# Chapter 5

## Is Legislative Supremacy Under Threat?
### Statutory Interpretation, Legislative Intention, and Common Law Principles

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## The relationship between statute law and common law

Our legal system consists mainly of two different kinds of law – statute law, which is enacted by our Parliaments, and common law, which has been developed over centuries by the judges in deciding cases. Australia has a Constitution, which is superior to both, but my address is not directly concerned with it. My topic is the relationship between statute law and the common law, which is a crucial aspect of the relationship between Parliaments and the judiciary.

The orthodox view is that statute law is supreme and prevails over the common law: Parliaments can change even common law principles deemed "fundamental". This is crucial to the principle of parliamentary sovereignty or supremacy.[1] But the relationship is complicated because statutes are interpreted by the judges according to interpretive principles that the judges themselves have developed; in other words, the meaning of a statute depends on the application of these judge-made, common law principles.

The question I want to raise is the extent to which that enables the judges to regulate and perhaps even limit the exercise by Parliaments of their law-making power. Of particular concern are some modern ideas about statutory interpretation that, if taken further, may pose a threat to the principle of legislative supremacy. I do not accuse judges who are attracted to these ideas of plotting to undermine that principle, but I do want to warn that it may be at stake.

## Interpreting statutes according to common law principles

In the late 19th century, Professor A. V. Dicey of Oxford University wrote what became a hugely influential classic on the British Constitution, in which he upheld the doctrine of parliamentary sovereignty including the supremacy of statute law over the common law.[2] But he also acknowledged that, in practice, the meanings of statutes are to some extent controlled by the judges:

> Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself . . . to the Houses of Parliament, if the Houses were called upon to interpret their own enactments.[3]

In other words, the judges used their power of interpretation to protect cherished common law principles from statutory change. Lord Devlin, a member of Britain's highest court in the 1960s, described 19th century judges as sometimes being "obstructive", by giving statutory words "the narrowest possible construction, even to the point of pedantry", in order to protect

> a Victorian Bill of Rights, favouring . . . the liberty of the individual, the freedom of

> contract and the sacredness of property, and which was highly suspicious of taxation. If the Act interfered with these notions, the judges tended . . . to assume that it could not mean what it said . . .[4]

The usual method of doing so was to "presume" that Parliament did not intend to infringe common law principles, and to allow that presumption to be rebutted only by language of irresistible clarity. Parliament would be tripped up unless it dotted every "i" and crossed every "t" – and even that might not be enough. As we will see, that approach to statutes is arguably being revived today, although the principles that the judiciary protects have changed.[5]

It is right and proper that statutes be interpreted by the judiciary when there is any dispute about their meaning. According to the principle of the separation of powers, while the law-maker has power to make the law, an independent judiciary must have the power to interpret and apply it. It would be dangerous if the law-maker were also the law-applier. The law-maker is not necessarily the best interpreter of its own laws: for example, it may confuse what it did enact with what it intended to enact, or with what it would have intended had it thought more carefully about the issues. And those subject to the law should be able to rely with confidence on the law that the law-maker did enact, even if the law turns out not to operate quite as the law-maker would have wanted. Judges therefore do not necessarily flout the supremacy of statute law merely by "constru[ing] statutory exceptions to common law principles in a mode which would not commend itself . . . to the Houses of Parliament, if the Houses were called upon to interpret their own enactments."[6]

On the other hand, the power of judges to interpret statutes should not be used to rewrite them. This is partly for the same reasons. First, the separation of powers: the judges' function is faithfully to interpret and apply statutes made by others, and not to usurp their law-making authority by rewriting statutes. This is especially the case in a democracy.

Secondly, members of the public and their legal advisers should be able to rely with confidence on the statute that was enacted, and not be vulnerable to unpredictable judicial revisions.

## Statutory interpretation, legislative intention, and legislative supremacy

Whether or not a particular statute is somewhat deficient in communicating Parliament's intentions and objectives, they are relevant and even indispensable to the interpretation of statutes.[7] This is because the enactment of a law is an act of communication by the law-maker to those who are subject to it. This act of communication employs a natural, human language; it is governed by the same principles, and is subject to the same pitfalls, involved in ordinary language usage. One of those principles is that the meaning of what we communicate to one another is determined not only by the very bare or sparse literal meanings of the words we use, but by contextual information that helps to flesh out the much richer meaning that we intend to communicate.[8] In doing so, context helps resolve ambiguities and vagueness, fills in gaps or ellipses, and reveals implicit assumptions and other implications. Without recourse to that rich, contextual information, it would be much harder for us to communicate with one another successfully.[9] The same goes for Parliament's attempts to communicate by enacting statutes.

This is why, for at least six centuries, common law courts have maintained that the primary object of statutory interpretation is "to give effect to the intention of the [law-maker] as that

intention is to be gathered from the language employed having regard to the context in connection with which it is employed."[10] This has often been described as "the only rule", "the paramount rule", "the cardinal rule" or "the fundamental rule" of interpretation."[11] The former Chief Justice of the High Court of Australia, Murray Gleeson, said that "[j]udicial exposition of the meaning of a statutory text is legitimate so long as it is an exercise . . . in discovering the will of Parliament: it is illegitimate when it is an exercise in imposing the will of the judge."[12]

Now, let us return to the question I started with. Statute law is supposed to be supreme over the common law, but its interpretation is governed by common law principles of interpretation. Does this enable judges to regulate or perhaps even control Parliament's exercise of its law-making power? We can now see how this question has traditionally been answered: the fundamental interpretive principle I just mentioned protects the supremacy of Parliament. It is the anchor that prevents the judges from drifting too far from Parliament's communication of its intentions through the text of the statute understood in light of the context of its enactment.

But there are some worrying signs that this fundamental principle is now under threat.

## *Lacey v Attorney-General of Queensland*

Consider an example: a case that went to our High Court in 2011 titled *Lacey v Attorney-General of Queensland*.[13] After the appellant had been sentenced for manslaughter, the Attorney-General appealed to Queensland's Court of Criminal Appeal on the ground that the sentence was "inadequate" or "manifestly inadequate". The Attorney sought a sentence even higher than the Prosecution had originally sought.

Section 669A (1) of the *Criminal Code* (Q) provided that, in determining an appeal by the Attorney-General against a sentence, the Court of Appeal "may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper". The question was whether this really meant what it said – whether the Court did have an "unfettered discretion". Justice Heydon, in a lone but powerful dissent, said it did, but the majority of six Justices held (in effect) that it did not.[14]

The majority explained at length the long history of a strong judicial preference for Crown appeals against sentences to be exceptional rather than routine, requiring demonstration that the trial judge made a clear error in applying established sentencing principles.[15] Appellate courts should not be able to impose a different sentence merely because they take a different view of the appropriate balance to be struck among the many relevant factors. That would open the floodgates to such appeals and reduce the "finality" of sentencing.[16] Instead of the appellate court maintaining and clarifying general principles, it would "plant a wilderness of single instances with more instances of its own choosing."[17] It would also create a kind of "double jeopardy", enabling the Crown to seek a "second bite of the cherry" by arguing for a higher sentence even than the one it had originally sought.[18]

The majority said that this would be contrary to "deep-rooted notions of fairness and decency", and also "infringe upon fundamental common law principles, rights and freedoms."[19] Consequently,

> common law principles of interpretation would not, unless clear language required it, prefer a construction which provides for an increase of the sentence without the need to show error by the primary judge.[20]

Justice Heydon considered that the statute's words, "unfettered discretion [to] vary the sentence and impose such sentence as to the Court seems proper", amounted to clear language.[21] But the majority interpreted the provision as allowing the Court of Appeal to impose a different sentence only if it first found that the trial judge had made an error in applying sentencing principles.

It seems to me that the majority are right as a matter of sound public policy. But Heydon J, in his dissent, showed that the provision was based on the opposite view of public policy. He outlined the history behind the provision. It had for thirty years – from 1942 until 1973 – been interpreted as conferring an unlimited judicial discretion, even though it did not then include the word "unfettered".[22] But, in 1973, the Court of Appeal held that the provision should be interpreted differently, so that legal error by the trial judge had to be shown.[23] Two years later, in order to restore the previous position, the Queensland Parliament added the word "unfettered" to the provision. When the legislation was discussed in Parliament at the committee stage, the Minister of Justice said this:

> For approximately 30 years, until a court decision in 1973, the Court of Criminal Appeal acted on the principle that the Court had an unfettered discretion and was not bound to inquire whether the trial judge was manifestly wrong in his sentence. The Court simply had to determine what was the proper sentence in the circumstances. The effect of the decision in 1973 was that the Court of Criminal Appeal does not have an unfettered discretion and the Attorney-General now has to prove that the sentence was manifestly inadequate. It is proposed to make it clear that the Court of Criminal Appeal does have an unfettered discretion and has therefore to determine what was the proper sentence in the circumstances.[24]

The Minister later said much the same thing in his Second Reading Speech, when he also mentioned that the legal profession was opposed to the amendment.[25]

How did the majority of the High Court deal with this very clear evidence of legislative intention (the statute was, after all, sponsored by a government with a majority in a unicameral legislature)? First, they said that the Minister's statements in Parliament were of little relevance. The statements showed what the Minister intended, but

> The Minister's words . . . cannot be substituted for the text of the law, particularly where the Minister's intention, not expressed in the law, affects the liberty of the subject.[26]

Secondly, they suggested that the very idea of legislative intention is a fiction:

> it is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.[27]

The majority said much the same thing about the idea of legislative purpose.[28] In other words, Parliaments do not really have intentions or purposes. Legislative intentions and purposes are in effect constructed by the judges themselves, by applying interpretive principles including common law principles. As one of the majority judges said in a later case, what matters is *not* "the

intention (expressed or unexpressed) of those who propounded or drafted the Act", but "the reach and operation of the law . . . as . . . ascertained by the conventional processes of statutory interpretation."[29] " 'Intention' is a *conclusion* reached about the proper construction of the law in question *and nothing more*."[30] So legislative intention is not something that was in the minds of the law-makers that the judges try to *discover* ; it is, instead, something the judges *construct* by applying to the statutory text principles – including common law principles – of interpretation.

Having sidelined the powerful evidence, and even the very concept, of legislative intention, the majority focused on the words of the statute, and held that in this statutory context the meaning of the word, "appeal", meant an appeal against an error of legal principle.[31] But that rings hollow, given that as a matter of historical fact the word "appeal" had not had that meaning in this statutory context in Queensland from 1942 until 1973.[32] Moreover, as Justice Heydon pointed out, the interpretation the majority gave to the 1975 amendment – which added the word "unfettered" to the provision – entailed that the amendment achieved nothing. The 1973 court ruling, which the amendment was clearly designed to reverse, remained in place and unaffected.[33]

## The "principle of legality"

Importantly, the common law principles that led to this result include what is now called "the principle of legality,"[34] which is the modern label for an expanded version of the interpretive principle I mentioned earlier – that Parliament is presumed not to intend to interfere with established common law principles and freedoms.[35] In the *Lacey* case, the majority put the point more strongly: the common law "imputes" to the legislature an intention *not* to interfere with those principles and freedoms.[36] Moreover, the principle of legality has been expanded to cover what the judges regard as "fundamental rights". Consequently, it is now often described as a constitutional principle – one the judges have created – because it provides some protection of fundamental rights and legal principles from legislative interference.[37]

The traditional justification for this interpretive principle – if not always its application – was entirely consistent with legislative supremacy, because its express aim was respect for presumed legislative intentions.[38] As the High Court said in 1990, "[t]he rationale . . . lies in the assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear."[39]

But there is a growing tendency to dismiss this traditional justification as an artificial rationalisation or polite fiction. Sir Anthony Mason, Chief Justice of the High Court, 1987-95, once referred to the "evident fictional character" of strong interpretive presumptions, because "they do not reflect actual legislative intent."[40] It has been claimed that these presumptions "no longer [have] anything to do with the intent of the Legislature; they are a means of controlling that intent."[41] In reality, it has been said, the courts stubbornly protect fundamental common law values from legislative interference, while acknowledging political constraints on their ability to do so.[42] Consequently, the presumptions "can be viewed as the courts' efforts to provide, in effect, a common law Bill of Rights — a protection for the civil liberties of the individual against invasion by the state."[43] *Déjà vu*, given what Lord Devlin said about 19th century judges protecting a Victorian Bill of Rights.[44]

Do Australian judges still regard the principle of legality as resting on a sincere presumption that Parliament is unlikely to intend to infringe fundamental or common law rights and principles? Or – perhaps because they regard the very concept of legislative intention as a fiction – do they

believe it is really an attempt to protect a "common law bill of rights"? If the latter, then the judges have brought in a bill of rights through the back door, so to speak – or are in the process of doing so – without anyone except lawyers noticing.

There is evidence that our judges disagree about this. In a very recent case in the High Court, [45] three judges described the traditional justification for the principle of legality – in terms of presumptions of legislative intention – as its "longstanding rationale". But then they added this quotation from a leading British academic:

> The traditional civil and political liberties . . . have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction.[46]

By approving this statement, these judges suggest that because of the intrinsic importance of certain liberties, the principle of legality can be used to protect us from legislation that judges consider to be unwise or ill-considered. But, in the same case, Justice Gageler expressly disagreed, observing that "[t]he principle [of legality] provides no licence for a court to adjust the meaning of a legislative restriction on liberty which the court might think to be unwise or ill-considered."[47]

The principle of legality now arises frequently in litigation requiring the interpretation of statutes. No doubt this disagreement will be the subject of further judicial consideration and discussion in the near future.

## Summary and conclusion

To summarise my concerns, our Parliaments' authority to make laws may be undermined by some combination of the following ideas about statutory interpretation (which I do not attribute to any particular judge):

(1) That the meaning of a statute depends (partly) on common law principles of interpretation, which the judges can change;
(2) That the very idea of Parliament having an intention – other than merely to enact a bare text – is a fiction; and
(3) That the purpose of the principle of legality must be to protect rights, rather than fidelity to Parliaments' (non-existent) intentions.

As for the first idea, it is true that statutory interpretation depends partly on common law principles, and that common law principles can be changed by the judges. But great caution is needed. There is a crucial difference between principles of statutory interpretation, and ordinary common law rules and principles governing the law of property, contracts, torts and so on. No-one believes that the latter are static; the judges have acknowledged authority to continue to develop them, as circumstances change, in the interests of justice and the public interest.

By contrast, principles of statutory interpretation concern the interpretation of laws, made by elected Parliaments possessing superior law-making authority, that the judges are not permitted to change (subject to some narrow exceptions). It follows that the judges do not possess the same relatively unfettered authority to change these interpretive principles according to their own assessment of justice and the public interest. While there is some scope for modification, the judges must not usurp or subvert the authority of Parliaments.[48] As Sir Gerard Brennan, Chief Justice of the High Court, 1995-98, put it:

> The authority of the courts to change the common law rules of statutory construction must . . . be extremely limited for the courts are duty bound to the legislature to give effect to the words of the legislature according to the rules which the courts themselves have prescribed for the communication of the legislature's intentions.[49]

But that brings us to the second idea: that legislative intentions do not really exist. If that were so, then Parliaments could only enact bare texts, with very sparse literal meanings, prone to ambiguity, vagueness and gaps, and shorn of presuppositions and other implications. This would drastically diminish a Parliament's ability to communicate successfully, and give rise to countless interpretive problems that, if there is no underlying intention, would have to be resolved by judicial creativity. Recall Chief Justice Gleeson's statement, quoted earlier, that statutory interpretation "is legitimate so long as it is an exercise . . . in discovering the will of Parliament: it is illegitimate when it is an exercise in imposing the will of the judge."[50] But if there is no such thing as "the will of Parliament" – if there is only a bare text – then there is no alternative to interpretive problems being resolved by the will of the judges, even if they do so through the medium of common law interpretive principles.

That leads to the third idea. If legislative intentions do not really exist, it would make no sense for the "principle of legality" to be based on genuine presumptions of legislative intention. It would become simply a way of protecting rights in the absence of a properly enacted Bill of Rights – rights chosen as worthy of protection by the judges themselves. Parliaments would be able to qualify such a right, but they would have to anticipate the potential judicial obstacle and take great pains to do so with irresistible clarity.

Moreover, if judges were to adjust the apparent meaning of legislation to accommodate common law rights they themselves have developed, regardless of Parliament's intentions, they would become co-authors of the laws resulting from their interpretations. Parliaments would no longer be the sole author of the statutes they enact; no matter what words they use, their meaning would be determined partly by values preferred by the judges. This is applauded by opponents of legislative supremacy, who claim that the meaning of any statute is "the joint responsibility of Parliament and the courts"[51] acting in a "collaborative enterprise".[52]

To a limited extent this is true: appellate courts often necessarily do contribute to the meanings of statutes. When, as is all too common, a statute is ambiguous or vague on some crucial point, judges may be forced to fill the gap in order to decide a case before them. But, in doing so, they are supposed to act as Parliament's faithful agents, seeking to implement its objectives. If they do not, and *a fortiori* if they modify clearly intended meanings that are not ambiguous or vague, then they become joint law-makers rather than faithful agents. Parliament then merely provides raw material, in the form of a text, which the judges refashion according to their own value judgments in order to produce the law.[53] It is difficult to see how that could be reconciled with the fundamental principle that it is Parliament – and not the courts – that has the authority to make statute law.

In conclusion, let me caution against exaggerating these dangers. There is no reason to be alarmist. I do not believe that our judges are intent on staging some kind of constitutional revolution. They do not all accept the ideas about statutory interpretation that I have criticised. They are well aware of and almost always respect the constitutional principle of legislative

supremacy in law-making. But I do want to caution them, and others, that these ideas may pose a threat to that principle, and should therefore be very carefully scrutinised.

## Endnotes

1. See J. Goldsworthy, "The Constitutional Protection of Rights in Australia", in G.J. Craven (ed.), *Australian Federation, Towards the Second Century*, Melbourne University Press, 1992, 151.

2. A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed., E.C.S. Wade (editor), Macmillan, 1967.

3. Ibid., 413-14.

4. Lord Devlin, "Judges and Lawmakers" (1976) 39 *Modern Law Review* 1, 13-14, quoted in Chief Justice Murray Gleeson, "The meaning of legislation: context, purpose and respect for fundamental rights" (2009) 20 *Public Law Review* 26, 34.

5. See text to n. 42 below.

6. See text to n. 3, above.

7. See R. Ekins and J. Goldsworthy, "The Reality and Indispensability of Legislative Intentions" (2014) 36 *Sydney Law Rev* 39.

8. See R. Ekins, *The Nature of Legislative Intent*, Oxford, Oxford University Press, 2012, ch. 7.

9. Ibid. See also J. Goldsworthy, *Parliamentary Sovereignty, Contemporary Debates*, Cambridge, Cambridge University Press, 2010, 236-43.

10. Maxwell, *On the Interpretation of Statutes*, W Maxwell & Son, London, 1875, 1.

11. Respectively, *Sussex Peerage Case* (1844) 8 ER 1034 at 1057 (Tindall CJ); *Attorney-General (Canada) v. Hallet & Carey Ltd.* [1952] AC 427 (Lord Diplock); *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161 per Higgins J.

12. The Hon Murray Gleeson, "The meaning of legislation: Context, purpose and respect for fundamental rights" (2009) 20 *Public Law Review* 26, 27.

13. (2011) 242 CLR 573.

14. French, CJ, Gummow, Hayne, Crennan, Kiefel and Bell, JJ.

15. (2011) 242 CLR 573, 578-84 [8]-[24].

16. Ibid., 583 [20]; for mention of the "floodgates" argument, see Heydon J at 603 [78].

17. Ibid., 596 [55].

18. Ibid., 581 [15] and 582-83 [17]-[19].

19. Ibid., 582 [17] and 584 [20] respectively.

20. Ibid., 583 [20].

21. Ibid., 603 [79].

22. Ibid., 602 [76].

23. *R v Liekefett; Ex parte Attorney-General (Qld)* [1973] Qd R 355.

24. Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 April 1975 at 834-835, quoted by Heydon, J. in *Lacey*, op cit., 606 [92].

25. Ibid., 586 [30].

26. Ibid., 598 [61].

27. Ibid., 592 [43].

28. Ibid., 592 [44].

29. *Momcilovic v The Queen* (2011) 245 CLR 1, 136 [327] and 134 [315] respectively (Hayne J).

30. Ibid., 141 [341] (emphases added) (Hayne J).

31. Ibid., 596-98 [56] – [60] (Hayne J).

32. See n 22, above.

33. Ibid., Heydon J at 604 [81].

34. Discussed at ibid, 582 [17], 583 [20] and 592 [43].

35. See text following n 4, above.

36. *Lacey*, op. cit., at 598 [61].

37. *Monis v R* (2013) 249 CLR 92, 128 [60] (French CJ). See also R. French, "Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons", Speech delivered at the Anglo-Australasian Lawyers Society and Constitutional and Administrative Law Bar Association, London, 5 July 2012, 22, available at: http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj05july12.pdf

38. See J. Goldsworthy, "The 'Principle of Legality' and Legislative Intention", in M. Groves and D. Meagher (eds), *The Principle of Legality in Australia and New Zealand*, Federation Press, Sydney, forthcoming.

39. *Bropho v Western Australia* (1990) 171 CLR 1, 18.

40. Sir Anthony Mason, *Commentary*, (2002) 27 *Australian Journal of Legal Philosophy* 172, 175 (2002).

41. Luc Tremblay, "Section 7 of the Charter: Substantive Due Process", 18 U.B.C. L. REV. 201, 242 (1984). *See also* Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act*, Oxford University Press, Oxford, 2009), 335.

42. John Burrows, "The Changing Approach to the Interpretation of Statutes", 33 *Victoria University Wellington Law Review* 981, 982-83, 990-95, 997-98 (2002).

43. D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia*, 7th ed., 2011, 168, [5.2].

44. See text to n 4, above.

45. *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 90 ALJR 38 (French, CJ, Kiefel and Bell JJ)*.

46. Ibid., 47 [11], quoting T.R.S. Allan, "The Common Law as Constitution: Fundamental Rights and First Principles", in Cheryl Saunders, (ed.), *Courts of Final Jurisdiction: The Mason Court in Australia*, Federation Press, 1996, 146, 148.

47. *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 90 ALJR 38, 61 [81].

48. See J. Goldsworthy, "The Constitution and Its Common Law Background" (2014) 25 *Public Law Review* 265, 270-71.

49. *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 322.

50. The Hon Murray Gleeson, "The meaning of legislation: Context, purpose and respect for fundamental rights" (2009) 20 *Public Law Review* 26, 27.

51. T.R.S. Allan, "Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority" (2004) *Cambridge Law Journal* 685, 689 n 13.

52. P.A.S. Joseph, "Parliament, the Courts and the Collaborative Enterprise" (2004) 15 *King's College Law Journal* 321.

53. R. Ekins, "The Relevance of the Rule of Recognition" (2006) 31 *Australian Journal of Legal Philosophy* 95, 100.