THE COMMON LAW BILL OF RIGHTS

FIRST LECTURE IN THE 2008 MCPHERSON LECTURES

STATUTORY INTERPRETATION & HUMAN RIGHTS

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I am honoured by your invitation to deliver the 2008 McPherson Lectures. Bruce McPherson is one of the outstanding Australian lawyers of my time in the law. I have long admired his legal scholarship and his judgments, particularly as a judge of an intermediate court of appeal. They are always learned, closely reasoned and definitive in their exposition of the area of the law with which his Honour was then concerned. As counsel I always felt that I was lucky to have anything Bruce McPherson said in my favour. As a judge I have invariably found his writing illuminating and instructive. His legal career fully deserved the rare honour of a Festschrift in which the length, depth and quality of his contribution to the law is set forth.[1]

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The theme I have chosen for the 2008 McPherson Lectures is "Statutory Interpretation and Human Rights".[2] The first lecture will

through that system in the future. Real issues about the proper role of the judiciary in a parliamentary democracy arise in this context. The range of legitimate opinion on this matter is wide and remains the subject of vigorous debate. I do not wish to be understood to take any particular position on the desirability, or otherwise, of a statutory human rights act.

There are now two human rights acts in Australia: in the Australian Capital Territory and Victoria. Such legislation is under consideration in Tasmania and Western Australia, as well as at the Commonwealth level. In New South Wales the introduction of a statutory human rights act was considered and rejected by a Parliamentary Committee, following a rather tentative suggestion by myself.[4] At the moment I do not detect any movement in this position in the New South Wales political debate.

A brief historical perspective is appropriate by reason of the fact that common lawyers have traditionally been reluctant to embrace the rhetoric of rights. It was not always thus.

Blackstone and Bentham

Human rights talk reflects the longstanding tradition of natural law, with which English common lawyers were once very comfortable. That changed about two centuries ago and a new tradition of legal positivism, adopting a command theory of law and a broadly utilitarian philosophy, became the dominant intellectual tradition of English jurisprudence, under the influence of Jeremy Bentham, John Austin and Albert Venn Dicey. The particular target of Bentham's vitriolic attack upon the common lawyers was Sir William Blackstone who, in 1753, delivered the first lectures on English law ever presented at an English university. Until that time Oxford and Cambridge had taught only Roman and canon law. The Inns of Court was the only university for common lawyers.

Blackstone, the first Vinerian Professor of Law at Oxford, presented the first and most influential systematic conspectus of the common law in his *Commentaries*. He had no difficulty about the language of rights. His references to natural law were little more than a ghostly memory of rhetoric past.[5] The quadripartite structure of this seminal work reflected the contemporary terminology of common lawyers. Book 1 is on the Rights of Persons: Book 2 on the Rights of Things; Book 3 on Private Wrongs; and Book 4 on Public Wrongs. The

influence of the legal positivists, in substance, redefined the first two Books. For the last two centuries the common law of England and its epigone, such as the Australian common law, has primarily been a law of wrongs, not balanced by a law of rights.

In the first book of Blackstone's *Commentaries*, "Of the Rights of Persons", Chapter 1 is entitled "Of the Absolute Rights of Individuals". His primary focus was on political or civil rights and, particularly, on the right of property. I would not wish to put Blackstone forward as any kind of model for a contemporary human rights scholar.[6] However, his choice of language must have reflected the practice of the bar at the time.

Of particular significance for the future was the influence of Blackstone's *Commentaries* in the United States of America. In the course of his defence of the American colonists against the conduct of the British executive, Edmund Burke noted that the *Commentaries* had sold as many copies in America as it had in England. Indeed, without any institution such as the Inns of Court, and with a dispersed population, the *Commentaries* became more of a law library than a law book for American legal practice.[7]

Almost a century of American lawyers, from the founding fathers and Chief Justice Marshall down to Abraham Lincoln, learned their law from Blackstone. For that reason, the language of rights, particularly, reflected in the Declaration of Rights of Virginia in 1776 and the Bill of Rights adopted in 1791 in the United States Constitution, came naturally to American lawyers. Because of the American Revolution and the adoption of a written Constitution, the rights terminology of late 18th Century lawyers, when legal discourse was a dominant feature of politics and society, [8] was frozen in time. In England it gradually disappeared.

Bentham as a young teenager was shocked when he attended Blackstone's lectures and heard him support the complexities of the common law. Bentham rejected the theory of natural law. He was a founder of the command theory of law: that all law was an act of will by a sovereign, rather than conforming to some ideal. The arcane mysteries of the common law offended Bentham's monomaniacal pursuit of the principle of utility – the balance of pleasure and pain – as the sole determinant of all proper societal rules. He was the first economic rationalist.

When the French Declaration of Rights appeared, Bentham launched a ferocious attack, declaring:

> "Natural rights is simple nonsense: natural and imprescriptible rights, [by which he meant rights which could not be abrogated by a legislature, was] rhetorical nonsense – nonsense upon stilts."

His basic proposition, in common with generations of legal positivists to come, was that rights were created by law, rights did not precede government or law. It is not often remembered that the example he used for this proposition, in the 'nonsense on stilts' passage, was the Australian Aborigines, whom he called "the savages of New South Wales" and who, he said, had no laws and therefore no rights.[9]

From the time of his original 1753 lectures at Oxford, which became the Introduction to the *Commentaries*, Blackstone proclaimed that the commencing point of his analysis was the proposition that the purpose of English governance was to promote political and civil liberty. In contrast, Bentham always treated liberty as subordinate to utilitarian reform.[10] Blackstone deployed a dialectical mixture of natural law and legal positivism.

By the middle of the nineteenth century, references to natural law had become distinctly embarrassing to British lawyers. The

Commentaries were still the basic text, but required updating in numerous respects. Unlike the United States, where new editions of the *Commentaries* continued to be produced and actively deployed in legal discourse, in England an expurgated and updated version emerged. The task was undertaken by Henry John Stephen, whose book *New Commentaries on the Laws of England (Partly Founded on Blackstone)* first appeared in 1841. Its numerous subsequent editions and student summaries remained a basic text for the best part of a century. The alterations are revealing.

In his Introduction Blackstone had referred to natural rights and said: "No human legislature *has power* to abridge or destroy them". Stephen's *New Commentaries* amended this statement to read: "No human legislature can *justifiably* abridge or destroy them". Similarly, the heading of Blackstone's Chapter 1 which was: "Of the Absolute Rights of Individuals" had become "Of Personal Rights". Assertions such as "the principle aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature" had disappeared.[11]

None of this is to suggest that the idea of rights played no part in the continuing development of the common law. There can, however,

be no doubt that the focus shifted. Rights were no longer regarded as "natural", in the sense that they had to be treated as existing prior to the creation of a polity and of the laws enacted or developed by custom by the polity. This is what we would today call "human rights". Furthermore, the focus remained on civil and political rights, although the original emphasis on property rights waned over the course of the 20th century until, perhaps, its very end. There was never a focus on the concern of contemporary rights discourse with economic or social rights or collective rights. Nevertheless, important principles were developed in a manner perfectly consistent with a focus on rights.

Significant areas of the common law, some reinforced by statute, served to protect human rights as they would now be understood. Although the language was somewhat different, the substance was in important respects the same. The central theme of this first lecture is that the protection which the common law affords to the preservation of fundamental rights is, to a very substantial degree, secreted within the law of statutory interpretation.

The law of statutory interpretation has always manifested a dialectic interaction between three approaches, traditionally referred to as the literal rule, the golden rule and the mischief rule. From time to

time one or other is given pre-eminence in accordance with the judicial Zeitgeist. This seems to change every half century or so. The literal rule is now called textualism, the golden rule is now called contextualism and the mischief rule is now called purposive interpretation. In Australia, contextualism and purposivism have come to dominate over recent decades. American jurisprudence, which went through that process long before us, appears to be reverting to textualism. The sources and intensity of threats to fundamental rights are one of the critical elements that may explain these shifts in emphasis.

The Kisch Case

An excellent example of the way in which the law of statutory interpretation protects fundamental rights is a 1934 judgment of the High Court which, by reason of its vintage, and by reason of the identity of some judges in the majority, does not raise the kinds of difficulties associated with contemporary debates about the judicial role in enforcing human rights.

A great cause célèbre of the mid 1930s was the attempt by the Commonwealth Government to prevent Egon Kisch, a Czech journalist, from attending a Communist front Peace Congress. Kisch's celebrity has received a recent, moderate revival, particularly at the hands of

Justice Hasluck of the Supreme Court of Western Australia.[12] The case affords a good illustration of some issues of statutory interpretation.

Kisch had acquired a degree of intellectual notoriety for his prolific, declamatory, investigative journalism. The attempt to prevent the Australian public hearing his subversive opinions caused outrage, particularly on the left. A theme of broader appeal was the fear expressed that such conduct could cause right thinking people overseas to think less of Australian intellectual life. Australians never seem so parochial as when we act in fear of being regarded as parochial. Perhaps it was inevitable that Australia's patron saint of the second rate, Norman Lindsay, proclaimed that he and Kisch were both victims of Australian "suburban complacency".[13]

Kisch, famously, in an obviously futile attempt to evade those who sought to ban his arrival, first landed in Australia by jumping from his ship in Melbourne - he entitled his subsequent memoir *"Australian Landfall"*. The leap broke his leg. This, of course, gave him immediate celebrity status. It also enabled him to energise his audiences, as he pursued the Soviet policy of "peace" in the years immediately preceding the Hitler-Stalin pact, with the rallying cry:

"My leg is broken. My English is broken. But my heart is not broken."[14]

The *Immigration Restriction Act* 1901 made provision for a dictation test in a "European language", of the examiner's choice. Another delegate who sought to address the Peace Congress came from New Zealand. He was given a dictation test in Dutch, failed it and was excluded.[15] Kisch had a reputation as a linguist. Dutch would not do for him. He was given the test in Scottish Gaelic. The issue for determination in the High Court was whether or not Scottish Gaelic was a "European language". By majority the High Court held that it was not and, accordingly, the dictation test administered to Kisch was invalid.

Starke J had no doubt about the position. He applied the "golden rule": give words their grammatical and ordinary meaning, unless the context indicates otherwise. He found no reason to read the words down. Scottish Gaelic was a language used by a large number of people in Scotland. It was a "European" language. All other members of the Court concluded otherwise.

Rich J noted:

"[T]he provision ... is dealing with the practical subject of immigration from abroad, particularly from other nations. It ostensibly provides a test against illiteracy and against ignorance of European speech. I think it would be unreasonable to hold that every distinguishable form of speech which has a home in Europe can be resorted to for the purpose of asking the immigrant to write at dictation a passage of fifty words in length in an European language. The expression 'an European language' means a standard form of speech recognized as the received and ordinary means of communication among the inhabitants in an European community for all the purposes of the social body. Scottish Gaelic is not such a language. Census figures show that it is the speech of a rapidly diminishing number of people dwelling in the remoter highlands of Scotland, and the western islands. It is not the recognized speech of a community organized politically, socially or on any other basis."[16]

Dixon J said:

"[T]he substance of the enactment and its subject matter ... show that the language resorted to is to be taken,

ostensibly at least, as a test of fitness of the person to whom the dictation test is administered to take his place in an organized British community."[17]

Dixon J concluded:

"I am very much alive to the difficulty of attaching a definite meaning to these words which will be satisfactory and which will accord with the probable intention of the Legislature. No doubt the Legislature did not itself sufficiently advert to the many uncertainties involved in the expression it used.

...

The rules of interpretation require us to take expressions in their context, and to construe them with proper regard to the subject matter with which the instrument deals and the objects it seeks to achieve, so as to arrive at the meaning attached to them by those who use them. To ascertain this meaning the compound expression must be taken and not its disintegrated parts. I am disposed to think that it means here to convey that a test is provided for immigrants depending upon a proper familiarity with some form of speech which in some politically organized

European community is regarded as the common means of communication for all purposes ... ."[18]

Evatt J adopted a more international perspective when he concluded:

"It cannot be denied that, in the *Immigration Act* dictation test, the Australian Parliament represented to the Governments and nationals of all other countries that exclusion from Australia would be the result of an elementary dictation test limited to those languages which the Governments of the world would immediately recognize as an accepted or standard language of modern Europe. Scottish Gaelic is not such a language."[19]

The *Kisch* case occurred before the courts decided to have recourse to a wide range of extrinsic materials, including parliamentary debates. Nevertheless it is difficult to believe that the High Court was unaware of the true origins of the dictation tests. The intention of Parliament when enacting the original *Immigration Restriction Act* 1901 was that the dictation test should be applied for the purpose of excluding

coloured migrants. It was the core provision of what became known as The White Australia Policy.

The use of a dictation test as a camouflage for a policy of racial exclusion was first introduced in Natal and, at the express suggestion of the British Colonial Secretary, Joseph Chamberlain, was adopted by a number of the Australian colonies.[20] The purpose of this camouflage was to preserve the illusion of an absence of racial discrimination within the British Empire, a matter especially sensitive in India, the Jewel of the Empire. The sensitivity of the imperial centre to any of the white colonies behaving in this manner was exacerbated by the fact that Great Britain was at that time cultivating the newly emerging power in the Far East, Japan, which had shown itself to be particularly sensitive to expressions of racial discrimination, including by the Australian colonies.

When Edmund Barton introduced the *Immigration Restriction Bill* into the first Commonwealth Parliament he implemented this imperial policy.[21] Amendments were unsuccessfully moved by the Labour Party to expressly exclude non-European migrants. Indeed, a handful of non-European applicants were allowed into Australia by means of the selection of a language under the dictation test in which they proved proficient. The degree of administrative discretion conferred by

permitting the examiner to select the language invited abuse, which no doubt occurred.

A B Piddington KC, 73 years old but driven by fear of fascism and the emergence of the New Guard, appeared for Kisch in the High Court. He handed up in Court the *Australian Encyclopaedia* (1926) Vol 1, drawing their Honours' attention to pp 653 *et seq.*[22] That text made the racist origins of the Act quite clear. It said:

> "The first federal parliament ... set itself to give effect to the popular demand for the exclusion of Asiatics, and after much controversy the language test was agreed upon ... *It was understood from the first that European immigrants would not be required to pass the test.*"[23]

This little bit of extrinsic material was handed up, without comment, it appears, from either the bar or the bench. Nonetheless, it was powerful as a guide to the eventual result in *Kisch.* It is a technique of advocacy that the late Sir Maurice Byers QC, a barristers' barrister, used to describe as: "putting the ball in the scrum".

Piddington made no submission to the High Court that the Parliament intended the dictation test to be administered only to

coloured applicants. He made no submission that the Act was never intended to apply to a white Czech, even if he was a Bolshevik. Piddington, did not submit that, rather than reading down the words "European language", it would better accord with the parliamentary intention to read down the word "person", in the relevant section, to mean "non-white" person. Perhaps, particularly with a newly aggressive Japan, it was too hard to be frank. More likely, it was the continued sensitivities of the British Empire that prevented anything like that being uttered in public – whether from the bar table or in a judgment.

The first use of the dictation test for a white person, of which I am aware, was in 1914. Miss Ellen Fitzgibbon, a young Irish girl, described as "of rather attractive appearance" was deported after failing a test in Swedish. The only clue we have is that on her voyage the captain of the ship had occasion to have Miss Fitzgibbon examined by a medical officer.[24] Preserving the public morals was still a factor in the mid 30s. A year after the Kisch affair, in 1936, the dictation test was used to exclude an English woman, Mrs M Freer, on the ground that her entry might lead to the dissolution of a "perfectly good Australian marriage".[25] The power was also frequently used for political purposes.

In the *Kisch* case reference was made to the importance of context. Indeed, it was context that proved determinative. The context on which reliance was placed extended beyond the Act itself to encompass the scope and purpose of the legislation. Emphasis was placed on the significance of language, in contrast to dialects, in a world-wide system of polities and societies. This was the context adopted by the Court as pertinent to the interpretation of legislation regulating the migration of persons from one polity/society to another polity/society. That is why the word "language" was identified as having been used with reference to a broader grouping than a distinct minority language or dialect. By these orthodox steps of statutory interpretation, a result affirming the right to freedom of movement was attained.

Principles of Interpretation

Statutory interpretation is not merely a collection of maxims or canons. It is a distinct body of law. It is capable of disaggregation, as the basic Australian text does, into categories such as: "extrinsic aids to interpretation"; "intrinsic or grammatical aids to interpretation"; and "legal assumptions".[26] An American analysis refers to this tripartite classification as: "referential canons"; "linguistic canons"; and "substantive canons".[27] Amongst the "substantive canons" the authors refer to legal presumptions and clear statement rules. It is in this respect

that it can be said that the common law developed a bill of rights in recognition of the fact that infringement of rights will often occur by statute or by the exercise of powers under statute.

I use the terminology of "bill of rights" because it has acquired a level of acceptance by wide usage, and is not yet replaced by "charter of rights", but it may be. Of course, the original "Bill of Rights" amendments to the United States Constitution, reflected in large measure the understanding of what was then referred to as "the rights of Englishmen", of which the most influential contemporary exposition was Blackstone's *Commentaries.* Many of the principles then called rights live on in the law of statutory interpretation. It may be more accurate to refer to a "common law bill of principles", but that would not convey the sense of a systematic protection of human rights which is the result, as a matter of practical reality, of those aspects of the law of statutory interpretation which constitute common law protections of human rights.

It is an inevitable concomitant of statutory interpretation that it is necessary to invoke interpretative principles which reflect values and assumptions that are so widely held as not to require express repetition in every text. Often these principles will play the determinative role in identifying the meaning of the text. The existence of such background

assumptions has been identified in many different circumstances of constitutional and statutory interpretation.[28]

The basic principle that Parliament did not intend to invade fundamental rights, freedoms and immunities has been well established in Australia at least since 1907, when the High Court adopted a passage from a text on statutory interpretation that said:

> "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."[29]

This principle, also applicable to subordinate legislation,[30] has been expressed and re-expressed by the High Court on numerous occasions.[31] An authoritative statement is in a unanimous joint judgment of the High Court in *Coco v The Queen*:

> "The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity

must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights."[32]

What is to be regarded as a "fundamental right, freedom or immunity" is informed by the history of the common law. One list, not intended to be comprehensive, was identified by McHugh J as entitled to a strong presumption against intrusion, in the following way:

"[A] civil or criminal trial is to be a fair trial, a criminal charge is to be proved beyond reasonable doubt, people are not to be arrested or searched arbitrarily, laws,

especially criminal laws, do not operate retrospectively, superior courts have jurisdiction to prevent unauthorised assumptions of jurisdiction by inferior courts and tribunals ...„[33]

The general principle is reflected in numerous specific principles of the law of statutory interpretation which can be set out as a common law bill of rights, based on the presumed intention of Parliament which operates in the absence of a clear indication to the contrary in the statute. These include rebuttable presumptions that the Parliament did not intend:

- To retrospectively change rights and obligations;[34]
- To infringe personal liberty;[35]
- To interfere with freedom of movement;[36]
- To interfere with freedom of speech;[37]
- To alter criminal law practices based on the principle of a fair trial;[38]
- To restrict access to the courts;[39]
- To permit an appeal from an acquittal;[40]
- To interfere with the course of justice;[41]
- To abrogate legal professional privilege;[42]
- To exclude the right to claim self-incrimination;[43]

- To extend the scope of a penal statute;[44]
- To deny procedural fairness to persons affected by the exercise of public power;[45]
- To give executive immunities a wide application;[46]
- To interfere with vested property rights;[47]
- To authorise the commission of a tort.[48]
- To alienate property without compensation;[49]
- To disregard common law protection of personal reputation;[50] and
- To interfere with equality of religion.[51]

This common law bill of rights overlaps with but is not identical to, the list of human rights specified in international human rights instruments, which have been given legislative force in some jurisdictions. That development will have an influence upon the degree of emphasis to be given to these presumptions. It will also influence the articulation of new presumptions. For example, the legislative proscription of discrimination on the internationally recognised list of grounds – gender, race, religion, etc – could well lead to a presumption that Parliament did not intend to legislative with such an effect. I am unaware of any authority which says that, but I can see how this proposition could now be added to the common law bill of rights.

I note, in this context, that a right not to be subject to racial discrimination was recognised at common law in a case which is not well remembered. In 1943 the West Indian cricket captain. Learie Constantine, was refused service at a prominent London hotel. He successfully sued for damages in an action on the case. The authorities referred to in that judgment are replete with references to common law rights. The judge concluded that Constantine's common law right had been violated.[52] This precedent could have been, but was not, developed into a general right at common law not to be discriminated against on racial grounds. Eventually, legislation established that right.

The right to a fair trial is perhaps the best established example of a presumption that is appropriately characterised as part of a common law bill of rights. Save with respect to the right to a speedy hearing, which has not been acknowledged in Australia, the Australian law is virtually indistinguishable from the case law with respect to a right of fair trial in those jurisdictions which have adopted a human rights instrument all of which contain a provision to that effect.[53]

It is not feasible to attempt to list exhaustively the attributes of a fair trial. The issue has arisen in a seemingly infinite variety of actual

situations in the course of determining whether something that was done or said either before or at the trial deprived the trial of the quality of fairness to a degree where a miscarriage of justice has occurred. There is probably no aspect of preparation for trial or trial procedure which is not touched, indeed often determined, by fair trial considerations. As Lord Devlin once put it:

> "[N]early the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see what was fair and just was done between prosecutors and accused."[54]

Justice Isaacs said in 1923, with reference to "the elementary right of every accused person to a fair and impartial trial":

> "Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle."[55]

I will not repeat what I have written elsewhere about the scope and range of circumstances in which the principle of a fair trial falls to be applied.[56] It is sufficient for present purposes to indicate that this is a fundamental common law right and, accordingly, the principle of statutory interpretation with which I am here concerned will be applied,

and applied with some strictness. Parliament will need to state with clarity that it intends to impinge upon the traditional incidents of the criminal trial which have been developed over the centuries by the application of the principle of a fair trial.

I give one example of this process at work in three separate jurisdictions in Australia over recent years with respect to the interpretation of provisions giving a general right of appeal. The High Court had long before determined that general words in a provision establishing a right of appeal do not extend to modifying the conclusive effect of a verdict of acquittal, to which the court referred as an "ancient and universally recognized constitutional right".[57]

Similarly Deane J said in *Rohde v Director of Public Prosecutions (Cth)*[58] in the context of appeals by the Crown against sentence:

> "A conferral of such a prosecution right of appeal infringes the essential rationale of the traditional common law rule against double jeopardy in the administration of criminal justice in a manner comparable to a conferral of a prosecution right of appeal against a trial acquittal ... As a matter of established principle, a general statutory provision should not ordinarily be construed as conferring

or extending such a prosecution right of appeal against sentence unless a specific intention to that effect is manifested by very clear language."

In New South Wales, the Court of Criminal Appeal applied this principle when refusing to allow the Crown to appeal from an interlocutory indication by a trial judge that he intended to direct a verdict of acquittal.[59] Furthermore, when legislation was introduced granting, in specified circumstances, the Crown a right to appeal from an acquittal, the fundamental nature of the principle of the criminal law involved, combined with the principle against retroactivity, the Court held that the legislation did not to apply to proceedings which had been instituted prior to the statute coming into effect.[60]

In Victoria the issue arose with respect to an attempt by the Crown to appeal an allegedly inadequate penalty imposed for a conviction for contempt. The Victorian Court of Appeal concluded that a generally expressed right of appeal should not be construed as extending to the Crown with respect of a sentence imposed following a conviction for contempt.[61]

In Queensland, the Court of Appeal also determined that a broadly stated statutory right of appeal did not apply to an order dismissing a contempt proceeding.[62]

These principles remain of robust utility.

The Principle of Legality

In recent years this range of presumptions, canons or maxims with substantive content has been categorised together under the general concept of the "principle of legality", which was reintroduced into contemporary discourse as a phrase found in the 4th edition of *Halsbury's Laws of England.* There it was employed as equivalent to the traditional phrase "the rule of law", albeit in a narrower sense to many uses of that concept.[63] It is, however, a concept with a long history and was expounded at some length in the early 1950s by Glanville Williams.[64] He was concerned with the application in the English criminal law of the traditional maxim of *nullum crimen sine lege, nullum poena sine lege* – no crime or punishment save in accordance with law.[65] This maxim, was applied in a number of respects: by the principle against retroactivity; by the rule of strict construction of penal statutes; and by the need for certainty in draftsmanship, has a long history as an integrative concept.

In the case which established "the principle of legality" as a unifying principle in English law, Lord Hoffmann said, in a passage subsequently quoted with approval by Gleeson CJ[66] and by Kirby J[67] and, in New Zealand, by Elias CJ and Tipping J:[68]

> "[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."[69]

As Lord Simon of Glaisdale once said, the canons of construction "are ... constitutionally salutary in helping to ensure that legislators are not left in doubt as to what they are taking responsibility for".[70] This idea is the same as that expressed by John Marshall, Chief Justice of the United States, when he said in 1820, with respect to the rule that penal laws are to be construed strictly:

> "It is the legislature, not the Court, which is to define the crime and ordain its punishment."[71]

The range of principles of the law of statutory interpretation, to which it is convenient to refer under the unifying concept of the principle of legality, are well known to every parliamentary drafter. They have been so well established for such a long period of time, and have been reaffirmed on so many occasions, that the courts are entitled to approach statutory interpretation on the assumption that, if the principles are not to be applied, the Parliament will say so, or otherwise express its intention so as to identify the results it wishes to achieve in a way that will ensure that the law of statutory interpretation does not interfere with that occurring.

As Gleeson CJ has said with respect to this principle:

"The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."[72]

Ambiguity

There is a tendency in some authorities to give a narrow application to the presumption relevant to the case before the court, on the basis that it is first necessary to find an ambiguity in the statutory formulation before the presumption can operate. In both the House of Lords and the New Zealand Court of Appeal, such references appear in judgments which emphasise the restrictive operation of common law presumptions in comparison with statutory provisions for interpretation in a human rights act.[73] In my opinion, this reflects an unnecessarily restrictive view of the concept of ambiguity in the law of statutory interpretation. When the relevant common law presumption is understood as a specific application of the principle of legality it is not appropriate to take a narrow approach to what is meant by ambiguity.

I have on more than one occasion had reason to draw on the observations of a master of statutory interpretation, Lord Simon of Glaisdale[74] – both an officer of the Simplified Spelling Society and a scrabble tragic – including the following:

> "Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know as exactly as possible, where he stands under the law)."[75]

Perhaps not without irony, the word "ambiguity" is itself ambiguous. It is not necessarily limited to situations of lexical or verbal ambiguity and grammatical or syntactical ambiguity. The word ambiguity is often used in a more general sense of indicating any situation in which the scope and applicability of a particular statute is, for whatever reason, doubtful.[76] Save where appearing in some Interpretation Acts, where the narrow conception may be intended, the common law concept of ambiguity should be understood in this broader sense.

Common Law Doctrines

The protection of fundamental rights, freedoms and immunities (to use the authoritative formulation from the joint judgment in *Coco*) has sometimes been expressed in a shorthand way as the protection of common law rights. That terminology can be misleading if it is used in such a way as to equate the position of fundamental rights, freedoms and immunities with the old presumption that Parliament did not intend to change the common law. There is a clear distinction between legislation which invades fundamental rights etc and legislation which alters common law doctrines.

As Lord Simon of Glaisdale put it in 1975:

> "It is true that there have been pronouncements favouring a presumption in statutory construction against a change in the common law ... Indeed, the concept has sometimes been put (possibly without advertence) in the form that there is a presumption against change in the law pre-existing the statute which falls for construction. So widely and crudely stated, it is difficult to discern any reason for such a rule – whether constitutional, juridical or pragmatic. We are inclined to think that it may have evolved through a distillation of forensic experience of the

way Parliament proceeded at a time when conservatism alternated with a radicalism which had a strong ideological attachment to the common law. However valid this particular aspect of the forensic experience may have been in the past, its force may be questioned in these days of statutory activism ... Whatever subsisting scope any canon of construction may have, whereby there is a presumption against change of the common law, it is clearly a secondary canon ... – of assistance to resolve any doubt which remains after the application of 'the first and most elementary rule of construction', that statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances. Moreover, even at the stage when it may be invoked to resolve a doubt, any canon of a construction against invasion of the common law may have to compete with other secondary canons. English law has not yet fixed any hierarchy amongst the secondary canons: indeed, which is to have paramountcy in any particular case is likely to depend on all the circumstances of the particular case."[77]

To similar effect, Kirby J has often emphasised the duty to obey legislative texts and the impermissibility of adhering to pre-existing common law doctrine in the face of a statute.[78]

McHugh J, on a number of occasions, stated that the presumption that a statute is not intended to alter or abolish common law rights must now be regarded as weak.[79] His Honour did not expressly distinguish in this respect between the presumption against altering common law doctrines and the presumption against invading common law rights. His Honour did, however, identify circumstances in which the presumption would operate with some strength, identifying that category as "fundamental legal principles"[80] or as "a fundamental right of our legal system".[81] He distinguished "fundamental rights" which are "corollaries of fundamental principles" from "infringements of rights and departures from the general system of law"[82] and "a fundamental right" from a right "to take or not to take a particular course of action".[83]

With respect to common law doctrines, his Honour emphasised the weakness of the presumption. He said:

> "Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that

the legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend 'ordinary' common law rights, the 'presumption' of non-interference with those rights is inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced."[84]

If I may be permitted the sin of self-quotation, in a case in which it was the Crown that relied on the so-called presumption that Parliament did not intend to change the common law, I said:

"The principle of statutory interpretation relied on by the Crown is, in my opinion, now of minimal weight. It reflects an earlier era when judges approached legislation as some kind of foreign intrusion. The scope and frequency of legislative amendment of the common law including the common law of criminal procedure, has over many decades been both wide-ranging and fundamental."[85]

This issue has arisen with respect to the manner in which Parliament has, over recent decades, restricted the law of torts. There

is a real issue as to what aspects of tort litigation could ever have invoked the principle that legislation must be interpreted on the assumption that it does not alter the common law. As I have sought to show elsewhere, reliance on the tort of negligence as establishing common law "rights" overlooks the fact that fundamental features of the tort as we know it were established by legislation which overturned common law rules restricting liability in tort. This included *Lord Campbell's Act,* which overturned the rule against the recovery of damages for the death of another person; the statutory abolition of the doctrine of common employment, by which an injured worker was denied the right to redress whenever injury resulted from the act of a fellow worker; the removal of the immunity of the Crown; the establishment of liability for nervous shock and apportionment of legislation overturning the absolute nature of the defence of contributory negligence.[86] It may well be that in many of these respects the common law would have developed in the same way. However, that is not what actually happened. In personal injury litigation many so-called "common law rights" were created by statute.

The relevant distinction was emphasised by Justice McHugh, when he said:

"The right to bring an action for psychiatric injury is an ordinary legal right. It is not a fundamental right of our society or legal system similar to the right to have a fair trial or to have a criminal charge proved beyond a reasonable doubt. Nor is the presumption against interfering with ordinary common law rights of the same strength as the presumption that laws do not operate retrospectively."[87]

I am aware that the Queensland Court of Appeal has applied the case law which refers to fundamental common law rights to statutory restrictions on the ability to seek damages for gratuitous services.[88] Each statutory scheme must be considered separately when applying these principles.

The Judicial Role

These interpretive principles are of longstanding. The debate about their deployment by common law judges goes back at least as far as Blackstone and Bentham. In many ways Blackstone's account of statutory interpretation in Book 1 of the *Commentaries*[89] is quite contemporary.

What attracted Bentham's outrage, in this as in other aspects, with the common law method, was the fluidity that is introduced by the use of interpretive principles, particularly those which emphasise the context and purpose of the statutory text and specific principles, e.g. that Parliament did not intend an absurd result. Bentham found all of this inconsistent with a rational legal order, which required express codification of everything. He made no allowance for ambiguities, gaps, generalities or the scope of language. He found the flexibility that the common law judges retained nothing short of outrageous.[90]

Notwithstanding the assumption in some continental legal systems that complete precision and comprehensiveness of expression is possible, Bentham's obsessiveness has never been accepted in the common law world. His view that every aspect of law could be written down as a complete body of law, which he called a Pannomion, has never been achieved, even in the Continental codes.

Many years ago Rupert Cross described Bentham's approach to Blackstone as "pig headed" and referred to:

> "The naïve belief manifested throughout so much of his work that it is possible for the laws of a sophisticated

society to be formulated in terms of indisputable comprehensibility."[91]

Over the centuries, judges in the common law tradition have found that the task of statutory interpretation is never as simple as Bentham thought. There are a range of circumstances in which the application of a statutory formulation is doubtful:

- When the words used are ambiguous or obscure;
- when deciding whether to read down general words;
- when implications are sought to be drawn from a text;
- when considering whether to depart from the natural and ordinary meaning of words, by adopting a strained construction;
- when deciding whether or not a statutory definition or interpretation section does not apply on the basis of an intention to the contrary;
- when giving qualificatory words an ambulatory operation;
- more controversially, whether words and concepts are to be read into a statute by filling gaps.

In the third lecture I will discuss some of these circumstances in detail.

The process of interpretation pursuant to the principle of legality, or any of its sub-principles, may not differ in essence from that to be conducted pursuant to a statutory requirement to interpret any Act or statutory instrument to conform with the list of human rights. I will discuss such provisions in the second lecture.

There are examples in legal history of the judiciary applying interpretive principles as a means of subverting legislative intent. The old rule that penal statutes have to be strictly construed – referred to as the rule of lenity in the United States – was developed to mitigate the harshness of the death penalty then applicable to minor offences and concomitant attempts by Parliament to restrict benefit of clergy.[92]

The contemporary controversy about judicial activism – particularly in the context of human rights litigation, raises parallel issues. Subject to any constitutional entrenchment of rights, the judiciary must always remember that the interpretive principles are rebuttable.

It is a corollary of the principle of legality, and a manifestation of what Chief Justice Gleeson has felicitously called judicial legitimacy, that the judiciary do not find ambiguity when there is none and recognise clear and unambiguous language when it is presented to them for

interpretation. Of course, from time to time, the results of the application of these interpretative principles will give rise to controversy.

There is a substantive distinction between what can permissibly be called "interpretation" and defiance of the legislative will. The distinction is not as easy to perceive in practice as it is to state in principle. Nevertheless, it is a fundamental distinction which I will address in the third lecture on genuine and spurious interpretation.

* * * * * *

You will permit a touch of nostalgia in conclusion. In the 1930s when the *Kisch* case was decided, respect for the courts was unalloyed. No Commonwealth Minister denounced the High Court for letting this rabble rouser pollute the minds of Australian youth or lead Australian women from the path of virtue. There was no electronic lynch mob on talk-back radio.

The Attorney General, Robert Menzies, of Scottish heritage himself and no doubt sensitive to the status of Scottish Gaelic, quietly paid Kisch's costs and let him go home. When the Sydney Morning Herald published articles and letters denouncing the judgment for its failure to recognise Scottish Gaelic as the glorious language it was – the

most vituperative written under a pseudonym by Sir Mungo MacCallum, Chancellor of the University of Sydney – the newspaper was prosecuted for contempt. I doubt if that would happen today.

Perhaps Egon Kisch left Australia ruminating about the application to his recent experience of the insights into bureaucratic conduct recently published by his old classmate at the Altstadter Gymnasium in Prague - Franz Kafka. We will never know.

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1 Aladin Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice B H McPherson CBE* (2006) Supreme Court of Queensland Library, Brisbane.

2 These lectures involve a re-presentation and development of ideas put forward in earlier addresses: see J J Spigelman, "Statutory Interpretation: Identifying the Linguistic Register" (1999) 4 *Newcastle Law Review* 1; J J Spigelman, "The Poet's Rich Resource: Issues in Statutory Interpretation" (2001) 21 *Australian Bar Review* 224; J J Spigelman, "Blackstone, Burke, Bentham and the *Human Rights Act* 2004" (2005) 26 *Australian Bar Review* 1; J J Spigelman, "Principle of Legality and the Clear Statement Principle" (2005) 79 *Australian Law Journal* 769.

3 The terminology common law bill of rights was, so far as I am aware, first deployed by John Willis in "Statute Interpretation in a Nutshell" (1938) 16 *Canadian Bar Review* 17. It has been adopted by others: see, eg, D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) LexisNexis Butterworths, Sydney at [5.2].

4 See J J Spigelman, "Rule of Law – Human Rights Protection" (1999) 18 *Australian Bar Review* 29 at 33; J J Spigelman, "Access to Justice and Human Rights Treaties" (2000) 22 *Sydney Law Review* 141 at 149–150; New South Wales, *A New South Wales Bill of Rights: Standing Committee on Law and Justice*, Report No 17 (2001).

5 See, eg, David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (1989) Cambridge University Press, Cambridge, ch 1.

6 See, eg, Albert S Miles et al, "Blackstone and American Indian Law" (2002) 6 *Newcastle Law Review* 89.

7 See Daniel J Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (1941) University of Chicago Press, Chicago; Albert W Alschuler, "Rediscovering Blackstone" (1996) 145 *University of Pennsylvania Law Review* 1; Paul O Carrese, *The Cloaking of Power: Montesquieu, Blackstone and the Rise of Judicial Activism* (2003) University of Chicago Press, Chicago, esp at 111–112; Albert S Miles, David L Dagley and Christina H Lau, "Blackstone and his American Legacy" (2001) 5(2) *Australia and New Zealand Journal of Law and Education* 46.

8 See, eg, Douglas Hay, "Property, Authority and the Criminal Law" in Hay et al, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (1975) Pantheon, New York; 'Introduction' in John Brewer and John Styles (eds), *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries* (1980) Hutchinson, London.

9 See Jeremy Waldron (ed), *'Nonsense Upon Stilts': Bentham, Burke & Marx on the Rights of Man* (1987) Methuen, London, at 53.

10 See Carrese supra, ch 5.

11 See Henry John Stephen, *New Commentaries on the Laws of England* (2nd ed, 1848) Butterworths, London, vol 1 at 35, 129; cf William Blackstone, *Commentaries on the Laws of England* (1st ed, 1765), Book 1, ch 1 at 120.

12 See Nicholas Hasluck, *Our Man K* (1999) Penguin, Melbourne; Nicholas Hasluck, "Waiting for Ulrich: The Kisch and Clinton Cases" (1999) 33 *Quadrant* 28; Nicholas Hasluck, "Reinventing the Kisch Case" (2000) 2 *University of Notre Dame Australia Law Review* 67; Nicholas Hasluck, *The Legal Labyrinth: The Kisch Case and other Reflections on Law and Literature* (2003) Freshwater Bay Press, Perth. See also Heidi Zogbaum, *Kisch in Australia: The Untold Story* (2004) Scribe Publications, Melbourne.

13 C M H Clark, "*A History of Australia, VI: The Old Dead Tree and the Young Tree Green (1916–1935)*" (1987) Melbourne University Press, Melbourne, at 474.

14 Ibid at 471.

15 Ibid at 463.

16 *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234 ('*Kisch*') at 241.

17 Ibid at 243.

18 Ibid at 244.

19 Ibid at 247.

20 See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) Angus & Robertson, Sydney, at 626–627.

21 See Geoffrey Bolton, *Edmund Barton: The One Man for the Job* (2000) Allen & Unwin, Sydney, at 243–245.

22 *Kisch* at 237.

23 Arthur Wilberforce Jose and Herbert James Carter (eds), *The Illustrated Australian Encyclopaedia* (1925) Angus & Robertson, Sydney, vol 1 at 653–654 (emphasis added).

24 See Gavin Souter, *Lion and Kangaroo : The Rise of a Nation, 1901–1919* (1978) Collins, Sydney, at 90.

25 F K Crowley (ed), *A New History of Australia* (1974) Heinemann, Melbourne, at 448.

26 See Pearce and Geddes supra, the Chapter headings of chs 3, 4 and 5.

27 See William N Eskridge Jr and Philip P Frickey, "Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking" (1992) 45 *Vanderbilt Law Review* 593 at 595.

28 See, eg, John Bell and George Engle, *Cross on Statutory Interpretation* (3rd ed, 1995) Butterworths, London, at 165–166; Cass R Sunstein, "Interpreting Statutes in the Regulatory State" (1989) 103 *Harvard Law Review* 405; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (the rule of law); *Egan v Chadwick* (1999) 46 NSWLR 563 at [16]–[25] (responsible government).

29 *Potter v Minahan* (1908) 7 CLR 277 ('*Potter*') at 304. The text was the 4th edition of *Maxwell on Interpretation of Statutes* ((1905) Sweet & Maxwell, London). Subsequent editions of that text substitute much wider language to this passage and should be treated with care; see *R v Janceski* (2005) 64 NSWLR 10 ('*Janceski*') at [67]–[88].

30 See *Hill v Green* (1999) 48 NSWLR 161 at [5]–[10], [143].

31 See, eg, *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 252; *Coco v The Queen* (1994) 179 CLR 427 ('*Coco*') at 437; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 ('*Daniels Corp*') at [11].

32 *Coco* at 437.

33 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 ('*Malika Holdings*') at [28].

34 See *Cox v Hakes* (1890) 15 App Cas 506 esp at 519, 528, 534; *Newell v The King* (1936) 55 CLR 707 at 711; *Maxwell v Murphy* (1957) 96 CLR 261 at 267; *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194; *Rodway v The Queen* (1990) 169 CLR 515 at 518; *Esber v Commonwealth* (1992) 174 CLR 430 at 440–441. The most recent detailed discussion of this principle is Ben Juratowitch, *Retroactivity and the Common Law* (2008) Hart Publishing, Oxford.

35 *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520, 523, 532; *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*') at [149]–[150]; *Uittenbosch v Chief Executive, Department of Corrective Services* [2006] 1 Qd R 565 at [7], [12]–[18].

36 *Commonwealth v Progress Advertising & Press Agency Co Pty Ltd* (1910) 10 CLR 457 at 464; *Potter* at 305–306; *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206.

37 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 31; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 ('*Simms*') at 125–127, 130.

38 See, eg, *Bishop v Chung Bros* (1907) 4 CLR 1262 at 1273–1274; *Tassell v Hayes* (1987) 163 CLR 34 at 41; *R v Fuller* (1994) 34 NSWLR 233 at 237–238; *Thompson v Mastertouch TV Service Pty Ltd (No 3)* (1978) 38 FLR 397 at 408–409, 412–413; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 ('*EPA v Caltex*') at 516–517; *Malika Holdings* at [28].

39 *Magrath v Goldsborough Mort & Co Ltd* (1932) 47 CLR 121 at 134; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ('*Plaintiff S157*') esp at [30]–[32].

40 *Davern v Messel* (1984) 155 CLR 21 ('*Davern*') at 30–31, 48, 63, 66.

41 *EPA v Caltex* at 558.

42 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 322, 338, 368–369; *Daniels Corp* at [11]. Note also *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at [7]–[8].

43 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Hamilton v Oades* (1989) 166 CLR 486 at 495; *Rich v Australian Securities and Investment Commission* (2004) 220 CLR 129.

44 *Ex parte Fitzgerald; Re Gordon* (1945) 45 SR (NSW) 182 at 186; *Krakouer v The Queen* (1998) 194 CLR 202 at [62].

45 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395–396; *Annetts v McCann* (1990) 170 CLR 596 at 598; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575–576.

46 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 116; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at [33]–[37], [59]–[68], [113].

47 *Clissold v Perry* (1904) 1 CLR 363 at 373; *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 682–683; *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 199–200.

48 *Coco* at 435–438.

49 *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552 at 563; *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343 at 359; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [28]–[31].

50 *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635–636.

51 *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525 at 544 per McHugh JA.

52 *Constantine v Imperial Hotels Ltd* [1944] 1 KB 693 at 708.

53 See generally J J Spigelman, "The Truth Can Cost Too Much: The Principle of a Fair Trial" (2004) 78 *Australian Law Journal* 29.

54 *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1347.

55 See *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 at 541–542.

56 Spigelman, "The Truth Can Cost too Much: The Principle of a Fair Trial" supra.

57 *Wall v R; Ex parte King Won (No 1)* (1927) 39 CLR 245 at 250; see also *Secretary of State for Home Affairs v O'Brien* [1923] AC 603 at 610.

58 (1986) 161 CLR 119 at 128–9.

59 See *R v Cheng* (1999) 48 NSWLR 616.

60 See *R v JS* [2007] NSWCCA 272 esp at [26]–[48].

61 See *Director of Public Prosecutions v Garde-Wilson* (2006) 15 VR 640 esp at [15]–[26].

62 See *Henderson v Taylor* [2007] 2 Qd R 269 esp at [13]–[16], [26]–[27], [73]–[78].

63 See *Halsbury's Laws of England* (4th ed, reissued, 1996) vol 8(2) at [6].

64 See Glanville Williams, *Criminal Law* (1st ed, 1953) Stevens, London, at 434–465, then ch 12 of this seminal text.

65 See also Aly Mokhtar, "Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects" (2005) 26 *Statute Law Review* 41.

66 *Plaintiff S157* at [30]; *Al-Kateb* at [19].

67 *Daniels Corp* at [106]; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at [180].

68 *R v Pora* [2001] 2 NZLR 37 at [53].

69 *Simms* at 131. See also *B v Director of Public Prosecutions* [2000] 2 AC 428 at 470; *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659 at [82]; *R v JS* at [36]-[37]; *Lodhi v R* (2006) 199 FLR 303 at [32]; *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203 at [111]; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at [82]–[85]; *Watkins v Queensland* [2007] QCA 430 at [64].

70 *Ealing London Borough Council v Race Relations Board* [1972] AC 342 at 361.

71 *United States v Wiltberger*, 18 US (5 Wheat) 76 (1820) at 95.

72 *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309 ('*Electrolux*') at [21].

73 See *R v Secretary of State to the Home Department: Ex parte Pierson* [1998] AC 539 at 587; *Quilter v Attorney-General* [1998] 1 NZLR 523, 526, 541–542, 581.

74 The titles of two earlier addresses were drawn from Lord Simon's judgments: "Identifying the Linguistic Register" and "The Poet's Rich Resource": see above n 2. See also his Lordship's series of articles on "English Idioms from the Law" (1960) 76 *Law Quarterly Review* 283 and 429; (1962) 78 *Law Quarterly Review* 245; and (1965) 81 *Law Quarterly Review* 52.

75 *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 236.

76 See the references set out in my earlier addresses in the *Newcastle Law Review* above n 2 at 2; 21 *Australian Bar Review* above n 2 at 231–232; *Repatriation Commission v Vietnam Veterans' Association of New South Wales Branch Inc* (2000) 48 NSWLR 548 at [116].

77 *Maunsell v Olins* [1975] AC 373 at 394–395.

78 See, eg, *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [143]–[147].

79 See *Malika Holdings* at [28]–[30]; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 ('*Gifford*') at [36].

80 *Malika Holdings* at [28].

81 *Gifford* at [36].

82 *Malika Holdings* at [28].

83 *Gifford* at [36].

84 Ibid. See also the reference by Gleeson CJ in *Electrolux* at [19] and *Malika Holdings* at [29]–[30].

85 See *Janceski* at [62].

86 See J J Spigelman, "Negligence: The Last Outpost of the Welfare State" (2002) 76 *Australian Law Journal* 432 at 437–438.

87 See *Gifford* at [37].

[88] See *Grice v Queensland* (2006) 1 Qd R 222 at [25]-[26]; *Kriz v King* [2007] 1 Qd R 327 at [18].

[89] Blackstone supra at 87–92.

[90] See the analysis in Cass R Sunstein and Adrian Vermeule, "Interpretation and Institutions" (2003) 101 *Michigan Law Review* 885 esp at 890–897.

[91] Rupert Cross, "Blackstone v Bentham" (1976) 92 *Law Quarterly Review* 516 at 520–521.

[92] See Pearce and Geddes supra at [9.8]; Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (1948) Stevens & Sons, London, vol 1 at 83–88; Lawrence M Solan, "Law, Language and Lenity" (1998) 40 *William and Mary Law Review* 57; Livingston Hall, "Strict or Liberal Construction of Penal Statutes" (1935) 48 *Harvard Law Review* 748; John Calvin Jeffries Jr, "Legality, Vagueness, and the Construction of Penal Statutes" (1985) 71 *Virginia Law Review* 189; Sarah Newland, "Mercy of Scalia: Statutory Construction and the Rule of Lenity" (1994) 29 *Harvard Civil Rights–Civil Liberties Law Review* 197; Stephen Kloepfer, "The Status of Strict Construction in Canadian Criminal Law" (1983) 15 *Ottawa Law Review 553.*