Rights and Freedoms and the Rule of Law

Victorian Law Foundation Oration

The Hon Robert French AC

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One of the more memorable moments of my time as Chief Justice came in May 2013. I was delivering a talk on complexity and moral clarity in the law. The venue was the Mildura Bowls Club. My hosts were the North West Law Alliance and the Murray Mallee Country Community Legal Service. There was not much seating, but there was food and drink. The audience stood about with cups of tea and pass-around sandwiches. Small children ran between their legs. Clear communication of my points was essential. It was a delightful, and I thought important, opportunity to talk about our legal system to people outside the capital city CBDs.

The occasion I enjoyed so much came about as part of National Law Week. Its growth and popularity in this State is one of many things which the Victorian Law Foundation has supported as part of its extensive program of activities delivering comprehensible information about our legal system to people throughout the State. It has done so for 50 years. This is its 50th anniversary and it is an honour to be asked to deliver the Foundation's Annual Oration this evening.

It has always been important that our community has an awareness of the essential elements of our legal system and our governmental institutions. It has never been more important than now. The spaces left by lack of awareness and misunderstanding are all too readily filled by snake oil salesmen coming in from the hinterland of our civil and political discourses. There has never been a more important time to encourage a widespread understanding of the importance of the rule of law to the protection of our rights and freedoms. As the famous United States jurist, Judge Learned Hand, said in a celebrated speech 'The Spirit of Liberty', delivered in 1944:

> Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.[1]

Respect for the rule of law as the primary means for the long term protection of rights and freedoms is also essential. This evening I want to say something about the nature of the rule of law and its relationship to our rights and freedoms.

The meaning of the term 'rule of law' is much debated. A core element of it is that nobody, private citizen, public official or government is above the law. Professor AV Dicey described it, in its English setting, as a 'characteristic' of the English constitution. General formulations of the rule of law have been developed in Britain which have application well beyond that country. A leading example is the concise statement of the late Lord Thomas Bingham in 2010:

> All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.[2]

Closer to home, Professors Cheryl Saunders and Katherine Le Roy in their book, *The Rule of Law*, saw the concept as embodying four principles:

> First, the polity must be governed by general rules that are laid down in advance. Secondly, these rules (and no other rules) must be applied and enforced. Thirdly, disputes about the rules must be resolved effectively and fairly. In a common law system, a fourth principle might be added: that government itself is bound by the same rules as citizens and that disputes involving governments are resolved in the same way as those involving private parties.[3]

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1 Judge Learned Hand, 'The Spirit of Liberty' (Speech delivered during an 'I AM an American Day', Central Park, New York City, 21 May 1944). The speech was later turned into a book of the same name: see I Dillard (ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (Alfred A Knopf, 1952) 144.

2 Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 8.

3 Cheryl Saunders and Katherine Le Roy, 'Perspectives on the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds) *The Rule of Law* (The Federation Press, 2003) 1, 5 (footnote omitted).

Each of those general ideas of the rule of law which I have quoted fits into the Australian legal order. I am content to adopt as my central theme a statement by a friend from Western Australia who served on the High Court for 11 years and died in April 2015. As the Hon John Toohey said '[t]he rule of law, the concept that we are all subject to the law and that noone is above it, is an essential element for a free society.'[4]

Under the Commonwealth Constitution with its division of law-making power between the Commonwealth and the States, the limits it imposes on those powers and its separation of the judicial from the legislative and executive branches of government, there is no such thing as unlimited official power. Section 75(v) of the Constitution has the effect of conferring jurisdiction on the High Court to judicially review decisions or conduct of Commonwealth Ministers and officers for jurisdictional error — which broadly speaking includes conduct in excess of constitutional or statutory powers. Chief Justice Gleeson described it as providing in the Constitution a 'basic guarantee of the rule of law'. Because it is a constitutional provision the jurisdiction it confers on the Court cannot be removed by anything other than a constitutional amendment. It is thus proof against attempts to place Commonwealth executive action beyond legal scrutiny and challenge. A similar protection has been implied by the High Court as applicable to the traditional supervisory jurisdiction of the Supreme Courts of the States.[5] The continuing existence of those courts was entrenched by the High Court's decision in *Kable v Director of Public Prosecutions (NSW)*.[6] The Court has also held that the courts of the States cannot be made subject to the direction of the executive governments of the States.[7] Nor can they have imposed on them or their judges functions which are incompatible with their essential characteristics. Those essential characteristics include open hearings, procedural fairness and publicly available reasoned decisions. There is, to the extent I have described, a pervasive constitutional protection for the rule of law in Australia in relation to the exercise of official power which enables its limits to be policed and enforced on the application of persons affected by its exercise.

In this country, the concept of the rule of law includes some specific propositions relevant to the exercise of official powers which may affect rights and freedoms:

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4 John Toohey, "Without Fear or Favour, Affection or Ill-Will': The Role of Courts in the Community' (1999) 28 *Western Australia Law Review* 1, 11.

5 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

6 (1996) 189 CLR 51.

7 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 219.

1. All official power derives from rules of law found in the Commonwealth and State Constitutions or in laws made under those Constitutions.

2. There is no such thing as unlimited official power, be it legislative, executive or judicial.

3. The powers conferred by law must be exercised lawfully, rationally, consistently, fairly and in good faith — failure to comply with those requirements can constitute jurisdictional error and make the purported exercise of the power invalid.

4. The courts have the ultimate responsibility of resolving disputes about the limits of official power and in so doing they, like those whose decisions they review, must act lawfully, rationally, consistently, fairly and in good faith and within the proper limits of their constitutional function.

Importantly, in Australia the interpretation of the Constitution and of laws made by the Parliaments is ultimately determined by the courts where there is a dispute. The courts have adopted certain key rules for statutory interpretation which are consistent with the democratic process and, to the extent possible, protective of common law rights and freedoms. They are:

1. Laws made by the Parliament are to be interpreted in accordance with their text, context and purpose and in accordance with common law and statutory rules of interpretation understood by those who draft the laws and, by attribution, by the parliaments which enact them.

2. Laws made by the Parliament are to be interpreted where interpretive choices are open on the text so as to avoid or minimise their impact on common law rights and freedoms. That principle is commonly referred to as the 'principle of legality'.

The legal system, of course, embraces far more than laws which affect official power. It covers the statutory and judge-made law dealing with the rights and liabilities of people in

conjunction with such matters as employment relations, property, commercial dealings, the duties and responsibilities of people towards each other including their legal duties of care, and extends to the great array of regulatory and criminal laws of the Commonwealth and the States.

The rule of law provides a kind of societal infrastructure. It creates and maintains the space within which we can enjoy our freedoms, exercise our rights, develop our capacities, find opportunities, take risks and generally pursue life goals. It is that infrastructure, strengthened by efficient and impartial and independent courts and tribunals, which encourages the investment of capital from domestic and offshore sources. It might also be thought, because it supports a society with respect for the human rights and freedoms of its members, to attract human capital in the form of people coming from other places to live and work here and contribute to the common good. It gives shape and definition to Australia as a particular kind of society in the global community of nations.

Let me focus for a moment on the notions of equality before the law and equal justice. Equality before the law is obviously important to our legal system and to the rule of law. However, it is not always sufficient to ensure equal justice. A law of equal application in a formal sense may have adversely discriminatory effects on some people because of their different circumstances and attributes. The problem was summed up in the well-known statement attributed to Anatole France '[t]he law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to get in the streets and to steal bread.'[8] As Justices Crennan and Kiefel (now Chief Justice Kiefel) and myself said in 2011 in *Green v The Queen*[9], which concerned the sentencing of co-offenders:

> 'Equal justice' embodies the norm expressed in the term 'equality before the law'. It is an aspect of the rule of law … It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law.[10]

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8 Anatole France, *The Red Lily* (1894) ch 7.
9 (2011) 244 CLR 462.
10 Ibid 472–73 [28].

A law which is inflexible in its approach to different cases and circumstances can fall short of equal justice. A law requiring the imposition of a mandatory minimum sentence of imprisonment for a particular class of offence may have that effect. A benefit of such a law may be that it provides certainty of outcome in categories of cases which are of great public concern. But where there are significantly different levels of moral culpability in the cases to which the law is applied, there may be a price to pay for certainty — a failure to dispense equal justice which may weaken the moral force of the law and result in the imprisonment of people who should not be imprisoned at all or who should be imprisoned for a lesser period than has been imposed. It also has implications for the protection of freedoms in our society. No law should deprive a person of his or her liberty except to the extent necessary to advance the legitimate public purpose of that law. Disproportionate punishment which does not match the offence offends against that principle and may be counter-productive to the goal of preventing repetition of offending. The extension of categories of offence for which minimum mandatory sentences are prescribed is a matter of continuing concern for those who believe we should aspire to equal justice.

Equality before the law and equal justice as aspects of the rule of law also embrace the idea of equal access to justice — which broadly speaking requires that people not be seriously disadvantaged in their interactions with the legal system because of their lack of material or personal resources, for example, by lack of understanding deriving from linguistic or cultural difficulties or lack of education. There is a significant level of concern in Australia today about the access problem which has been reflected in a number of Inquiries and Reports over many years. It is one of the areas addressed by the objectives and activities of the Victorian Law Foundation. It has also been reflected in the relatively recent establishment of the Judicial Council on Diversity which is supported by the Council of Chief Justices and which, with the assistance of Commonwealth funding, has prepared guidelines for courts which can help to mitigate some of the difficulties. It is also, I am pleased to say, a current focus of attention by the Law Council of Australia, whose President, Fiona McLeod, is present tonight.

Impaired or unequal access to justice or compromised access to justice detracts from the strength of the rule of law as part of our societal infrastructure. That weakness has been with us for a very long time and will not be solved in the short or medium term. But it must

continue to be addressed in a practical and material way by all those involved in the justice system in this country.

We can properly claim that the rule of law in Australia is well-established. It is, as Sir Owen Dixon said in the *Communist Party case*,[11] an assumption on which our Constitution is based. We cannot say that it can be taken for granted. Indeed, it is important that it never be taken for granted. There are to be found in contemporary democratic societies, men and women of action and emphatic opinion in government and outside it who are impatient with the rule of law and the constraints it imposes on legislative and executive powers and who regard courts, in the words of the late Professor Gordon Reid, 'as an inconvenient differentiation of government'.

There is, of course, nothing particularly unusual about expressions of executive impatience with legal constraints on the exercise of public power. In democratic societies with a constitutional or conventional separation of powers that impatience is generally expressed in words rather than extra-constitutional action. Expressions of impatience have emanated from both sides of politics from time to time, particularly in the politically sensitive area of immigration policy generally and asylum seeker policy specifically. A recent example from beyond our shores is the denunciation of the President of the United States of a Federal Judge, Judge Robart, who issued a Temporary Restraining Order against the implementation of a Presidential Executive Order of 27 January 2017 entitled 'Protecting the Nation from Foreign Terrorist Entry into the United States'. The Judge was a conservative Republican appointment. In issuing the Temporary Restraining Order on the application of the States of Washington and Minnesota he was careful to explain the limits of his judicial function. He said:

> Fundamental to the work of this court is a vigilant recognition that it is but one of three equal branches of our federal government. The work of the court is not to create policy or judge the wisdom of any particular policy promoted by the other two branches. That is the work of the legislative and executive branches and of the citizens of this country who ultimately exercise democratic control over those branches. The work of the Judiciary, and this court, is limited to ensuring that the

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[11] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

> actions taken by the other two branches comport with our country's laws, and more importantly, our Constitution.[12]

His description of the judicial function was uncontroversial and would be regarded as equally uncontroversial in Australia.

The United States' judge's explanation of his confined judicial function cut no ice with the President. In a tweeted comment on Judge Robart published at 12 am on 5 February 2017 he said: 'The opinion of this so-called judge, which essentially takes law enforcement away from our country is ridiculous and will be overruled.'

The President's statement could not be dignified as 'criticism' of a judicial decision. It was rather a content-free coupling of epithets calculated to mitigate the political embarrassment caused by the ruling by suggesting that it and the 'so-called judge' somehow lacked legitimacy. It also involved a verbal pre-emption of the appeal process. Instead of saying 'the decision will be appealed' the President said 'it will be overruled'. It is abundantly clear that neither the judge or the appellate court would be intimidated or influenced by the President's remarks. Nevertheless, such remarks may be seen as calculated to undermine respect for the rule of law in the sense in which I have described it above. Some of you may have heard the live broadcast of argument in the Ninth Circuit Court of Appeal in which the United States Government sought a stay of the Temporary Restraining Order which had been issued by Judge Robart. For judges and lawyers who listened to the argument the questions from the Bench directed to both the Federal Government's lawyer and the lawyer representing the State of Washington who was defending the Temporary Restraining Order, were precisely the kinds of questions which one would expect judges to ask in a debate about the continuation of an interim injunction. Not so for the President who is reported in the *New York Times* to have said, following the hearing, and of course while judgment is reserved, that he had 'listened to a bunch of stuff last night on television that was disgraceful'. He said 'I think it's sad. I think it is a sad day. I think our security is at risk today.'

It is interesting and encouraging that the President's nominee to the Supreme Court, Justice Neil Gorsuch, has evidently told a United States Senator, as reported in CNN, that the

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[12] *State of Washington v Donald J Trump*, Case No C17-0141, JLR, US District Court, Western District of Washington and Seattle.

President's tweets about Judge Robart were 'demoralising' and 'disheartening'.[13] The President obviously expected an immediate victory in the Court of Appeal. He said: '[i]f you were a good student in high school or a bad student in high school, you can understand this and its really incredible to me that we have a court case that's going on so long.'

The President and his government have, of course, indicated an acceptance of the rule of law to the extent that their response has been to appeal. There is an example in the history of the United States of the continued exercise by a President of draconian executive powers despite a judicial determination that the powers did not exist.

On 27 April 1861, during the Civil War, President Abraham Lincoln issued an order to the Union General, Winfield Scott, which authorised him to suspend the writ of habeas corpus on the military lines between Philadelphia and Washington if public safety required it. Lincoln relied upon Article 1, section 9 of the Constitution which provided that:

> the privilege of the Writ of Habeas Corpus shall not be suspended, unless, when in cases of Rebellion and Invasion the public safety may require it.

On 25 May, Federal Troops arrested John Merryman for recruiting and leading a drill company for Confederates. Chief Justice Roger Taney, sitting as a trial judge, issued habeas corpus to the Federal General Cadwallader who refused to accept service. Taney then ruled that only Congress could suspend the writ of habeas corpus under Article 1, section 9. That is to say it was a legislative not executive power. Lincoln ignored Taney's ruling. The Court did not deal with the issue again. In 1863, Congress enacted legislation authorising the suspension of habeas corpus from time to time. In the meantime however, Lincoln made other suspension orders. He maintained at all times that he could suspend habeas corpus without the help of Congress. There was some support for his position.[14] What is notable for present purposes is that Lincoln did not appeal against Taney's ruling. He simply ignored it. The breadth of the power which he asserted in doing so is reflected in a sweeping Proclamation which he issued on 24 September 1862 suspending habeas corpus for the rest of

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13 CNN, Supreme Court Nominee Gorsuch calls Trump's tweets 'disheartening'.

14 James A Dueholm, 'Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis (2008) 29 *Journal of the Abraham Lincoln Association* 47–66.

the war in relation to a wide category of persons arrested under the martial law which he also proclaimed.[15]

This is an extreme example. Lincoln was facing an existential crisis for the nation he led. His example is not being invoked by the President today. The appeal against the Temporary Restraining Order, whatever the incendiary language which preceded and followed it, is consistent with the rule of law because it accepts that the executive power is subject to judicial review even if only to determine whether it is justiciable. That acceptance reflects the position in the United Kingdom and in this country.

A question about the application of the rule of law to executive power arose in a sequel to the *Tampa* case in 2001. As a member of a Full Court of three judges, I had found that the executive power of the Commonwealth extended to preventing asylum seekers on board the MV Tampa from entering Australia. Justice Beaumont agreed. Chief Justice Black dissented. But Michael Black and I found ourselves on the same side in a subsequent joint judgment when we rejected the Commonwealth's claim for legal costs against the parties, including Liberty Victoria who had brought the proceedings on behalf of the rescuees on the Tampa. The Commonwealth argued that the proceedings were not in the public interest and did not warrant a departure from the usual rule that the loser pays the other sides costs. The Commonwealth said that the proceedings were an interference with the exercise of the executive power analogous to a non-justiciable act of State. Chief Justice Black and I disagreed with the Commonwealth's proposition, saying:

> It is not an interference with the exercise of executive power to determine whether it exists in relation to the subject matter to which it is applied and whether what is done is within its scope.[16]

There are those who suggest that the rule of law and the rights and freedoms it protects may be attenuated in times of national emergency. That suggestion echoes the famous observation of Cicero from about 63BC — 'Silent enim leges inter arma' — in the

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15 Roy P Basler et al (eds) *The Collected Works of Abraham Lincoln* (1953-1955) vol 5, 436-37 cited in Dueholm, above n 14.

16 *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229, 242 [30].

clash of arms the laws are silent. When he made it it was a statement about a person's right of self-defence against attack.

In a speech delivered in the year 2000, former Chief Justice Rehnquist of the Supreme Court of the United States, discussed Lincoln's actions and those of President Franklyn Delano Roosevelt, who had issued a proclamation after Pearl Harbour relocating Japanese/American citizens to particular places within the United States. The Chief Justice said:

> while we would not want to subscribe to the full sweep of the Latin maxim — Inter Arma Silent Leges — in time of war the laws are silent, perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.[17]

Interestingly, the point was picked up in an episode of the Star Trek spin-off series, 'Deep Space Nine' broadcast on 3 March 1999 under the title 'Inter Arma Enim Silent Leges'. The Latin words were used by Star Fleet Vice Admiral, William Ross, to justify a covert executive operation in breach of the laws of the federation. Criticising him, the Deep Space Nine medical officer, Dr Bashir said:

> In time of war, the laws fall silent. Cicero.
>
> So is that what we have become; a twenty fourth century Rome, driven by nothing other than the certainty that Caesar can do no wrong?[18]

The script writer had evidently been browsing in a book store and had come across a book by Chief Justice Rehnquist entitled *All the Laws but one: Civil Liberties in Wartime.* The Latin words appeared on the dust jacket and on the title of the last chapter.

Chief Justice Rehnquist's comment may be contrasted with Lord Atkin's famous war-time dissent in the House of Lords in *Liversidge v Anderson,*[19] which seriously annoyed his

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[17] Remarks of Chief Justice William H Rehnquist, 100th Anniversary Celebration of the Norfolk and Portsmouth Bar Association, Norfolk, Virginia, 3 May 2000 www.supremecourtus.gov/publicinfo.

[18] http://memory-alpha.wikia.com/wiki/Star_Trek_Deep_Space_nine

judicial colleagues. The case concerned the *Defence (General) Regulations 1959* (UK) under which a person could be detained upon a determination by the relevant Secretary of State. Lord Atkin said:

> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.[20]

The words 'rights' and 'freedoms' echo through our history and our civil and political discourse. They attach, in our ordinary speech, to individual men and women. The usage reflects the idea in international law of human rights and freedoms as aspects of the dignity and equality of every human being. The Constitution does not provide expressly or by implication general guarantees of human rights and freedoms. There are, however, several provisions of the Australian Constitution which incorporate guarantees of rights and freedoms. Briefly they are:

- Section 51(xxiiiA) which empowers the Commonwealth Parliament to make laws about medical and dental services but expressly precludes civil conscription, eg forcing doctors or dentists to work for the government under a national health system.
- Section 51(xxxi) which, in effect, requires that any law of the Commonwealth Parliament with respect to the acquisition of property from any State or person must provide that the acquisition of property be on just terms. This was the constitutional provision relied upon by the makers of the film 'The Castle'.
- Section 75(v) which entrenches judicial review of decisions of Commonwealth officers.
- Section 80 which requires trial by jury for an offence against a law of the Commonwealth which is tried on indictment.

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19 [1942] AC 206.
20 Ibid 244.

- Section 92 which guarantees freedom of interstate 'trade, commerce and intercourse'. The latter part of that guarantee applies to freedom of movement across State boundaries and was relied upon to strike down national security regulations in 1945.[21]
- Section 116, which prohibits the Commonwealth from making any laws for establishing any religion or imposing any religious observance or prohibiting the free exercise of any religion. It also provides that no religious test shall be required as a qualification for any office or public trust under the Commonwealth.
- Section 117 prohibits discrimination between the residents of States.

The Court has also held that there is an implied freedom of political communication under the Constitution. It is implied, among other things, from the provisions of ss 7 and 24 of the Constitution which require that Senators and Members of the House of Representative be chosen directly by the people. It has been much litigated in challenges to laws which burden freedom of speech in various ways. It does not create a personal right or freedom but imposes limits on the law-making power of Parliament and on the common law. Political speech can be burdened for a legitimate purpose consistent with our representative democracy if the burden is reasonable and appropriately adapted to meet that legitimate purpose.

Many of the things we think of as basic rights and freedoms come from the common law. The common law is also used to interpret Acts of Parliament and regulations made under them so as to avoid or minimise intrusion into those rights and freedoms. That is done against the backdrop of the supremacy of Parliament. Parliament can, by using clear words for which it can be held politically accountable, qualify or extinguish those rights or freedoms except to the extent that they are protected by the Constitution.

The common law rights and freedoms include the following — personal liberty — freedom of movement — freedom of speech — freedom of association and assembly — freedom of religion — immunity from deprivation of property without compensation — the presumption of innocence — the privilege against self-incrimination — legal professional

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[21] *Gratwick v Johnson* (1945) 76 CLR 1.

privilege — the right to a fair trial — and the right to procedural fairness in administrative decision-making and judicial processes.

Sometimes the two words, 'rights' and 'freedoms' are used in ways which confuse one with the other. People may say that they have a 'right' to do something when they are simply free to do it. It may be that a right or a freedom is really indicative of a limit on legislative or executive power. It is necessary to know how the words are used when debating their intersection with the rule of law. If they are being used in different ways debates about them may be at cross purposes.

A very basic understanding of personal 'freedom' views it as the condition of a person who has the capacity to do something such as to walk, to think, to form beliefs and opinions, and to express himself or herself in writing, speech and artistic works. If a person has the capacity to do those things and is not prevented by law from doing them, he or she can be said to have personal freedom to do them. That understanding of freedom is descriptive rather than normative. It does not depend upon the existence of a law.

In a judgment given in 1995, the eminent English jurist, Sir John Laws, encapsulated that idea neatly when he said:

> For private persons, the rule is you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions.[22]

In making that observation Sir John Laws drew an important distinction between the position of a human and that of a public authority. For a public authority the rule is different — any action to be taken must be justified by positive law. That is a proposition which is important to the idea of the rule of law so far as it applies to the exercise of official power.

Rights and freedoms sometimes are used to describe the same thing. A freedom may be protected by law and thereby acquire the character of a right. When rights and freedoms are confused false controversies can arise. In the course of a debate in the Senate concerning

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[22] *R v Somerset County Council; ex parte Fewings* [1995] 1 All ER 513, 523.

s 18C of the *Racial Discrimination Act 1975* (Cth), the Attorney-General, Senator Brandis, is said to have observed that 'people do have a right to be bigots you know'. There was much reaction to that statement, some of it quite over-blown. There were two difficult words in it. The first was 'right' and the second was 'bigot'. Had the Attorney-General said that 'people are free to be bigots' he might have been seen as saying something less controversial. And if, by using the word 'bigot' the Attorney had simply been understood as referring to a person who holds prejudiced attitudes or beliefs adverse to a particular group, the statement would have been quite uncontroversial. The law generally does not, because it cannot, constrain or regulate what people think or believe however ridiculous or offensive others may find their beliefs to be. When bigotry is so understood, everybody is free to be a bigot. However, when bigotry is manifested in speech or action directed against others, there can be a debate about whether the law should step in. Whether it should or not is a matter of public policy.

Restrictions on rights and freedoms may be imposed by democratic processes — by laws enacted by the Parliament. They may also be imposed by delegated legislation and legislative instruments made by Ministers or public officials under the authority of Acts of Parliament. The mere fact that a law adversely affects a right or freedom does not mean that the rule of law is somehow undermined. There is, however, a need for a continuing societal, parliamentary and official culture of scepticism about laws which seek to reduce any freedoms or the existence or exercise of any rights.

Laws affecting rights and freedoms are often justified by arguments that they are necessary to effectively meet important objectives such as the prevention of terrorist acts or the disruption of organised crime, to avoid lesser social mischiefs or to regulate a range of activities. Environmental laws, town planning laws and traffic laws all fall into that category.

A number of cases in the High Court over the past few years have considered the powers of investigative authorities to interrogate and compel answers and provision of information from persons in matters in respect of which those persons are facing or may face criminal charges. There is a clear tension between the existence of such processes and the accusatorial nature of the trial process at common law which places the burden of proof on the prosecution and does not require the accused to help the prosecutor or to say anything unless he or she chooses to do so. There are also statutory provisions which reverse the burden of proof. For example, a person in possession of more than a certain amount of a

prohibited drug may be required to prove that he or she did not intend to sell or supply it to others.

The Australian Law Reform Commission (the Commission) in December 2015 produced a Report on encroachments by Commonwealth laws on traditional rights and freedoms. The Report was commissioned by the Attorney-General, Senator Brandis. It is a very substantial Report. Time does not permit an overview of all the encroachments which it covered. It may be sufficient to refer to some of the Commission's comments in its Executive Summary. One observation was that in Australia legislation prohibits, or renders unlawful, speech or expression in many different contexts — including in relation to various terrorism offences and terrorism related secrecy offences, other secrecy laws and the *Racial Discrimination Act 1975*. The Commission considered that Part 2A of the Act of which s 18C forms a part, would benefit from a more thorough review in relation to freedom of speech in conjunction with consideration of anti-vilification laws more generally. The Commission also observed that generally there was reason to consider whether Commonwealth secrecy laws provide for proportionate limitations on freedom of speech.

The Commission noted that a wide range of Commonwealth laws may be seen as interfering with freedom of association or freedom of assembly. The areas of greatest concern included aspects of counter-terrorism and the character test in migration law. A number of Commonwealth laws were also seen as interfering with freedom of movement. Some of them relate to limitations long recognised by the common law such as official powers of arrest or detention, customs and passport controls, and quarantine. The Commission thought it desirable to review others to ensure that they do not unjustifiably interfere with that freedom. These are just some examples of the areas which were examined. There were many others. There is much work of re-examination to be done if the Commission's suggestions are to be implemented.

The Commission's study is something which could well be reproduced in the States and Territories of Australia considering not only State and Territory Acts of Parliament, but also the vast array of rules and regulations, by-laws and statutory instruments which confer powers on officials over members of the public.

The rule of law which I have discussed this evening is perhaps the most important protections of our rights and freedoms. In the end, however consistently with the rule of law,

statutes can be enacted by parliaments driven by short-term political imperatives which erode although perhaps only in a piecemeal way elements of those rights and freedoms. Over time, and cumulatively, this can be a process of death by a thousand cuts.

Anxious and diligent scrutiny of laws and delegated laws by those drafting them and those enacting them or making them is necessary to ensure that restrictions on rights and freedoms are publicly known and publicly justified and go no further than is necessary to meet legitimate public objectives. Sunset clauses for restrictions requiring reconsideration of their utility and proportionality should also be a routine measure.

In the end the rule of law provides the framework within which we can protect and enjoy our rights and freedoms. It does not guarantee them. The strongest guarantee as Learned Hand said all those years ago is to be found in a spirit of liberty in the people. The work of the Foundation and other public educational and advocacy bodies around Australia has a continuing and critical role in the maintenance of that spirit.