as it acted bona fide, its decision related to the subject matter of the power and was reasonably capable of reference to the power. This language (of Dixon J in *Hickman*<sup>14</sup>) was, at least when read out of context as a freestanding tripartite principle, unusually obscure. Later encapsulation of these ideas as identifying “inviolable limitations or restraints”<sup>15</sup> revealed the circularity in the description. Nevertheless, the language held sway for some 60 years as a means of construing a privative clause, if not the wider range of protective provisions.

*Hickman* (and its progeny) developed in federal jurisdiction under Commonwealth law, where the constitutional requirements of s 75(v) of the Constitution operated. The *Hickman* principles therefore were a means of *saving* protective clauses from constitutional invalidity, albeit by severe pruning. But if Griffith CJ was correct in identifying the problem as one of reconciling apparently inconsistent statutory provisions, the underlying problem was not constitutional, although the solution may have been constitutionally driven.

On that view, *Hickman* was but a staging post: if a statute conferring a limited jurisdiction and removing the power to enforce the limits was internally inconsistent, Parliament could clarify its intention. Indeed, the point of reconciliation was implicit: the conditions were not intended to be binding in the sense that breach gave rise to invalidity. That understanding also avoided the constitutional problem of s 75(v). As

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<sup>13</sup> *Baxter v New South Wales Clickers' Association* [1909] HCA 90; 10 CLR 114 at 131.

<sup>14</sup> *R v Hickman; Ex parte Fox and Clinton* [1945] HCA 53; 70 CLR 598.

<sup>15</sup> *R v Coldham; Ex parte Australian Workers Union* [1983] HCA 35; 153 CLR 415 at 419 (Mason ACJ and Brennan J).

explained in *Richard Walter*,<sup>16</sup> a protective provision could be construed as expanding the scope of the power conferred. That approach was generalised in *PBS*:<sup>17</sup> the consequence of a breach of statutory constraint was, subject to constitutional limitations, a matter for Parliament. The tribunal or executive officer could not be given a power to act beyond the legislative limits of Parliament, nor to act in defiance of broader constitutional principles, such as the separation of powers. That said, it was all a matter of construing the legislation: see *Futuris*.<sup>18</sup> Gouliaditis<sup>19</sup> has argued persuasively that this result is unsatisfactory. He makes two broad points. One is that the analysis of the High Court in *Plaintiff S157*,<sup>20</sup> and especially in *Kirk*,<sup>21</sup> is driven by the constitutional imperative to preserve the full extent of the High Court's own functions under s 73 of the Constitution. That explains the relaxed approach to the effect of the protective clause in s 175 of the *Income Tax Assessment Act 1936* (Cth), the taxpayer having alternative statutory avenues of challenge to a legally (and indeed factually) flawed decision.<sup>22</sup>

His second point is that the suggestion in *Futuris* that we now engage in statutory construction unencumbered by the complexities of *Hickman* is simplistic. He notes the view of Gageler expressed in 2001 that the *Hickman* principles remain useful.

A second area of inquiry tends to confirm this view. It too seeks to create constraints on legislative power, namely the imposition of the clear statement principle, sometimes labelled the principle of legality. In broad terms, the principle requires that a clear statement by the Parliament is necessary to create a legislative intention to reduce or withdraw what are described as "fundamental rights and freedoms". As a principle of statutory interpretation it appears to stand outside constitutional constraints because it assumes that Parliament has a specific power, which can be exercised if it speaks sufficiently clearly.

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<sup>16</sup> *Deputy Commissioner of Taxation (Cth) v Richard Walter Pty Limited* [1995] HCA 23; 183 CLR 168.

<sup>17</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [91].

<sup>18</sup> *Federal Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32; 237 CLR 146.

<sup>19</sup> Nicholas Gouliaditis, "Privative Clauses: Epic Fail" [2010] 34 *MULR* 870.

<sup>20</sup> *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2; 211 CLR 476.

<sup>21</sup> *Kirk v Industrial Court of New South Wales* [2010] HCA 1, 239 CLR 531.

<sup>22</sup> *Taxation Administration Act 1953* (Cth), Pt IVC.

The clear statement rule has a different operation. It is part of the common law principles that govern interpretation of statutes and hence help to “define” the boundaries between the judicial and legislative functions.<sup>23</sup> Thus French CJ adopted the language of Gummow J in *Wik*<sup>24</sup> describing the common law as “the ultimate constitutional foundation in Australia.” The Chief Justice continued in *Momcilovic*:<sup>25</sup>

“It is in that context that this Court recognises the application to statutory interpretation of the common law principle of legality.”

There is an intriguing shift in the point of reference within this passage. As explained in the following paragraph, the “principle of legality” is “expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language.”<sup>26</sup> In that sense, the clear statement rule might be described as a principle of statutory interpretation: the proposition that it applies to statutory interpretation invites the question as to whether it is self-referential. In other words, is the clear statement rule not only a “quasi-constitutional ‘manner and form’ requirement”<sup>27</sup> but an entrenched requirement?

French CJ was quick to emphasise that the principle of legality “does not constrain legislative power”,<sup>28</sup> but it clearly imposes a constraint, albeit procedural rather than absolute. However, there may be a stronger point underling this discussion: Chapter III of the Constitution undoubtedly imposes constraints on federal legislative power. Just as a state parliament cannot deprive a state Supreme Court of a “defining characteristic”, so the federal parliament cannot deprive the High Court of a function properly described as a defining characteristic of a court. In these terms, it is the function of the courts, according to reasonably well defined principles, to determine the meaning of legislation enacted by the parliament. It is therefore beyond the power the parliament to impair that function. The function is not a common law function, in the sense that it is in any direct sense the result of judicial decisions: rather, it is part of an “ultimate constitutional foundation”, which may be beyond the power of the courts or the parliament to vary.

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<sup>23</sup> *Momcilovic* ...at [42].

<sup>24</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182.

<sup>25</sup> *Momcilovic*

<sup>26</sup> *Momcilovic* at [43].

<sup>27</sup> Goldsworthy, *Parliamentary Sovereignty*, p 309.

<sup>28</sup> *Ibid.*

Thirdly, the Court has emphasised three features of statutory interpretation. One is the rejection of subjective interpretation in favour of an objective assessment of meaning to be derived from the text.<sup>29</sup> This is a curious construct: it implies that only the text is relevant to determining meaning, to the exclusion of second reading speeches and extraneous materials. However, that would be inconsistent with the conventional principles, such as the mischief rule, as an indicator of purpose.<sup>30</sup> It seems unlikely that that is intended: rather, it seems to reflect a diminution in the weight likely to be accorded to such expressions of intention.<sup>31</sup> Does this have implications for the institutional relationship between Parliament and the courts?

A second feature is the common assertion is that the principles of statutory interpretation are understood and accepted by all arms of government.<sup>32</sup> That sounds like an empirically justifiable statement, but that too may be doubted because the Court has never offered a factual basis for it. Rather, it seems to be a normative statement: that is, being pronounced by the courts (or rather the High Court) it should be accepted by all arms of government. But if that is so, where does the Court get its authority to make such proclamations? If that is a constitutional function of the Court, is it an exclusive function, or one shared with the Parliament? If shared, which authority is dominant in the event of a clash? Alternatively, is it meaningful to say it is *not* a constitutional function of the Court – except in the sense that it can be ignored as an exhortative flourish, which does not sound plausible. The third feature is slightly different: it derives from statements of the Court as to the inter-relationship of the courts of different States (and Territories).

If the High Court sets out a principle of statutory interpretation, does it apply to all legislative instruments or only to those of the political entity which enacted it? At least in principle, one would expect the principles to be restricted: for example, each jurisdiction has its own *Interpretation Act*. Yet the High Court has never, to my knowledge, expressly limited its statements in this way. This seems unlikely to be inadvertent inattention to detail, but is there an alternative explanation?

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<sup>29</sup> *Lacey v Attorney General (Qld)* [2011] HCA 10; 242 CLR 573 at [43]-44 (French CJ, Gummow, Hayne, Kiefel and Bell JJ); *Lee v New South Wales Crime Commission* [2013] HCA 39; 251 CLR 196 at [45] (French CJ).

<sup>30</sup> *Heydon's Case* (1584) 3 Coke 7a; 76 ER 637 at 638.

<sup>31</sup> See *Northern Territory v Collins* [2008] HCA 49; 235 CLR 619.

<sup>32</sup> *Zheng v Cai* [2009] HCA 52; 239 CLR 446 at [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

One possible explanation is that the Court sees these principles as part of the “common law”, which it asserts is unitary and applicable in all States and Territories. Of course, that is only true to the extent the common law is not varied by statute, but even statutory interpretation is subject to legislation in every jurisdiction in Australia. Accordingly, uniformity should be demonstrated rather than assumed.

This has broader ramifications: for example, it is not necessarily true that uniform laws will entail uniform application in all jurisdictions. There are contextual reasons which may lead to disparities. These factors may provide compelling reasons for one court not to follow its interstate sibling, an issue which has yet to be fully explored.<sup>33</sup>

To return to the concept of subjective and objective intention, it is a truism of modern statutory interpretation that we adopt a purposive approach. But that is to seek recourse in a principle of generality not dissimilar from the language of literalism. The true development of modern statutory interpretation was a recognition (or perhaps rearticulation) of the self-evident truth that sentences, not words, are the useful building blocks of communication and, by extension, that meaning is inherently contextual. But the context, as it appears to judges in a particular case, may be quite different from the context as it appeared to the executive in proposing legislation for the Parliament or to the Parliament itself. Somehow principles of statutory interpretation must accommodate such considerations. Yet it is often only by reference to extraneous materials that the context understood by the legislature can be grasped.

Further, in discussing principles stated to be generally understood and accepted, would not some reference to the institutional role of parliamentary counsel be a relevant consideration?

Finally, whilst there is a plethora of canons of statutory interpretation, there is no coherent principle governing their application. The result is that judgments can appear opportunistic in their adoption of one canon rather than another, which may support a different conclusion. This is a real difficulty, but it is not addressed in our judicial reasoning. By contrast, in construing international Conventions, the

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<sup>33</sup> See *Fairfax Media Publications Pty Ltd v Bateman* [2015] NSWCA 154.

authoritative treaty, the Vienna Convention,<sup>34</sup> contains a number of principles which, at least in practice, tend to be applied sequentially.<sup>35</sup>

## Conclusions

This incomplete conspectus illustrates two propositions. First it must be true that principles of statutory interpretation are a critical element of the inter-relationship between the legislature and the courts. In that sense they must constitute an inherent element of our constitutional arrangements. Since both Parliament and the courts have sought to promulgate such principles, it is surprising that there has been so little examination of their role. That may be a function of the fact that neither arm of government can claim full control, although the wrestle over privative clauses, and now the principle of legality, show that the fault line is not quiescent.

Rather, the expression of friction occurs in relation to outcomes, rather than technical legal principles. So much was apparent from the cases which preceded the enactment of a strong privative clause in the *Migration Act*, the decision in *Plaintiff S157* emasculating that provision and the government's response to M70, the Malaysia solution decision. However, there are less politically controversial cases where the application of principles of statutory interpretation can readily explain different results.<sup>36</sup>

An analysis of this area will reveal a more broad based structure to our constitutional law than that revealed in the written Constitution.

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<sup>34</sup> Vienna Convention the Law of Treaties (1969).

<sup>35</sup> See *Firebird Global Master Fund II Ltd v Republic of Nauru* [2014] NSWCA 360. *Li v Zhou* [2014] NSWCA 176; 87 NSWLR 20 at [26].??

<sup>36</sup> See *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; 248 CLR 378, *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9; 88 ALJR 473, *Taylor v Centennial Newstan Pty Ltd* [2009] NSWCA 276; 76 MSWLR 379.