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51

research in brief

Guy Cumes

THE PRINCIPLE OF LEGALITY

THE NAMELESS HORIZON OF AUSTRALIAN CRIMINAL LAW

forschung aktuell – research in brief/51
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MAX-PLANCK-INSTITUT
FÜR AUSLÄNDISCHES UND INTERNATIONALES
STRAFRECHT

The Principle of Legality: The Nameless Horizon of Australian Criminal Law

Guy Cumes

All her friends have been tried for treason. And crimes that were never defined.

Darren Hayes & Daniel Jones (1997),
Savage Garden, To the Moon and Back

The 'principle of legality' might have been better named, for it is to be hoped that everything a court does rests on legality.

Heydon J, Momcilovic v The Queen [2011] HCA 34
(8 September 2011), [444], footnote [639]

The empty horizon was a nameless horizon and did not attract him. And whenever he happened to glance towards it … he sensed the threat its namelessness presented to the particular configuration of familiar elements which determined the direction and conduct of his life. The risk 'out there' was too general. It was not calculable, its boundaries were undetermined, and it was not acceptable to him … for that which has no name may not exist, may be, indeed, a mere illusion.

Alex Miller (1992), The Ancestor Game, Ringwood, Vic, p. 208

Science … is made up of mistakes, but they are mistakes which it is useful to make, because they lead little by little to the truth.

Anthony Doerr (2015), All the Light We Cannot See, London, p. 328
(quoted from Jules Verne, Twenty Thousand Leagues under the Sea)

Preface

The world-wide principle of legality (WWPOL) is a common law principle of Australian criminal law that is based on the *nullum crimen*, *nulla poena sine lege* principle (NCNP). This internationally accepted meaning of the principle is, however, at least in explicit terms, not stated or recognized in Australian law. In the last decade, on the other hand, significant attention has been given to articulation and development of the 'Australian meaning' of the principle of legality (APOL). Yet, like other legal systems which explicitly recognize the WWPOL, Australian law requires that crime and punishment can only be based on conduct that could have been known to be illegal through pre-existing law at the time of the offence. The law however, does not, but for a few exceptions, articulate this as the 'principle of legality,' despite several allusions to it in legislation, case law and commentary. The effect is that the concept of the 'principle of legality' (POL) is not known by its worldwide meaning as a legal norm that underpins the constitutional limits and legitimacy of criminal law, even though, paradoxically, this is what it does in practice. This position of Australian criminal law is exacerbated by the problem of coherence that is created by the recognition that is given to the 'Australian meaning' of the POL. The result is an incoherent and inadequate development of the law and legal principle which needs to be addressed, clarified, and formulated in further research. This research paper is based on the law and literature known to the author at December 2016.

April 2018 *Guy Cumes*

Contents

Abbreviations

AC	Appeal Cases
ACCC	Australian Competition and Consumer Commission
A Crim R	Australian Criminal Reports
ACT	Australian Capital Territory
A-G	Attorney-General
ALJ	Australian Law Journal
ALR	Australian Law Reports
ALJR	Australian Law Journal Reports
ALRC	Australian Law Reform Commission
ano	another
APOL/(A)POL	Australian principle of legality
Art.	Article
CCC	Criminal Code (Cth)
ch(s).	chapter(s)
CHRRA	Charter of Human Rights and Responsibilities Act
CJ	Chief Justice
CJ at CL	Chief Justice at Common Law
CLR	Commonwealth Law Reports
Cmmr	Commissioner
Co.	company
Corp	corporation
Crim LJ	Criminal Law Journal
CSR	clear statement rule
Cth	Commonwealth
DPP	Director of Public Prosecutions
e.g.	for example

EWCA Civ.	England and Wales Court of Appeal, Civil Division
ex rel	ex relatione
FCA	Federal Court of Australia
FCAFC	Federal Court of Australia Full Court
fn	footnote
HCA	High Court of Australia
HR	human rights
HRA	Human Rights Act
ICAC	Independent Commissioner against Corruption
ICCPR	International Covenant on Civil and Political Rights
Imp.	Imperial (parliament of the UK)
J	Justice
JA	Judge of Appeal
JJ	Justices
JP	judicial power
KB	Kings Bench
LTD	Limited
MULR	Melbourne University Law Review
MOJ	miscarriage of justice
Mon LR	Monash University Law Review
MPI	Max Planck Institute
NCNP	nullum crimen, nulla poena sine lege
NSW	New South Wales
NSWCA	New South Wales Court of Appeal
NSWCCA	New South Wales Court of Criminal Appeal
NSWSC	New South Wales Supreme Court
NSWLR	New South Wales Law Reports
NT	Northern Territory
PAR	principle against retroactivity
para.	paragraph
POL	principle of legality

Pty Ltd	proprietary limited
QBD	Queen's Bench Division
Qld	Queensland
QCA	Queensland Court of Appeal
R	Regina
s.	section
ss.	sections
SA	South Australia
SASC	South Australia Supreme Court
SASCFC	Full Court of the Supreme Court of South Australia
SCC	Supreme Court of Canada
SCR	Supreme Court Reports
Tas	Tasmania
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations
USA/US	United States of America
vol.	volume
Vic	Victoria
VSC	Victoria Supreme Court
VSCA	Victorian Supreme Court of Appeal
WA	Western Australia
WAR	Western Australia Reports
WASC	Western Australia Supreme Court
WLR	Weekly Law Reports
WWII	World War II
WWPOL	world-wide principle of legality

Part 1

Overview

1. Introduction

The internationally accepted concept of the principle of legality (POL) is based on the *nullum crimen, nulla poena sine lege* principle (NCNP). In international and domestic foreign criminal law, in both civil and common law systems, the POL is a principle of law which requires that there must be no crime or punishment except in accordance with pre-existing law.[1] In this paper this concept of the POL is referred to as the 'world-wide principle of legality' (WWPOL).[2]

The NCNP has been recognized and adopted in Australian criminal law in legislation and in diverse judicial and academic opinion. It is beyond doubt that the law recognizes the existence of the concept of the WWPOL as a fundamental common law, and statutory, principle. Through the elements which comprise it, it has a critical role in the interpretation of criminal law legislation and in the scope and application of the criminal law. However, Australian criminal law does not refer to the concept as the 'principle of legality.'

Contrastingly, the term 'principle of legality' is used in Australian law to refer to a principle of statutory interpretation which is equated with the common law presumption against interference with fundamental rights, freedoms and immunities. In this form the 'Australian principle of legality' (APOL) is a quintessential element of Australian law and jurisprudence. It demands that fundamental common law principles and the rights and freedoms to which they give rise, as well as the general system of the common law, may not be derogated from unless the legislature has set them aside through the use of incontrovertibly clear and unambiguous language.

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1 *Williams* 1983, p. 7 states the POL is "the proposition that there should be no criminal offence except one specified in pre-existing law (nulla poena sine lege, or nullum crimen sine lege)." This quote is reprinted in the revised edition of this work, *Baker* 2012, [7].

2 See *Cumes* 2015, p. 77.

The central concern of this research paper is to highlight and explore these contrasting meanings of the POL. In doing this, the research identifies a paradox in the approach of the High Court of Australia (HCA) to its acknowledgement and recognition of the principle. The description and meaning of the APOL is not the accepted worldwide meaning of the principle as stated by the WWPOL. The aim of the research is to articulate this position of the law and the meanings and significant aspects of both versions of the POL including the relationship between them. It identifies in particular the problem of legal coherency that arises from the contrasting versions of the principle, and suggests an alternative nomenclature, already acknowledged by the HCA, the concept of the 'clear statement rule' (CSR), which allows them to be differentiated. Finally, it poses a number of issues for further research that inform further analysis of its subject.

This research paper is based on the author's work that formed the foundation for an article published in the (Australian) Criminal Law Journal.[3] It contains material not included in that publication as well as new formulation of some of the published material. Although an attempt has been made not to replicate or repeat the published work, some parts of it are included in this research paper.

2. Overview

2.1 Background

The identification of the concept of the WWPOL as the NCNP in modern English law has been traced to the work of *Glanville Williams*.[4] In his work, Criminal Law: The General Part, *Williams* wrote that the WWPOL is stated in the English translation of the NCNP: "There must be no crime or punishment except in accordance with fixed, pre-determined law."[5] According to *Williams* the WWPOL is part of the General Part of criminal law. The unique and ground-breaking nature of *Williams*' chapter is demonstrated by a critique which notes "the alien quality of the principle" and "how unusual it is to find a discussion of legality at all" in English criminal law.[6] Contemporaneously with *Williams'* work, the meaning of the WWPOL and its identification with the NCNP was explored in the United States of America

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3 *Cumes* 2015, pp. 77–100.

4 *Faheem Khali Lodhi v R* 2006, [31] per *Spigelman* CJ; see also *R v JS* 2007, [35]; *Spigelman* 2009a, p. 29; see on this and the following *Cumes* 2015, pp. 77, 79, 84.

5 *Williams* 1961, p. 575. For elaboration of *Williams*' description of the WWPOL see below Part 3, 2.

6 *Farmer* 2014, p. 269. *Farmer* summarizes *Williams'* outline and writing on the WWPOL at pp. 270–271 and his concept of the General Part of criminal law at pp. 265–271.

by *Jerome Hall*.[7] *Hall* described the POL as "a definite idea in Western legal history" and "one of the enduring ideas of Western civilization."[8] *Nulla poena*, he wrote, "represents the peak of all the values expressed in criminal law." This understanding of the WWPOL has been confirmed in modern work.[9]

In contrast to this articulation of the WWPOL as the NCNP, the APOL is derived from alternative roots in English law, especially the judgment of Lord *Hoffman* in *R v Secretary of State; Ex parte Simms*[10] and Lord *Steyn*'*s* discussion of the principle of legality in *R v Secretary of State; Ex parte Pierson.*[11] Lord *Steyn* adopted the term 'principle of legality' as an expression to describe the relationship between the rule of law and parliamentary sovereignty.[12] He argued that the rule of law limits parliamentary sovereignty through the concept of the POL,[13] the meaning of which, he adopted from its description in Halsbury.[14] Halsbury describes the POL as a principle which "is sometimes referred to as the rule of law" which in turn, it says is "a political principle the classic exposition of which is in Dicey, Law of the Constitution".[15] Lord *Steyn* also referred to this understanding of the POL in *Simms*[16] where he stated that the principle is "a presumption of general application operating

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7 See *Hall* 1960, Chapter II. The references in this research are generally to the 2nd editions of both authors' texts. The first editions which dealt inter alia with the WWPOL were *Hall* 1947 and *Williams* 1953.

8 On this and the whole of the following, including quotations, the references to *Hall*, unless otherwise indicated are *Hall* 1960, pp. 28–35, 56–59.

9 See Part 3, 1.3.

10 *R v Secretary of State* 1999/2000, p. 131.

11 *R v Secretary of State* 1997/1998, p. 587.

12 See for affirmation of this approach *R v Secretary of State* 1999/2000, p. 130.

13 See for support of this interpretation of Lord *Steyn*'*s* approach *Jowell* 2011, pp. 25–26 who notes that Lord *Steyn* referred to the "presumption in favour of the rule of law" as the 'principle of legality,' and this was adopted by Lord *Hoffman* in *Simms*. See also for similar comment *Pearce & Geddes* 2011, [1.3].

14 *R v Secretary of State* 1997/1998, p. 587 noting Halsbury's Laws of England 1996, 13, par 6.

15 Halsbury's Laws of England 1996, pp. 13–14. Halsbury, p. 14 fn 1, notes that "Dicey identified three principles which together establish the rule of law." These principles are adopted as the framework principles of the rule of law for the purposes of this paper. It is beyond the scope of this research to analyse the concept of the rule of law: it is an extensively scrutinized concept. Despite criticism of it, *Dicey*'*s* formulation of the rule of law remains the foremost statement of the concept, see Halsbury p. 14 fn 1. For this appraisal of *Dicey*'*s* work, analysis of the three principles and critique see *Jowell* 2011, pp. 12–22. For comment on the rule of law within the context of Australian criminal law see *Cumes* 2013c, pp. 44–46; *Cumes* 2013d, pp. 61–64.

16 *R v Secretary of State* 2000, p. 130.

as a constitutional principle" and again refers to Halsbury as the source for his argument.[17]

The description of the POL in Halsbury does not refer to *Williams*' use of the term, nor its historical roots in the NCNP, and similarly Lord *Steyn* makes no reference to these aspects of it. Likewise, nor does Lord *Hoffman* in his brief judgment in *Simms* when he adopted the concept of the POL as one of the "principles of constitutionality" which is applied by the courts to limit "the power of the legislature."[18]

The HCA has adopted Lord *Steyn's* and Lord *Hoffman's* meaning of the POL. In doing so it appears to have overlooked *Williams'* work and the historical heritage of the principle in the NCNP. However, *Williams'* work on the NCNP is referred to and adopted by the HCA but without acknowledging his use of the term POL.[19] The identification and elaboration of this paradox is a central concern of this research.

2.2 The 'Australian' principle of legality

Although the subject of only little more than a decade of legal development the APOL has become established in Australian law as a fundamental principle of statutory interpretation. In this form it operates as a core presumption for preserving common law principles, rights and freedoms, and the common law system of law[20] against legislative interference.[21] It is equated with what was traditionally referred to as the "presumption against modification or abrogation of fundamental rights."[22] It has been adopted, however, as a substitute term for this presumption: although, in this context, the first recognized use of the term 'principle of legality' in the

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17 Together importantly, as in *R v Secretary of State* 1997/1998, pp. 587–588, with *Cross, Bell & Engle* 1995, pp. 165–166 (which is referred to as "*Cross*"); refer Part 2, 1. and 1.3.

18 *R v Secretary of State* 1999/2000, pp. 131–132; see also *Lim* 2013, p. 373, arguing the POL is one of a "wider set of governmental precepts requiring that any governmental action be undertaken only under positive authorization."

19 See for elaboration generally Part 4, 3.

20 *Australian Education Union v General Manager* 2012, [30]. With respect to the criminal law, the APOL is directed specifically toward the preservation of the common law criminal justice system, namely the adversarial and accusatorial system of criminal justice; see *NSW Food Authority v Nutricia* 2008, Summary [7–11], [104–106, 155, 159–161] per *Spigelman* CJ; *X7 v Australian Crime Commission* 2013, [87] per *Hayne & Bell* JJ; *Lee v New South Wales* 2013, [176] per *Kiefel* J.

21 For elaboration on the material noted here, and references, see generally Part 2.

22 This is the description used by *Gleeson* CJ in *Electrolux v The Australian Workers' Union* 2005, [21] (hereafter *Electrolux*).

HCA was in 2004,[23] it is now stated that the principle of legality was first adopted in Australian law in 1908. This identification of the POL with the common law presumption has been articulated by the HCA and other superior courts, and has been extensively adopted in academic commentary. *Spigelman* CJ's[24] assessment in 2005 that "the principle of legality appears likely to be adopted here"[25] has been well and truly realized, and it is now said that "the status and strength of the principle of legality continues to increase."[26]

The Australian meaning of the POL[27] is exemplified by the definition given by *French* CJ in *Momcilovic v The Queen*:[28]

> *The principle of legality … is expressed as a* presumption *that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law.*

This articulation of the POL has been stated in various forms all of which have the same tenor. For example, *French* CJ has said that the principle is "formulated as a strong presumption that broadly expressed discretions are subject to the fundamental human rights recognized by the common law."[29] For the purposes of this paper, the 'Australian principle of legality' is taken to mean, in summary, the presumption in favour of fundamental common law principles and the common law system. This emphasizes its fundamental focuses: the protection of 'common law principles'

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23 There were however earlier references to the POL in the HCA. In *Church of Scientology v Woodward* 1982, [5] *Murphy* J referred to 'principles of legality' without any further explanation. *Kirby* J in *Daniels v Australian Competition* 2002, [106] noted that the use of the term by Lord *Hoffman* in *R v Secretary of State* 1999/2000, p. 131 was similar to his (*Kirby* J's) statement of the 'fundamental rights principle' 10 years previously. He, however, like *Gleeson* CJ, *Gaudron, Gummow & Hayne* JJ in *Daniels*, [11] did not use the term 'principle of legality.'

24 The judicial title is used in this paper to include references to extra-judicial comments, such as here. See similarly for reference to extra-judicial comments by *French* CJ and *Heydon* J.

25 *Spigelman* 2005, p. 774.

26 *Meagher* 2012, p. 486; see also *Lim* 2013, p. 414, "The principle of legality is now firmly established in the law."

27 This term or alternately 'the APOL' is used throughout this paper to mean the concept which has been named as the 'principle of legality' in Australian law.

28 2011, [43] (emphasis added); see also for reiteration of the second sentence of this statement *Attorney-General (SA) v Corporation Adelaide* 2013, [42] per *French* CJ; see also *French* 2013c, pp. 826–827 for discussion and confirmation of this meaning of the APOL; for recent affirmation of the principle noting the authority of *Momcilovic* see *R v Independent Anti-Corruption Cmmr* 2016, [40].

29 *French* 2007, p. 26.

which embrace 'rights and freedoms' that are corollaries of them, not vice versa, and secondly, the system of the common law in which the principles, rights, and freedoms are grounded. The shorthand expression for this presumption used throughout this paper is 'the fundamental common law principles presumption' or simply the 'presumption.' The analysis of the APOL presented in this research aims to show that it is a very different concept to the criminal law principle known as the 'principle of legality' and the two principles could not be confused with each other. The contrast is developed by analysis of WWPOL as expressed by the NCNP.

2.3 The world-wide principle of legality and paradox

In contrast to the APOL, the WWPOL, although having a longer history as a fundamental common law principle in the criminal law, is not articulated in Australian law by the use of the term 'principle of legality.'

The existence of the WWPOL in Australian law is articulated in this research by reference to the work of leading common law commentators, and examination of how it has been articulated in Australian legislation, commentary, cases and judicial opinion, and finally, by implication, in the law itself. This demonstrates that the WWPOL has not been judicially acknowledged as a principle of Australian criminal law, and its foundation in the NCNP has not been explicitly stated. It has been obliquely referred to in the HCA, but treated discursively. Consequently it remains undefined, and its importance and meaning in the criminal law, and its application to practice, are unstated and unexplored.

This position however reflects an important paradox in the law. Without referring to it specifically as the 'principle of legality,' the HCA and other superior courts recognize the principle as a long-standing principle of the common law which applies in the criminal law. In *Polyukhovich v Commonwealth*[30] *Toohey* J observed that, "The notion that there should be no crime or punishment, except in accordance with law, was recognized as early as 1651 …"[31] It is incontestable that it is the duty and function of a court to ensure a trial is conducted in accordance with law,[32] and that "sentencing an offender must always be undertaken according to law."[33] Australian criminal law extensively adopts the worldwide meaning and idea of the WWPOL as a fundamental principle of the criminal law, and it has a critical presence in Australian criminal law jurisprudence. The result is that the principle occu-

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30 1991, p. 687. *Toohey* J refers to *Williams* 1961, p. 580 as the source for this comment, however does not refer to *Williams*' use of the term 'principle of legality.'

31 See also Part 4, 3.1 noting *Heydon* J's comments that the NCNP is an "old idea" in the common law.

32 *Lee v New South Wales* 2013, [188] per *Kiefel* J.

33 *Magaming v The Queen* 2013, [47].

pies a central role, position and status as a legal principle (a legal norm) that informs the operation of Australian criminal law and determines the limits and legitimacy of criminal law legislation and practice. But nowhere is this explicitly stated. Instead, the concept of the WWPOL is taken for granted in Australian criminal law, a status that corresponds to observations about the principle with which it is intrinsically associated – the principle against the retroactive operation of the criminal law[34] – which, it has been observed, "has generally been accepted without argument" and whose "proponents … tend to accept it as axiomatic."[35]

2.4 The relationship between the 'Australian' principle of legality and the world-wide principle of legality/nullum crimen, nulla poena sine lege principle

The distinction between the APOL and the WWPOL raises the important issue of whether there is a relationship between them and what this might be.[36] They constitute competing concepts of the term 'principle of legality:' the fundamental common law principles presumption, the APOL, and the worldwide concept of the principle based on the NCNP. Consideration of this relationship demonstrates the confusion that is apt to arise from the overlapping terminology that is used for them and the problem of coherence that arises from this.

As noted in Part 3 of this research,[37] *Spigelman* CJ refers to the NCNP as an "integrative concept." His use of a similar term to describe and explain the scope of the APOL, namely that it is a "unifying concept" which incorporates other "subprinciples," suggests that this term is used to mean that the NCNP is a unifying concept that embraces other principles.[38] These include, as he notes, the principle against retroactivity, the rule of strict construction of penal statutes and the principle of certainty. This understanding of the NCNP, the WWPOL, is consistent with its formulation as a principle that incorporates the four elements noted in Part 3 of this research.

Some of the principles that fall within the WWPOL overlap with criminal law principles that are incorporated in, and protected by, the unifying concept of the APOL. In particular, the presumption against retroactivity and the presumption against extension of penal statutes are recognized as "rebuttable presumptions" that fall within the ambit of the APOL.[39] In this guise, like the APOL, they are part of a range of presumptions that operate to limit statutory interpretation, but which do

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34 See on this principle especially Part 4, 4.

35 *Popple* 1989, pp. 251, 253; see also *Cumes* 2015, p. 99.

36 See also *Cumes* 2015, p. 96.

37 See Part 3, 1.3.

38 Refer Part 2, 1.4.

39 See Part 2, 1.5.

not frustrate the purposes of an Act of Parliament as expressed by the principle of parliamentary sovereignty.[40] Apart from this observation, the distinction between the integrative scope of the APOL and the WWPOL/NCNP is that the former embraces a wide range of principles, the limits of which have not been articulated.[41] Although it has not been referred to in this context, it arguably also includes the NCNP. The WWPOL/NCNP is a fundamental common law principle that operates in the criminal law. It is, of its essence, a principle to which the APOL is directed. Elements of the WWPOL fall within the scope of the APOL: it is hardly contestable that this doctrine, as it has been expressed in Australian law, does not also incorporate the WWPOL itself. It follows that criminal legislation which purports to abrogate the WWPOL/NCNP operates subject to the APOL.

This association between the APOL and the WWPOL/NCNP has a potentially very broad effect. How and the extent to which the principles might operate together to determine the validity of criminal legislation is unexplored in Australian law. An issue to which they may have common application is preventive detention legislation, the potential effect of which is such legislation is arguably invalid. This issue is explored elsewhere in this research.[42]

2.5 The problem of coherence

This effect of the HCA's adoption of the APOL, and its apparent overlooking of the POL as the WWPOL with its roots in the NCNP, is puzzling and problematic.

Australian law is treated as an independent corpus, and the HCA is cautious about articulating new legal principle, and adopting concepts of foreign law or international practice. With respect to the former, *French* CJ has said, "The proclamation of new general principles, the unnecessary extension of existing principle or the construction of theories of everything for a particular class of case are high risk exercises."[43] With respect to the latter, the court has affirmed that before international practice will be followed it must be shown why it should construe Australian law by reference to it.[44] A core concern of the court in adopting these positions is its fidelity to the idea of the coherence of the law, which is reflected in the concept of what is now referred to as the "emerging" doctrine of coherence.[45]

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40 *Allan* 1985, p. 121; refer also Part 2, 1.3; Part 3, 3.1.1; Part 6, 1.

41 See Part 2, 1.5; see now also *Bagaric & Alexander* 2015, pp. 520–525.

42 See Part 4, 3.2.4.

43 *French* 2013b, p. 102; see also *Gillooly* 2013, p. 35, "The common law generally discouraged judicial excursions into the realms of legal theory," noting comments by *McHugh* J.

44 *Mansfield v The Queen* 2012, [48–50].

45 *Mason* 2016, p. 324.

The coherent development of the law, namely its coherence and congruity, has been identified as a "central policy issue" for the court.[46] In particular it is said that coherence is "an important policy consideration which can be a central policy consideration in the development of the common law …"[47] The notion of "legal coherence"[48] postulates the idea of law as a "coherent and consistent whole;" a corpus comprising a system of juridical concepts that establish a "body of accepted rules and principles" which underpin legal doctrine and changes to it.[49] *Sir Anthony Mason* argues that the "concept or doctrine of coherence" applies to the "analogical development of the common law" and "extends to the testing of novel propositions for consistency and coherence with the existing legal system and its principles."[50]

Given this context, two issues, which generally inform reform of Australian law and the approach of this research as work that proposes reform of Australian criminal law through the adoption of the WWPOL, need to be noted. Firstly, the formulation of the doctrine of coherence, is, at least partly, premised on the well-recognized observation that from time to time Australian law is confronted with fundamental developmental problems. These concern whether, and if so how, the law should determine that a 'new' or 'novel' law or principle may be adopted by it, or alternatively whether existing law and legal principles may be expanded in order to accommodate a new, or newly revised, law, principle or legal development. The resolution of this issue through the application of the doctrine of coherence has been considered in, and articulated by, the HCA in *Sullivan v Moody.*[51] In this case the court stated that the implementation or adoption of new law and legal principle is subject to strict conditions. These are that the court should consider (a) whether the proposed principle is compatible (congruent, or consistent) with other relevant legal principles, and (b) whether its adoption would subvert other legal principles (such as the principle of parliamentary sovereignty) or be incongruent or inconsistent with other areas of law. Secondly, it is also clear and recognized as common law principle, that international law and international principles to which Australia has given its concurrence are a legitimate influence on the development of common law especially where it relates to universal human rights.[52]

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46 *Gillooly* 2013, pp. 44, 46, who notes cases (*Miller* and *Equuscorp)* where the HCA has stated this position.

47 *Mason* 2016, p. 336.

48 *Gillooly* 2013, pp. 35, 48.

49 *Gillooly* 2013, pp. 34 fn 4, 35 fn 13 notes that this idea is based on the concept of law as a science, a concept of law that he explains has "ancient roots" in Roman law; refer Part 3, 3.1.

50 *Mason* 2016, p. 337–338.

51 2001, [53–62]. See particularly for this analysis of the case *Gillooly* 2013, pp. 36–38.

52 *Mabo v State of Queensland* 1992, p. 42 per *Brennan* J. *Brennan* J's dictum in *Mabo* is referred to as the 'interpretive principle;' see *Brown et al*. 2011, [3.10.3], and *Levy v*

These approaches to the incorporation of new law and expansion of current law inform the implementation of the WWPOL into Australian criminal law. The WWPOL is both compatible with existing principles of the criminal law and not incongruent with other foundational legal principle. Moreover, as this research argues, the WWPOL is an internationally recognized human right and Australian Parliaments have recognized the international principles for which the principle and its elements stand.[53] In Australian law, the WWPOL, modeled on the NCNP, is founded on the same rationale and ideas as its international and foreign counterpart. They are equivalent, consistent and compatible doctrines.

From this viewpoint, the current position of the HCA, through its adoption of the POL in its 'Australian meaning' and conversely the non-adoption of the principle as the NCNP, raises two problems which question the legitimacy of the former as a concept that is consistent with the coherent development of the law. Firstly, it constructs a concept that does not conform, and indeed is inconsistent, with the concept as it is uniformly adopted in international and foreign domestic law. Secondly, it creates confusion and uncertainty for Australian law. The naming of the 'Australian principle of legality' creates incoherence in the law: it gives the identical name to a concept that is internationally – but more importantly, on analysis of Australian criminal law itself – known to mean something else.

Within this context, it is a theme of this research that Australian law should adopt the term and meaning of the WWPOL for which it stands in international and foreign domestic law. Conversely a concomitant theme of the research is that the HCA should stop referring to 'the fundamental common law principles presumption' as 'the principle of legality.' This it could do simply by adopting different terminology for the presumption, such as for example the 'presumption of legality' or the 'legality presumption;' a term which, although still retaining the reference to 'legality,' emphasizes its roots and contemporary application as a presumption of the law of statutory interpretation.[54] An alternative, and preferable, route to the renaming of the APOL is however already offered by the HCA and judicial and academic opinion. As noted in Part 2 of this research, the APOL has been identified as being analogous to the USA concept of the clear statement rule (CSR).[55] This term could be readily adopted as a descriptor of the principles that are currently expressed un-

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Victoria 1997, pp. 644–645 per *Kirby* J; see also *Thomas v Mowbray* 2007, [380] per *Kirby* J who argues that the interpretive principle operates as a form of the (A)POL to require that legislation that purports to abrogate "fundamental rights, recognised by civilised countries" will not be upheld unless "the purpose of the legislature is clear, evidenced by unambiguous and unmistakable language." For analysis of the interpretation principle as articulated by *Kirby* J see *Beck* 2013, pp. 200–209; see also *Kirby* 2011, pp. 278–279.

53 See Part 4, 2.

54 See Part 2, 1.2.

55 See Part 2, 1.7.

der the nomenclature of the APOL and there would be considerable advantages in doing so, particularly as it would facilitate consideration of USA jurisprudence in the development and articulation of the principle in Australian law.

Although there are some indicators of a cautious and selective approach to the use of the POL in its Australian meaning[56] which might precipitate a modest change of name, they cannot however be said to represent the current opinion, or direction, of the court. On the contrary the concept of the APOL is regarded as doctrine of the court, and only its scope and application are in issue.[57] Furthermore, the extensive and increasing reference to, and reliance on, the APOL as a central principle of statutory interpretation in recent important opinion, particularly the Australian Law Reform Commission (ALRC), confirms that it is an established doctrine of Australian jurisprudence.[58]

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56 See Part 2, 1.8.

57 See the contrasting decisions with respect to the application of the APOL in the HCA in *X7 v Australian Crime Commission* 2013, and *Lee v New South Wales* 2013. In both cases the members of the court approached the issues for resolution as being founded on the application of the APOL. In *Lee* see e.g. *French* CJ, [29], *Kiefel* J, [191] and *Gageler & Keane* JJ, [307]. The conflicting judgments, however, with respect to the application and scope of the principle in this case, and its different majority opinion to that in *X7*, demonstrate the debated character of the principle in Australian law. On the contested meanings and foundations of the APOL, see also *Lim* 2013, pp. 374, 376–377, 394, 414; *Mason* 2016, pp. 328–331. Refer for other references and comment on this point, Part 2, 1.

58 See ALRC 2015, and especially for application and analysis of the APOL in the Report, 1.12, 2.27–2.34. Each chapter of the Report addresses the APOL in the context of the common law right which is in issue in it. Part 2 of this research contains extensive references to the APOL. In addition to the material noted there, see also for recent analysis of the APOL *Burke* 2015, pp. 159–169; *Chen* 2015, pp. 329–376; *Bagaric & Alexander* 2015, pp. 515–551; *DPP (Vic) v Kaba* 2014, [165–193] per *Bell* J.

Part 2

The 'Australian' principle of legality

1. The Australian meaning of the principle of legality

It is argued that "the catalyst for the contemporary renaissance, or maybe more accurately the progressive renovation, of the principle of legality" was the rise of human rights (HR) as a core concern of the international legal order after World War II (WWII) and the willingness of the HCA to imply rights and freedoms from the text and structure of the Constitution.[59] Within this broader historical context, the contemporary development of the concept of the APOL in Australia[60] is explained by *Spigelman* CJ:[61]

> *The concept of the principle of legality was* reintroduced *to contemporary jurisprudence by Lord Steyn, being a term he found in the fourth edition of Halsbury's Laws of England … It has subsequently been adopted in Australia, first by Chief Justice Gleeson writing extra-judicially … and subsequently in a number of judgments.*

Spigelman CJ adds,[62] the (A)POL was established as "a *unifying principle* in English law" by Lord *Hoffman* in *Simms*[63] who said,

> *the principle of legality means that Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by general or ambiguous words … In the absence of express language or necessary implication to the*

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59 *Meagher* 2014, p. 418.

60 See on this and the following also *Cumes* 2015, pp. 85–87.

61 *Faheem Khali Lodhi v R* 2006, [31] per *Spigelman* CJ (emphasis added); see for an almost identical statement *R v JS* 2007, [35]; see also *Spigelman* 2005, p. 774; *Spigelman* 2009a, p. 29.

62 *Faheem Khali Lodhi v R* 2006, [31] (emphasis added); see also *R v JS* 2007, [36]; *Spigelman* 2009a, p. 30.

63 *R v Secretary of State* 1999/2000, p. 131.

> *contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.*

This passage has been consistently and uniformly cited with approval in the HCA, as well as by English and New Zealand authorities.[64] It is described as the "most famous judicial exposition," and "the quintessential statement," of the (A)POL.[65] *Meagher* notes that, in the HCA, *French* CJ, and his predecessor *Gleeson* CJ, "have consistently highlighted the importance" of the principle.[66]

Gleeson CJ adopted Lord *Steyn's* comments in *Pierson* in two judgments given in 2004 within a month of each other: *Al-Kateb v Godwin*[67] and *Electrolux*.[68] In *Electrolux* he distilled Lord *Steyn's* judgment into the following:[69]

> *Lord Steyn described the presumption as an aspect of the principle of legality which governs* the relations between Parliament, the executive and the courts.

This passage, which is a paraphrasing of Lord *Steyn's* speech, has been consistently adopted by the HCA. It is not mentioned that Lord *Steyn* quoted these words from Sir *Rupert Cross* who refers to[70]

> *presumptions of general application ... (which) operate at a higher level as expressions of fundamental principles governing both civil liberties and* the relations between Parliament, the executive and the courts.

Lord *Steyn* identified "the 'spirit of legality,' or what has been called the principle of legality" as such a presumption.[71]

In *Al-Kateb* and *Electrolux Gleeson* CJ highlighted the linkage between the 'fundamental common law principles presumption' and the 'principle of legality,' and significantly the relationship between these concepts and the rule of law.[72] *French*

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64 The list of authorities is extensive. See e.g. references noted in: *Faheem Khali Lodhi v R* 2006, [33]; *Spigelman* 2005, p. 774; *Spigelman* 2009a, p. 30; *Meagher* 2011, pp. 455–456.

65 *Meagher* 2011, p. 455; see also *Meagher* 2013, p. 209 referring to it as the "most famous contemporary statement" of the (A)POL.

66 *Meagher* 2012, p. 471.

67 2004, [19–20] (hereafter *Al-Kateb*).

68 2004, [21]. *Gleeson* CJ refers to the passage of Lord *Hoffman* in *Simms* only in: *Al-Kateb.*

69 2004, [21] (emphasis added); see also for this observation *Pearce & Geddes* 2011, [5.2].

70 *R v Secretary of State* 1997/1998, p. 588 (emphasis added); refer Part 1, 2.1.

71 *R v Secretary of State* 1997/1998, p. 587.

72 See for elaboration below 1.3; see for similar comment *Meagher* 2012, p. 470.

CJ adopted these comments in *Evans v State of New South Wales*[73] and subsequently in a number of judgments in the HCA (both singularly and jointly) which have articulated the nexus between the APOL and the 'presumption,' as well as its meaning and reach. Despite this jurisprudence the unclear nature, content, and scope of the APOL is acknowledged.[74] This section of this research seeks to identify basic tenets of the APOL in an attempt to address this shortcoming. In doing so it identifies the APOL as a very different concept from the WWPOL.

1.1 Equivalence with the 'fundamental common law principles presumption'

It is universally accepted in Australia that, in *Al-Kateb* and *Electrolux, Gleeson* CJ adopted the term 'principle of legality' as a concept that was equivalent to the expression of the 'the fundamental common law principles presumption' as previously expressed by the HCA in *Re Bolton; Ex parte Beane*[75] and *Coco v The Queen*.[76] The terms in which the APOL was formulated in *Coco* have been "repeatedly restated by the High Court of Australia over the years"[77] and are now regarded as representing doctrine of the court.[78] The statement of the APOL is:

> *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*

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73 2008, [72–73] (as he then was, *French* J, in a joint judgment with *Branson & Stone* JJ). For analysis of this decision see *Meagher* 2009, pp. 295–314.

74 *Pearce & Geddes* 2011, [1.3], and for further analysis [5.3–5.5]; see also *Meagher* 2011, p. 456; *Lim* 2013, pp. 373, 414; refer Part 1, 2.5 for this observation and extended comment and references.

75 1987, p. 523.

76 1994, p. 437 per *Mason* CJ, *Brennan, Gaudron & McHugh* JJ.

77 *French* 2007, p. 26, noting these cases.

78 See inter alia *Thomas v Mowbray* 2007, [380] per *Kirby* J who notes that the principle enunciated by *Gleeson* CJ in: *Al-Kateb*, [20] is said to be "settled doctrine in this court;" see also *Plaintiff M47 v Director General of Security* 2012, [119] per *Gummow* J, [529] per *Bell* J. In: *X7 v Australian Crime Commission* 2013 *French* CJ & *Crennan* J, [21] refer to "*the settled principle* that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or necessary implication to that effect" (emphasis added). This passage was adopted in: *Lee v New South Wales* 2013, [126] per *Crennan* J. See for comment confirming this acceptance of the APOL in the HCA and the cases which follow it *Pearce & Geddes* 2011, [5.3–5.7]; *Meagher* 2011, p. 454; *Meagher* 2012, pp. 470–471. *Meagher* 2014, p. 419 argues that the statement by the HCA in: *Coco* is "the authoritative contemporary statement as to the nature and scope of the principle of legality."

> *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 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.*

These cases and all those that follow them in the HCA attribute the derivation of the APOL to the statement of *O'Connor* J in *Potter v Minahan,*[79] who said, without explicit reference to the term:

> *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.*

This statement is a paraphrased form of the principle stated more than 100 years earlier in the USA – where the principle is known as the 'clear statement rule' rather than the 'POL'[80] – by *Marshall* CJ in *United States v Fisher.*[81] *French* CJ notes that the passage in *Potter v Minahan* is the progenitor of the "evolution of an approach to statutory interpretation which is protective of fundamental rights and freedoms" and the principle stated in it "has been repeatedly invoked in this Court" as the statement that supports the "principle of legality in statutory interpreta-

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79 1908, p. 304. The list of references on the adoption of *Potter v Minahan* is extensive. See amongst references in the HCA *Al-Kateb,* [19], *Electrolux,* [21], *Plaintiff M47 v Director General of Security* 2012, [118–119] per *Gummow* J, [528] per *Bell* J, noting the 'principle of legality' is "a longstanding principle of interpretation" that derives at least from *Potter v Minahan* and which has been "strictly applied" by the HCA since *Re Bolton; Attorney-General (SA) v Corporation Adelaide* 2013, [42] per *French* CJ; *X7 v Australian Crime Commission* 2013, [21] per *French* CJ & *Crennan* J, [86] per *Hayne & Bell* JJ, [158] per *Kiefel* J; *Lee v New South Wales* 2013, [171] per *Kiefel* J, [308] per *Gageler & Keane* JJ. See also *French* 2013c, p. 827; *Lim* 2013, pp. 378–381; *Spigelman* 2005, p. 780; *NSW Food Authority v Nutricia* 2008, [99] per *Spigelman* CJ; *French* 2007, p. 26; *Meagher* 2014, p. 418; *Thwaites* 2014, p. 45 noting that "the use of the presumption increased starting in the late 1980s." *Pearce & Geddes* 2011, [5.28] distinguish between "statements of presumption against alteration of common law doctrines" [5.28] which derive from *Potter v Minahan*, and "statements of presumption against the invasion of common law rights," which have another derivation. They note however, that "most cases do not distinguish between them" [5.35].

80 Refer below 1.7; see also Part 1, 2.5.

81 1805, p. 358; see on this and the following statement *French* 2010a, p. 45; *French* 2010b, p. 29.

tion."[82] The result is that, as the HCA noted in *Lacey,* the presumption is "frequently called the principle of legality."[83]

1.2 A principle of statutory interpretation

The APOL is a general principle of statutory interpretation.[84] It is referred to as an interpretive principle of the law;[85] a "rule of construction"[86] within the law of statutory interpretation[87] which is used as a principle to interpret legislation. *Spigelman* CJ identifies the POL as one of the most "fundamental" of the "background assumptions" of the law of statutory interpretation.[88] *French* CJ has referred to the "presumption" as "a common law interpretative principle protective of rights and freedoms against statutory incursion."[89] In *Lacey* the HCA[90] said the "presumption" or principle of legality is an example of a "canon of construction" which informs the objective of statutory interpretation. This objective is the "giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have." The APOL provides the strongest guidance for resolving issues of statutory construction as it aims to find the legislative "intention" of a statute within the framework of "the constitutional relationship between the arms of government respecting the making, interpretation and application of laws."[91] Thus, as *Meagher* argues, the APOL "underpins an interpretive approach of 'constitutional' significance".[92] It imposes a "manner and form requirement for clear language before courts will construe a statute as displacing fundamental rights and freedoms."[93]

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82 *Lacey v Attorney-General of Queensland* 2011, [17] per *French* CJ, *Gummow, Hayne, Crennan, Kiefel & Bell* JJ.

83 2011, [43].

84 Of the many references see *Al-Kateb,* [22] per *Gleeson* CJ and *Plaintiff M76 v Minister for Immigration* 2013, [180] per *Kiefel & Keane* JJ who refer to it as a "fundamental principle."

85 *Lee v New South Wales* 2013, [37]; *Spigelman* 2005, p. 773, 780; *French* 2007, p. 26.

86 *X7 v Australian Crime Commission* 2013, [24] per *French* CJ & *Crennan* J, [87] per *Hayne & Bell* JJ; *Lee v New South Wales* 2013, [126] per *Crennan* J, [171–173] per *Kiefel* J. See also for reference to the APOL as a "common law rule of construction" *Australian Communications v Today FM* 2015, [68–69] per *Gageler* J.

87 *NSW Food Authority v Nutricia* 2008, [97] per *Spigelman* CJ.

88 *Spigelman* 2005, p. 773.

89 *French* 2010b, p. 34.

90 2011, [43].

91 *Plaintiff M47 v Director General of Security* 2012, [118] per *Gummow* J.

92 *Meagher* 2014, p. 421.

93 *French* 2013c, p. 827.

1.3 Rationale, the rule of law, constitutional status and limitations

It is argued that

> *in its modern guise, the principle of legality has come to be recognized as an independent common law principle that is central to the proper functioning of our constitutional system of democratic government and the maintenance of the rule of law.*[94]

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> *contemporary conception of the principle of legality is now associated more with the promotion of legislative clarity, interpretive transparency and its capacity to enhance political accountability and so democratic government.*[95]

This parliamentary and constitutional framework of the APOL is founded on the rationale that common law principles operate as a limitation upon parliamentary sovereignty. The 'philosophy' of the presumptions against alteration of common law doctrines and invasion of common law rights is that "it is the responsibility of the courts to protect the individual from the excesses of the state. It is assumed that this protection is best afforded by the principles of the common law."[96] This approach underlies the foundation of Lord *Steyn's* judgment with respect to the application of the POL in *Pierson.*[97]

In *Assistant Commissioner Condon v Pompano*[98] *French* CJ expressed this concisely:

> *... the common law informs the interpretation of the Constitution and statutes made under it ... The common law may be changed or abrogated by parliaments. The courts must apply the laws enacted by the parliaments. However, where the Constitution limits legislative powers and the purported exercise of those powers is challenged*, the courts must also decide whether those limits have been exceeded. *Their decisions will be informed by the text of the Constitution, implications drawn from it, and* principles derived from the common law.

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94 *Meagher* 2014, p. 418.

95 *Meagher* 2014, pp. 419–420.

96 *Pearce & Geddes* 2011, [5.27].

97 Refer Part 1, 2.1.

98 2013, [2–3] (emphasis added); see also now for similar comment *French* 2016, p. 407. For brief comment of the way in which the Constitution and principles of common law, noted in this quotation, operate as limitations on parliamentary sovereignty see Part 4, 3.2.3. Otherwise this complex issue is beyond the scope of this paper and is a matter for further research; see Part 6, 2.1 & 2.2 point 5.

This approach of the courts is supported by the often quoted statement[99] of the Supreme Court of the United States in *Rodriguez v United States*[100] that:

> *No legislation pursues its purposes at all costs … and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.*

The principles and presumptions of statutory interpretation are part of the common law of Australia.[101] It follows that the APOL derives from, and is, a common law principle,[102] known to Parliament, which imposes limits on the interpretation of legislation. The APOL "is a clear and prior judicial statement to the elected arms of government as to the common law rights and freedoms that will be jealously guarded from legislative encroachment."[103] Its "lynchpin" in contemporary Australian law is this "curial insistence that Parliament must consider and then decide whether its legislation is to infringe the common law bill of rights."[104]

In this role, the APOL "governs the relations between Parliament, the executive and the courts."[105] It is founded in the rule of law, and is referred to as the "presumption in favour of the rule of law."[106] These foundations of the APOL underpin the proposition that it has a constitutional grounding:[107] they accord to the principle a "fundamental constitutional status"[108] as one of a "wider set of constitutional precepts requiring that any governmental action be undertaken only under positive

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99 See *Faheem Khalid Lodhi v R* 2006, [37–39].

100 1987, pp. 525–526.

101 *Plaintiff S10 v Minister for Immigration* 2012, [97].

102 *French* 2013c, p. 826.

103 *Meagher* 2014, p. 420.

104 *Meagher* 2014, p. 426.

105 *Saeed v Minister for Immigration* 2010, [15], noting *Electrolux,* [21].

106 *Jowell* 2011, pp. 25–26 noting Lord *Steyn*'*s* construction of the POL in: *R v Secretary of State* 1997/1998, p. 587.

107 Consideration of the constitutional status of the APOL is beyond the scope of this research; see for observation Part 6, 2.1. For references on the constitutional character of the APOL see particularly *French* CJ's extra-judicial opinion that the APOL "can properly be regarded as 'constitutional' in character even if the rights and freedoms which it protects are not," *French* 2007, p. 27; see also *French* 2010a, p. 46; *French* 2010b, p. 30; *French* 2013c, p. 827; see also *Spigelman,* 2009b, p. 3: "… many of the principles characterized under the general rubric of the principle of legality … are accurately characterised as quasi-constitutional." *Meagher* 2014, p. 413 argues the APOL "has transformed a loose collection of rebuttable interpretive presumptions into a quasi-constitutional common law bill of rights," and in this sense operates like its "American counterpart," the clear statement rule (pp. 421, 428).

108 *Pearce & Geddes* 2011, [1.3].

authorization."[109] The "constitutional significance of the principle of legality"[110] is particularly recognized as having been articulated by *Gleeson* CJ in *Electrolux*:[111]

> *The presumption … 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.*

In *Australian Education Union*[112] *French* CJ with *Crennan & Kiefel* JJ, adopting this passage, said:

> *In a representative democracy governed by* the rule of law*, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies,* retroactively*, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the* principle of legality *which also applies the constructional assumption that Parliament will use clear language if it intends to overthrow fundamental principles, infringe rights, or depart from the general system of law.*

Without necessarily limiting its meaning, the focus of the rule of law in the context of its relationship with the APOL is represented by *Dicey's* third principle, "the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts."[113] It is a political and constitutional concept that underpins the relationship between parliament, the executive and the judiciary. It is reflected in the separation of powers doctrine, but with a distinct emphasis: it requires that parliamentary sovereignty, and executive policy, is not absolute, but rather, as the statement in *Rodriguez v United States* quoted above observes, subject to law.[114] This includes common law principles such as the APOL.

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109 *Lim* 2013, p. 373.

110 *Meagher* 2011, p. 455.

111 2004, [21]; see also *Al-Kateb,* [20]. *Gleeson* CJ's statement in: *Electrolux* has been unambiguously adopted by the HCA. See inter alia for references *K-Generation v Liquor Licensing Court* 2009, [47] per *French* CJ; *R & R Fazzolari v Parramatta City Council* 2009, [43] per *French* CJ; *Saeed v Minister for Immigration* 2010, [15] per *French* CJ, *Gummow, Hayne, Crennan & Kiefel* JJ; *Australian Crime Commission v Stoddart* 2011, [182] per *Crennan, Kiefel & Bell* JJ; *Australian Education Union v General Manager* 2012, [30] per *French* CJ, *Crennan & Kiefel* JJ; *Monis v The Queen* 2013, [331] per *Crennan, Kiefel & Bell* JJ; *Attorney-General (SA) v Corporation Adelaide* 2013, [42] per *French* CJ.

112 2012, [30] (emphasis added). On the concept of retroactive legislation see especially Part 4, 4.

113 Noted in: Halsbury's Laws of England 1996, p. 14; see Part 1, 2.1.

114 See for discussion of this concept of the rule of law *Allan* 1985, p. 112 and generally, pp. 111–143.

This understanding of the rule of law has the effect that, as *French* CJ has said, the operation of the APOL "is entirely consistent with the principle of parliamentary supremacy."[115] The approach of the courts is, as Lord *Hoffman* in *Simms* has said of the position in the United Kingdom (UK):[116]

> *... the courts of the United Kingdom, though acknowledging the sovereignty of parliament, apply principles of constitutionality little different to those which exist in countries where the power of the legislature is expressly limited by a constitutional document.*

The definitional condition of the APOL as a principle of statutory interpretation means that it operates within the context of parliamentary sovereignty and is not an absolute legal norm that overrides it. Thus, "the principle of legality does not constrain legislative power." It does not allow courts:[117]

> *to maintain unimpaired common law freedoms which the Commonwealth Parliament or a State Parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted or qualified.*

Moreover, it is argued the APOL:[118]

> *at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked.*

By way of an example of this approach to the application of the APOL by the HCA, *Keane* J said in *CPCF v Minister for Immigration*[119] of s. 72(4) Maritime Powers Act 2013 (Cth):

> *The action which s 72(4) authorises is necessarily apt to be contrary to the wishes and interests of the person affected by it. In these circumstances, the principle of statutory construction that a statute said to authorise interference with common law rights must state that intention expressly or by words of necessary intendment is of little assistance. Section 72(4) expressly authorises the detention and movement of a person who was reasonably suspected of having been on a detained vessel. The legislature has directed*

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115 *French* 2010b, p. 34; see also *French* 2013c, p. 827; refer Part 1, 2.4.

116 *R v Secretary of State* 1999/2000, p. 131.

117 *South Australia v Totani* 2010, [31] per *French* CJ; see also *Momcilovic v The Queen* 2011, [45] per *French* CJ, [510–514] per *Crennan & Kiefel* JJ; *Lee v New South Wales* 2013, [3] per *French* CJ, [126] per *Crennan* J, [313–314] per *Gageler & Keane* JJ.

118 *Lee v New South Wales* 2013, [314] per *Gageler & Keane* JJ; see also noting this limited application of the APOL by *Gageler & Keane* JJ, *Strickland* 2014, pp. 812–827.

119 2015, [420–422] per *Keane* J (footnotes omitted).

> *its attention squarely to the question whether the liberty of such a person should be invaded in those circumstances, and has determined that such a person may be moved against his or her wishes. As was said by this Court in Australian Securities and Investments Commission v DB Management Pty Ltd: "It is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve."*

Similarly, in *North Australian Aboriginal Justice Agency v Northern Territory*[120] the HCA considered whether a State parliament could invest a police officer with investigative, prosecutorial and punitive functions. Although in the instant case the issue did not fall for determination because of the non-punitive character of the custody which the section in issue (s. 133AB) authorised, the court made the following observation:

> *If such a law were enacted ... the question might arise as to whether the conferring on a police officer of a combination of prosecutorial and judicial powers would offend against fundamental common law principles to such an extent that the grant of legislative power ... should not, in the absence of clear words, be construed as extending that far.*

This reference to the APOL and its application in the circumstances of the case specifically to the principle of liberty was expanded upon by *Gageler* J:[121]

> *The principle of construction known as the principle of legality is of little assistance given that the evident statutory object is to authorise a deprivation of liberty and that the statutory language in question is squarely addressed to the duration of that deprivation of liberty. The principle "exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law" and "is fulfilled in accordance with its rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed." The principle 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.*

These examples demonstrate, with regard to the APOL, that:[122]

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120 2015, [45].

121 2015, [81] (footnotes omitted). For comment on this case see inter alia *Odgers* 2016, pp. 6–7.

122 *Australian Communications v Today FM* 2015, [67] per *Gageler* J; see for comment and analysis of this case *Leith* 2016, pp. 255–271, and especially on the application of the APOL, pp. 262–267, 270–271.

[o]utside its application to established categories of protected common law rights and immunities, that principle must be approached with caution. The principle should not be extended to create a common law penumbra around constitutionally imposed structural limitations on legislative power.

Accordingly, other constitutional rights such as the right of silence may be preferred as principles that prevent interference with fundamental rights rather than the APOL.[123] It is argued therefore that that the APOL as a "common law principle of construction" has a "narrowly focused application."[124]

1.4 A unifying principle

Spigelman CJ argues the APOL is a "unifying concept" which identifies "the higher purpose of a number of interpretive principles which have in the past been called canons or presumptions or maxims."[125] He argues the principle "should be used to encompass a range of more specific interpretative principles that have been developed over many centuries of common law development of the law of statutory interpretation."[126] These "constituent interpretative principles" of the APOL,[127] "subprinciples,"[128] or "rebuttable presumptions" fall within the "rubric of the principle of legality" or are manifestations of it.[129] Thus for *Spigelman* CJ the APOL is a general concept or unifying principle under which a "range of presumptions, canons or maxims with substantive content" or "a range of principles of the law of statutory interpretation" can be categorized.[130] Confirming this approach other opinion argues the "rebuttable presumptions are now considered fundamental rights and freedoms at common law and are protected to the extent that the courts can apply the (A)POL in the construction of statutes."[131] Indeed, the APOL "has transformed a loose collection of rebuttable interpretive presumptions into a quasi-con-

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123 *Gray* 2013, p. 185 argues that the right of silence is a constitutional right associated with the right to fair trial and that such recognition overcomes reliance on the APOL as a device for protecting it. He refers to the APOL as a "frail shield in terms of rights protection."

124 *Australian Communications v Today FM* 2015, [69] per *Gageler* J.

125 *Spigelman* 2005, p. 774, elaboration pp. 774–776; see also *Faheem Khalid Lodhi v R* 2006, [30] where *Spigelman* repeats this argument; *Chen* 2015, p. 330 notes other references.

126 *Spigelman* 2005, p. 775; see also *Pearce & Geddes* 2011, [1.3].

127 *Spigelman* 2005, p. 779.

128 *Spigelman* 2009a, p. 42.

129 *Spigelman* 2005, pp. 775–776.

130 *Spigelman* 2009a, pp. 29, 31.

131 *Meagher* 2014, p. 416.

stitutional common law bill of rights."[132] This result is that, according to the principle:[133]

> *Courts are entitled to approach statutory interpretation on the assumption that, if the principles are not 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.*

1.5 Scope: fundamental common law rights and the presumption against retrospectivity

Consistently with its concept noted above, the APOL requires that statutes are "construed against the background of common law rights and freedoms"[134] and the "general system of law."[135] Legislation that purports to abrogate or interfere with either is "read down" by a process of statutory interpretation which is based on the APOL. The principle applies, however, only to "fundamental common law rights";[136] and thus it is argued that it demands that parliament cannot abrogate or curtail "fundamental rights, freedoms and immunities."[137] The concept of fundamental common law rights has been described as referring to "fundamental legal principles"[138] or "a fundamental right of our legal system"[139] and comprises fundamental rights that are "corollaries of fundamental principles."[140] However, no attempt has been made to distinguish between "fundamental rights" and "fundamental principles."[141] This ambivalence has contributed to the suggestion that what constitutes a fundamental right within the context of the APOL raises difficulties,

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132 *Meagher* 2014, p. 413; refer above, 1.3 for comment on the constitutional character of the APOL.

133 *Spigelman* 2009a, p. 31.

134 *Momcilovic v The Queen* 2011, [51] per *French* CJ; see Part 1, 2.2.

135 *Australian Education Union v General Manager* 2012, [30]; *X7 v Australian Crime Commission* 2013, [86–87] per *Hayne & Bell* JJ; see Part 1, 1.

136 *Thomas v Mowbray* 2007, [208, 380] per *Kirby* J; see also *Momcilovic v The Queen* 2011, [444] per *Heydon* J; *Lee v New South Wales* 2013, [313–314] per *Gageler & Keane* JJ; *Harrison v Melhem* 2008, [7] per *Spigelman* CJ; *Spigelman* 2005, p. 781; *Lim* 2013, p. 388.

137 *Spigelman* 2009a, p. 34; and see for elaboration on the meaning of "fundamental" pp. 34–39.

138 *Malika Holdings v Stretton* 2001, [28] per *McHugh* J.

139 *Gifford v Strang Patrick* 2003, [36] per *McHugh* J.

140 *Malika Holdings v Stretton* 2001, [28] per *McHugh* J.

141 See *Pearce & Geddes* 2011, [5.2, 5.6–5.7] for analysis of the meaning and scope of these terms; see also *Lim* 2013, pp. 395, 413 on the meaning of "fundamental;" see further now discussion of the issue of "fundamental" rights within the context of the APOL, *Chen* 2015, pp. 343–353.

and "it might be better to discard [the adjective 'fundamental'; G.C.] altogether in this context."[142] Alternatively, it is argued the criteria for determining rights that fall within the scope of the protection of the APOL should be "vulnerability" rather than "fundamentality."[143]

The potential range of fundamental common law principles, rights, and freedoms that fall within the province of the APOL is extensive.[144] Relevantly to the WW POL/NCNP, it is argued these include the non-retrospectivity of changes in rights or obligations generally and particularly the non-retrospectivity of statutes extending the criminal law. Thus it is said the "presumption against retrospectivity … manifests … the (A)POL,"[145] as well as the "rebuttable presumption" that parliament "did not to intend to … extend the scope of a penal statute."[146] The application of the POL to prevent legislative interference with "the right not to be punished by retrospective legislation" is recognized in the UK.[147] *Spigelman* CJ argues that the "rebuttable presumption" that parliament did not intend to "retrospectively change rights and obligations," which he also refers to as the common law "presumption against retrospectivity,"[148] together with the "clear statement princi-

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142 *Momcilovic v The Queen* 2011, [43] per *French* CJ; see also *Evans v State of New South Wales* 2008, [69–70]; *Lim* 2013, pp. 377, 397.

143 *Lim* 2013, pp. 378, 398–409.

144 It is beyond the scope of this research to explore and state the extent of these rights. See however, particularly, the list of fundamental rights and freedoms noted (without expressing an opinion) in: *Momcilovic v The Queen* 2011, [444] per *Heydon* J which he refers to as "illustrations" of the scope of principles that may fall within the APOL; see also the lists in: *Spigelman* 2005, p. 775; *Spigelman* 2009a, pp. 23–24; *Pearce & Geddes* 2011, [5.36]; *Bagaric & Alexander* 2015, pp. 521–525; for comment and analysis see *Meagher* 2011, pp. 456–464; see also ALRC 2015 (refer Part 1, 2.5): the report examines a range of fundamental common law principles and with respect to each, how and the extent to which the APOL provides protection of them. For this methodological approach of the Report see 1.12. As an example of the incorporation of common law principles within the range of the APOL see *DPP (Vic) v Hamilton* 2011, p. 441, [34]: it was held that, due to the APOL, the common law of arrest and detention was not curtailed by subdivision 30A Crimes Act 1958 (Vic). The common law is that a citizen does not have a legal duty to cooperate with or to assist police upon request. The corollary of this is that the police do not have the power to detain a suspect in order to question him/her with a view only to determining whether or not he/she should be arrested. It was held, applying the APOL, that nothing in subdivision 30A could be interpreted as evincing a legislative intention to affect these principles.

145 *Bell v Police (SA)* 2012, [29]; see also ALRC 2015, 13.42.

146 *Momcilovic v The Queen* 2011, [444]; see also *Spigelman* 2009a, pp. 23–24; see for comment on the overlapping "rights" embraced by the APOL and the WWPOL Part 1, 2.4.

147 *Waddington v Miah* 1974, noted in: *Nicklinson v A Primary Care Trust* 2013, [65].

148 *Faheem Khalid Lodhi v R* 2006, [30–31] per *Spigelman* CJ; *R v JS* 2007, [45].

ple,"[149] are "specific examples" of what is comprised within the "unifying concept of the principle of legality."[150] Thus, he maintains, with respect to retrospective criminal legislation:[151]

> *The principle of legality ... supports the reasoning ... that an overtly retrospective statute, which may have the effect of making past acts criminal, will not be understood to be applicable to criminal proceedings that have already been instituted, unless the Court can identify express words or a necessary intention that that is the intention of Parliament.*

The scope of the APOL as embracing retroactive legislation has also been recognized in the HCA.[152]

1.6 Application in the criminal law

As a principle that establishes a standard for determining whether parliament has exceeded its legislative authority, the APOL applies to a broad range of legislation. This includes "ordinary" legislation as well as "parliamentary legislation creating a power to make delegated legislation, and to the delegated legislation itself." With respect to each form, it requires a narrow construction of the legislation.[153]

The APOL has particular application in the criminal law and especially "in the case of a statute creating a criminal offence."[154] In this regard it has two important roles. Firstly, it operates as a rule of construction which underpins the role of the criminal law in preserving specific common law principles, rights, and freedoms. As noted above, the range of these principles is broad and within the criminal law includes fundamental rights such as the principle of fair trial, as well as the principle against retroactive operation of the criminal law. It also includes the NCNP.[155] Secondly, beyond this operation in the substantive law, the principle also operates within criminal procedural law to preserve the integrity of the adversarial nature of the

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149 See below 1.7 for comment and analysis of the clear statement rule.

150 *R v JS* 2007, [34] per *Spigelman* CJ; see also *Faheem Khalid Lodhi v R* 2006, [30, 35].

151 *Faheem Khalid Lodhi v R* 2006, [35]; and see *R v JS* 2007, [45–46]; refer Part 4, 4.

152 *Australian Education Union v General Manager* 2012, [30]; see also with respect to criminal legislation *DPP (Cth) v Keating* 2013 and *Agius v The Queen* 2013, [23]; refer Part 4, 4.

153 *Attorney-General (SA) v Corporation Adelaide* 2013, [150] per *Heydon* J.

154 *Faheem Khalid Lodhi v R* 2006, [39]; see now this argument particularly with respect to the application of the APOL to sentencing *Bagaric & Alexander* 2015, pp. 515–517, 524–530, 537–551. On the application of the APOL to "compulsory examination frameworks" in the criminal law see now *Smith* 2016, pp. 213–217, 229.

155 For elaboration of this argument see Part 1, 2.4.

criminal justice system and doctrines that underpin it.[156] In each of these roles the APOL supports the requirement that criminal offences and procedures must be read narrowly and strictly.[157] Accordingly it operates as a critical device for defining the limits and legitimacy of the criminal law and criminal justice processes.

The methodology by which it does this is demonstrated in cases noted by *Meagher*,[158] particularly, *Lacey*.[159] The issue in this case that concerned the APOL was whether the appeal court had power under s. 669A(1) Criminal Code 1899 (Qld) (referred to by the HCA as a "criminal statute") "to vary a sentence absent any demonstrated or inferred error on the part of the sentencing judge." The HCA identified the common law right in issue in the case as the double jeopardy principle, and held that, in the absence of clear and unambiguous language in the section to the contrary, the APOL "operated to protect the content of that right to the greatest extent legislatively possible." According to *Meagher*, the case demonstrates that the "lynchpin of the (A)POL in contemporary Australian law" is the "curial insistence that Parliament must consider and *then decide* whether its legislation is to infringe the common law bill of rights" (emphasis added). This methodological approach accords with the approach stated in *Coco*,[160] that the courts must be satisfied "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." In recent case law, this approach is demonstrated in *R v OC*[161] where the court held that s. 76 Australian Securities and Investments Commission Act 2001 (Cth) expressly provided for an alteration of the accusatorial process in the criminal trial, and the APOL had no effect. Similarly, in *Hamden v Callanan*[162] the APOL was held not to prevent legislative abrogation of the common law privilege against self-incrimination.[163]

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156 Refer Part 1, 1 and 1.5. As examples of this aspect of the operation of the APOL see *NSW Food Authority v Nutricia* 2008, summary [5–6], and [110–136, 159] per *Spigelman* CJ; *Bros Bins Systems v Industrial Relations Commission* 2008, [54–61] per *Spigelman* CJ.

157 *Monis v The Queen* 2013, [29, 59] per *French* CJ.

158 *Meagher* 2014, pp. 424–426. Apart from *Lacey, Meagher* also refers to *X7 v Australian Crime Commission* 2013 and *Lee v New South Wales* 2013 as instances of the application of the APOL to criminal legislation. See also for examination of *Lacey* in this context *Meagher* 2013, pp. 210–211.

159 2011; refer above 1.2.

160 1994; see above 1.1.

161 2015.

162 2014.

163 See now on the application of the APOL to this privilege, or principle *Smith* 2016, pp. 213–217, 229.

1.7 The clear statement rule

The concept of the (A)POL is known in the USA as the 'clear statement rule' (CSR).[164] In *Australian Communications v Today FM, Gageler* J notes,

> *the Australian version of the common law principle of statutory construction which has come to be known in the United Kingdom as the "principle of legality" ... has long been known in the United States as the "clear statement rule."*[165]

Spigelman CJ discussed the concept of the clear statement principle in his work, 'The Principle of Legality and the Clear Statement Principle,'[166] and has referred to it in a number of cases as well as in 'The Application of Quasi-Constitutional Laws'.[167] He posits it as an interpretative principle of the law of statutory interpretation that operates as the standard for implementing the APOL and which limits the operation of legislation which abrogates fundamental rights, freedoms and immunities. He argues it requires that "(w)henever rights, liberties and expectations are affected, if Parliament wishes to interfere with them, it must do so with clarity."[168] The CSR has wide application in civil law but "operates with particular force in the criminal context."[169] Its effect is that "a statute will not be interpreted to overturn a fundamental principle in the absence of a clear statement that that was Parliament's intention."[170]

In his critique of the APOL, *Meagher* has adopted *Spigelman's* concept of the CSR,[171] arguing that "(t)he principle of legality is a strong Australian species of clear statement rule that is applied when legislation engages common law rights, freedoms and principles."[172] He argues the CSR is the "American counterpart" of the (A)POL.[173] Although it is posited that the clear statement principle is the manifestation of the APOL only "in the narrow sense,"[174] *Meagher* maintains that the

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164 Refer Part 1, 2.5.

165 2015, [67]. The footnote with this comment, [111], refers to *United States v Fisher,* noted above 1.1.

166 2005, p. 779.

167 2009b, pp. 33–35.

168 2009b, p. 35.

169 *Faheem Khalid Lodhi v R* 2006, [43]; and see [50].

170 See *R v JS* 2007, para. 2, summary (the retrospectivity issue), and [31–32]; see also *NSW Food Authority v Nutricia* 2008, para. 4, introduction, and [97–98]; *Harrison v Melhem* 2008, [7].

171 *Meagher* 2014, pp. 413–414.

172 *Meagher* 2014, p. 442; and see for similarly expressed statement pp. 415, 428–429; see also *Meagher* 2013, p. 213.

173 *Meagher* 2014, pp. 421, 428.

174 *Lim* 2013, p. 373.

analogy between the two concepts is extensive. He argues the APOL performs the same role and is equivalent to the US rule[175] and particularly has a similar "rights-protective democracy-enhancing role" to the US rules.[176] Both have "similar normative justifications" and share a "methodological parallel."[177] They both "provide for fundamental rights strong protection against statutory modification"[178] and exist as "a rule of law: in the absence of clear statutory text speaking to the precise issue, judges must interpret the statute in a certain way."[179] The result he argues is that in Australia "the High Court requires the application of the (A)POL as clear statement rule."[180]

The strong analogy between the APOL and the CSR and their common foundations and operation is an important issue in the analysis and critique of the APOL. This research has noted that the roots of the adoption of the APOL, by this name, lies in English jurisprudence.[181] Analysis noted in this section which identifies the similarities and links between the APOL and the CSR has not been adopted as a ground for a new naming of the APOL which avoids the terminological overlap between it and the WWPOL. This however, as noted in Part 1 of this research, offers a way forward for the differentiation between the concepts.[182]

1.8 The naming of the Australian principle of legality

The identification of the APOL with the CSR, and by implication, the differentiation of both concepts from the WWPOL, supports consideration of a re-naming of the 'Australian' POL which avoids the problem of incoherence.[183] Although the APOL is "settled doctrine" of the HCA,[184] the reference to the concept of the CSR in the HCA noted above is part of an analysis of the APOL which, albeit rare, indirect and cautious, questions its title.[185]

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175 *Meagher* 2014, pp. 415–421, at "II. The Principle of Legality as Clear Statement Rule."

176 *Meagher* 2014, p. 415.

177 *Meagher* 2014, pp. 421, 422; and for elaboration pp. 422–429.

178 *Meagher* 2014, p. 442.

179 *Meagher* 2014, p. 428.

180 *Meagher* 2014, p. 442.

181 See Part 1, 2.1.

182 Refer Part 1, 2.5.

183 Refer Part 1, 2.5.

184 See above 1.1.

185 See for elaboration of the following *Cumes* 2015, pp. 86–87, particularly noting comments by *French* CJ and *Gageler* J.

In *Momcilovic v The Queen*, *Heydon* J, although adopting the APOL in terms consistent with all members of the HCA,[186] added by way of footnote:[187] "The 'principle of legality' might have been better named, for it is to be hoped that everything a court does rests on legality."

Heydon J's cautious reference to the APOL is particularly supported by comments in which he has acknowledged the existence of the concept of the WWPOL. In *Harris v Digital Pulse*[188] he adopted *Fitzgerald's* comments on the rule of law and specifically his reference to the POL.[189] He noted that *Fitzgerald* wrote, with reference to the rule of law: "In the sphere of criminal law this idea has become crystallized as the *principle of legality*, a principle according to which only breaches of existing criminal law should be punishable ..." (emphasis added).

In *PGA v The Queen*[190] *Heydon* J referred again to this passage. However, on this occasion the phrase 'principle of legality' is omitted. The quote from *Fitzgerald* in *Heydon* J's judgment is: "In the sphere of criminal law this idea has become crystallized as ... a principle according to which only breaches of existing criminal law should be punishable …"

Heydon J does not explain why he omitted the words 'principle of legality' from the quotation in this case. It is noteworthy, however, that in both judgments he also omitted any reference to *Fitzgerald's* expanded commentary on the POL in which he explains that "the principle is summed up in the maxim nulla poena sine lege."[191] It appears, *Heydon* J was aware of the duplication in the use of the term 'principle of legality' but did not want to explicitly deal with this issue.

Despite this approach, which suggests that *Heydon* J wanted to distance himself from explicit acknowledgment of the worldwide meaning of the POL, it is clear that he accepts the fundamental principle stated by it. In *PGA v The Queen,*[192] after dealing with the history of the principle against retroactivity in English law, he adopts the comments of *Stephens* J in *R v Price*[193] who said "the great leading rule

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186 2011, [444]. He said the principle of legality "rests on an assumption that, unless clear words are used, the courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms."

187 Fn [639].

188 2003, [349] (as he then was, *Heydon* JA).

189 *Fitzgerald's* comments, as *Heydon* JA notes, are from *Fitzgerald* 1962, pp. 9–10; refer Part 3, 3.2.

190 2012, [147].

191 *Fitzgerald* 1962, p. 168; and see for expanded comment, pp. 168–171.

192 2012, [129].

193 1884, p. 256.

of criminal law is that nothing is a crime unless it is plainly forbidden by law."[194] He then goes on to set out the critical role of the principle against retroactivity in "the law's aversion to the judicial creation or extension of crimes" and argues that the core foundation of the principle is grounded in the need for certainty in the law.[195]

These and other observations support the hypothesis that the judges of the HCA know that the term 'principle of legality' is also used to describe the NCNP. This is most clearly demonstrated by their references to *Williams*' work with respect to the NCNP and its elements, in particular the presumption against retroactivity. Thus, in *DPP (Cth) v Keating*[196] the court adopts *Williams* as a reference for its arguments with respect to this presumption, however does not refer to his use of the concept of the 'principle of legality' as the general principle from which it is derived.[197] This awareness in the HCA of the existence of another formulation of the concept of the POL which applies in criminal law jurisprudence cannot be glossed over. It demonstrates a need to understand the NCNP and to explore how it has been considered in Australian law. This is done in the following parts of this research.

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194 This quotation is also noted by *Williams* 1961, pp. 594–595, who argues that *Stephen* J's comments express the limits of judicial discretion with respect to the extension of the common law into the making of criminal offences.

195 2012, [129]; see for the whole argument and conclusions [125–161]; see also on the importance that *Heydon* J attaches to the principle of certainty Part 4, 4.

196 2013, [48] fn [36].

197 See for elaboration, Part 4, 4.

Part 3

History, Status and Scope of the World-wide Principle of Legality

1. Overview

1.1 History[198]

The derivation of the maxim *nullum crimen sine lege, nulla poena sine lege* can be traced to pre-Roman civilizations, including ancient Greece, and was embraced in Roman criminal law.[199] With respect to its relationship to the use of written penal law in criminal trials in Europe, its derivation can be traced to the early Middle Ages.[200] In English legal history,[201] the NCNP was "prominent from the promulgation of the Charter of Henry the First" in 1100. Its status was underpinned with the establishment of the supremacy of the rule of law in Magna Carta, especially through Art. 39,[202] and later was strengthened by the rise of parliament, in "important petitions and bills of rights" and, as recognized in the HCA, in the writings of *Hobbes,*[203] *Coke, Locke* and *Blackstone.*

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198 For elaboration of all the material in this and the following sections of this Part see *Cumes* 2015, pp. 79–84.

199 For references on this and all the following in this section including quotations, the references to *Hall*, unless otherwise indicated, are *Hall* 1960, pp. 28–35, 56–59. In addition to *Hall,* on this and the material in this section see *Ambos* 2006, pp. 18–19; *Dubber* 2013, pp. 371–373; *Habibzadeh* 2006, pp. 33–37; *Hallevy* 2010, p. 8.

200 *Martyn* 2013 pp. 10–14, 16–20. For elaboration on the history of the WWPOL in the judge's arbitrium (free choice) in pre-enlightenment Europe and the development of the principle from this historical base see the chapters in: *Martyn, Musson & Pihlajamäki* 2013.

201 For historical analysis of the development of statutory criminal legislation in England from the 13th century see *Musson* 2013, pp. 33–47.

202 Magna Carta 1215, reproduced as Art. 29 Magna Carta 1297.

203 See e.g. *Toohey* J in: *Polyukhovich v Commonwealth* 1991, p. 687 referring to *Hobbes*' work in 1651; see Part 1, 2.3.

These historical roots include the foundations of the principle against retroactivity (PAR) which, in the common law, can be traced at least to the 18th century.[204] *Blackstone* argued that an enactment which proscribes otherwise lawful conduct as criminal must apply only to future conduct as only then will it have the characteristic of being a "prescribed" rule as required by the law.[205] The combined result of these movements was that the WWPOL became "part of a more comprehensive concept of due process of law" going well beyond "mere protection against retroactive criminal laws."[206] In this form, both through the Imperial statutes and the common law, it formed part of the received law of the Australian colonies with British settlement.[207]

The derivation of the WWPOL in its modern form is linked to its formulation by the Classical School of criminal law during the Enlightenment of the 18th century and the development of the political philosophy of liberalism.[208] In continental criminal law, the express identification of the principle with the NCNP was introduced by *Feuerbach* in his work of 1801.[209] Thereafter, the WWPOL as a concept that embraced both *nullum crimen* and *nulla poena* was advanced by leading European legal scholars and found its expression in constitutional, as well as criminal law codification movements of the 18th and 19th centuries. It was entrenched in the US Constitution (1789) (particularly but not only in the form of *lex praevia*)[210], the French Declaration of the Rights of Man (1789, Arts. 7 and 8), the French Consti-

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204 *PGA v The Queen* 2012, [129] per *Heydon* J. On the history of PAR see also *Polyukhovich v Commonwealth* 1991, pp. 610–611 per *Deane* J; *Popple* 1989, pp. 252–253; *Taylor* 2000, pp. 198–199; *Toole* 2015, pp. 286, 288; ALRC 2015, 13.11–13.12.

205 *Blackstone* 1765, pp. 45–46. For various references in the HCA to the passage from *Blackstone* see *Polyukhovich v Commonwealth* 1991, pp. 534–535 per *Mason* CJ; p. 609 per *Deane* J; p. 642 per *Dawson* J; and *PGA v The Queen* 2012, [245] per *Bell* J. Putting this passage in context, *Mason* CJ notes however that "nowhere does Blackstone assert that it is beyond the power of Parliament to enact such a law."

206 *Ambos* 2006, pp. 18–19.

207 Among many references on the reception of Australian law see inter alia those noted in: *Cumes* 2013b, pp. 29–31; *Cumes* 2013g, pp. 100–102; *Cumes* 2011, pp. 3–4. It is beyond the scope of this research to elaborate on this issue. See for further comment Part 4, 2. and Part 6, 2.2 point 4.

208 In addition to *Hall*, on this and the material in this section see *Ambos* 2006, pp. 17–20; *Hallevy* 2010, pp. 8–14; *Haveman* 2003, pp. 50–51; *Martyn* 2013, pp. 9–12; *Hornung* 2002, p. 238.

209 See especially in addition to *Hall*, *Ambos* 2006, p. 17; *Dubber* 2013, pp. 380–381. *Haveman* 2003, p. 51 and *Williams* 1961, p. 576 note that *Feuerbach* used the words "nullum crimen, nulla poena sine praevia lege poenali." See also *Cadoppi* 1998, p. 78; *Hornung* 2002, p. 238.

210 *Haveman* 2003, p. 40 fn 4.

tution of 1791, and the French and Bavarian ('German')[211] Penal Codes since 1791 and 1813 respectively.[212] The result of these developments was that by the beginning of the 19th century the WWPOL replaced "old medieval and early modern principles."[213] *Glanville Williams* argues that it "has been regarded … as a self-evident principle of justice ever since the French Revolution."[214]

1.2 Contemporary status

The concept of the WWPOL has been adopted in the Constitution and criminal codes of many countries.[215] More than 80% of states recognize the non-retroactivity of criminal offences (*nullum crimen*), and more than 75% recognize the non-retroactivity of increased punishments (*nulla poena)* in their constitutions.[216] In the legal systems of all these countries the concept of the WWPOL is an express, written principle of either, or both, constitutional and criminal law. For example, in Germany, it is a principle of both constitutional law and criminal law through identical provisions in Art. 103(2) Grundgesetz (the German Constitution / the Basic Law) and Art. 1 Strafgesetzbuch (the Criminal – or Penal – Code).[217] The effect is that "German law follows, in principle, the strict application of the maxim nullum crimen, nulla poena sine lege;"[218] the WWPOL underpins the legality of the criminal law, and legislation that offends its tenets is unconstitutional and void.[219] On the other hand, the principle is not an express element of the constitutional framework in Australia. The effect, conversely, is that it operates as a common law principle which requires that courts interpret criminal legislation restrictively according to its conditions.[220]

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211 The Bavarian Penal Code 1813 and the later Prussian Penal Codes were the progenitors of the later German Penal Code 1871.

212 For overview of these developments see, in addition to *Hall*, *Williams* 1961, pp. 576–578; and in the HCA, *Polyukhovich v Commonwealth* 1991, p. 687 per *Toohey* J; see for analysis of the WWPOL in the French penal codes *Soleil* 2013, pp. 145–168.

213 *Martyn* 2013, p. 14.

214 *Williams* 1961, p. 575, noting references on "the history and valuable discussion" of the WWPOL at fn 2.

215 See in particular for studies of the operation of the WWPOL in diverse countries *Sieber & Cornils* 2008; *Sieber, Forster & Jarvers* 2011; and for detailed overview of the principle in European states and the US Constitution, *Martyn* 2013, pp. 7–9.

216 *Gallant* 2009, pp. 243–246, and for detail Appendix A & C; see also *Dana* 2009, p. 880; *Toole* 2015, pp. 286, 288.

217 *Bohlander* 2009, pp. 24–25; *Hallevy* 2010, pp. 11–12.

218 *Bohlander* 2009, p. 10.

219 *Williams* 1961, p. 578.

220 *Williams* 1961, p. 578. *DPP (Cth) v Keating* 2013 is an example of this approach to the application of the WWPOL. The location of the principle or its elements, as prin-

The WWPOL is widely recognized in international law, specifically international human rights law, via inter alia the Universal Declaration on Human Rights 1948 (Art. 11(2)), the International Covenant on Civil and Political Rights (ICCPR) (Art. 15(1) & (2)), the Rome Statute of the International Criminal Court (Rome Statute) (Arts. 22–24), and in customary international law.[221] It is also recognized in regional human rights law in Europe, the Americas, Africa and in the Arab states – the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 7(1)), American Convention on Human Rights (Art. 9), African Charter on Human and People's Rights (Art. 7(2)), and the Arab Charter on Human Rights (Art. 15), although all these human rights instruments state the principle in various and differing ways. The meaning and scope of the principle in these conventions has been articulated in international and foreign domestic case law although *Ambos* argues that whilst "current criminal law theorists" distinguish between *crimen* and *poena*, "this does not seem to be the case with international criminal law jurisprudence and writing in general."[222] Notwithstanding differences, the broad acceptance of the WWPOL demonstrates its incontestably wide interpretation and application throughout the world. The effect is that the principle is more than a principle of justice; it also embodies an internationally recognized human right and has been "integrated into the concept of fundamental human rights in criminal justice."[223] In particular, with respect to the concept of the non-retroactivity of crimes and punishments in international law *Gallant*[224] argues that its inclusion in international instruments has the effect that this element of the principle applies both in national and international criminal law as a matter of customary international human rights law, and exists as part of the general principles of law recognized by the community of nations. This status and its wide acceptance signifies universal approval of the underlying policy of the WWPOL, namely that "it is desirable to deal with … social problems by law and legal methods; and conversely … it is not desirable to deal with them extra-legally."[225]

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ciples which inform statutory interpretation is implicitly recognized by the HCA, referring to the principle of certainty. See for this argument and elaboration Part 4, 4.

221 For references to the international and regional human rights instruments, and the extensive jurisprudence relating to the incorporation of the WWPOL into international and foreign domestic law, and its effect, see among many references, *Gallant* 2009, pp. 8–9, 158, 175, 202–207, 352–403; *Ambos* 2006, pp. 20–32; *Dana* 2009, pp. 866–927; *Haveman* 2003, pp. 53–75; *Polyukhovich v Commonwealth* 1991, pp. 611–612 per *Deane* J, and pp. 687–688 per *Toohey* J, both of whom refer to retroactive criminal legislation, not specifically the WWPOL.

222 *Ambos* 2006, pp. 20–21.

223 *Gallant* 2009, p. 3; see also *Dana* 2009, p. 867. Refer below, 3.2.

224 2009, pp. 8–9; see also *Toole* 2015, p. 288.

225 *Hall* 1947, p. 50.

1.3 Modern incorporation

The "first lengthy development" of the WWPOL in modern English criminal law is attributed to *Glanville Williams*.[226] *Spigelman* CJ notes,[227] referring to the "concept of the principle of legality" that *Williams*,

> *employed* those very words *as the translation of the principle of Roman Law expressed in the maxim* nullum crimen nulla poena sine lege *– there is no crime nor punishment except in accordance with law. He set out what remains the most comprehensive consideration of the principle of legality to the* criminal law.

He argues that *Williams*[228]

> *was concerned with the application in the English* criminal law *of the traditional maxim* nullum crimen sine lege, nullum poena sine lege. *This maxim ... has a long history as an* integrative concept.

The meaning of the WWPOL and its identification with the NCNP was explored in the USA, in work that was contemporaneous with *Williams*, by *Jerome Hall*.[229] It has been confirmed in modern work. *Ashworth & Horder* like other commentators,[230] note that the 'principle of legality' is "sometimes expressed by the maxim *nullum crimen sine lege."*[231] They add however, like *Hall*, who equated the principle with the 'rule of law,'[232] and others, that this "fundamental principle is more frequently rendered in England in terms of 'the rule of law'."[233] What is meant by the 'rule of law' in this context is important for understanding the focus of WWPOL and its derivation in the NCNP. This is addressed below.[234] It is one of its important characteristics that distinguish it from the 'Australian principle of legality.'

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226 *Faheem Khali Lodhi v R* 2006, [31]; see for elaboration of this and the following below 2.

227 *R v JS* 2007, [35] (emphasis added).

228 *Spigelman* 2009a, p. 29 (emphasis added). On the notion of the NCNP as an "integrative concept" see Part 1, 2.4.

229 See *Hall* 1960, Chapter II.

230 See Part 4, 1. noting *Fairall & Yeo.*

231 *Ashworth & Horder* 2013, pp. 56–57.

232 *Hall* 1960, p. 27; see for elaboration below 3.

233 *Ashworth & Horder* 2013, p. 56; see also *Hallevy* 2010, p. 12; see for comment on this relationship in Australian jurisprudence Part 4, 1.

234 See below 3.2.

1.4 The four elements

The original rule of the WWPOL formulated by *Feuerbach* referred almost exclusively to *lex praevia* and not the "other elements attributed to the principle today."[235] The modern conception of the principle is however, constituted by four elements, also referred to as "corollaries" or "attributes," of the WWPOL.[236] In German criminal law, for example, the elements are contained in Art. 103(2) Basic Law and Art. 1 Criminal Code.[237] In the following list, the first two elements are referred to as "threshold requirements on the quality of criminal law," and elements 3 and 4 as "prohibitions" of the application of criminal law.[238] The elements are applied more "strictly" in the civil law systems than in the common law.[239]

1. Crime and punishment must be based on written law: *nullum crimen/nulla poena sine lege scripta* – the principle of written law (*lex scripta*).
2. The criminal law must be certain. Criminal offences and punishment must be clearly defined: *nullum crimen/nulla poena sine lege certa* – the principle of certainty and clarity (*lex certa*).
3. The criminal law cannot operate retroactively: *nullum crimen/nulla poena sine lege praevia* – the principle against retroactive application of criminal law (*lex praevia*).
4. There must be strict limits on the interpretation of criminal law: *nullum crimen/nulla poena sine lege stricta* – the principle of strict interpretation of criminal law (*lex stricta*). An important element of this principle is that crime and punishment cannot be established to the detriment of the offender by analogy: the principle against analogy.[240]

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235 *Ambos* 2006, p. 21.

236 *Hall* 1960, pp. 28, 63 – "corollaries"; *Dana* 2009, pp. 864–866 – the four "attributes" of *nulla poena*.

237 *Bohlander* 2009, pp. 24–25; *Taylor* 2000, pp. 212–213. Refer above 1.2.

238 *Dana* 2009, p. 864.

239 *Haveman* 2003, pp. 40, 42, 49–50; see for overview of the elements and their meaning and application in diverse legal systems *Sieber & Cornils* 2008; *Sieber, Forster & Jarvers* 2011.

240 The principle against analogy has a different, limited application and meaning in the common law to that in civil law systems where it is widely recognized; see generally on this and the principle *Haveman* 2003, pp. 46–49; discussion in: *Hall* 1960, pp. 35–48; *Williams* 1961, pp. 586–592; and in contemporary work, *Snyman* 2008, pp. 45–48. The comment in: *Haveman* 2003, p. 47 that "not a word is mentioned on (the ban on analogical application) in common law textbooks dealing with the principle of legality" is not supported by the references noted in this section. There is certainly discussion of the principle however the preferred common law position is that it is referred to as a general concept of strict interpretation rather than a specific concept known as the "principle against analogy."

The elements of the WWPOL are widely recognized in domestic and international instruments,[241] and in the working documents of international legal associations.[242]

2. Definition and common law analysis

The WWPOL states that a person[243] cannot be convicted or punished for conduct that was not expressed by law to be an offence and subject to a penalty at the time of its commission or omission. Thus, criminal responsibility and punishment can only be based on a prohibition imposed by "existing applicable valid law."[244] The Canadian Supreme Court has described the meaning of the "ancient Latin maxim *nullum crimen sine lege, nulla poena sine lege*" as "there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive."[245]

In domestic and international criminal law the WWPOL is a legal principle[246] that is defined by the two strands of the NCNP maxim, namely:[247]

1. *Nullum crimen sine lege:* nothing is a crime except as provided by law.
2. *Nulla poena sine lege:* no punishment may be imposed except as provided by law.

These "serve as the bedrock" of the principle.[248]

These two pillars of the principle are articulated in the concepts of *nullum crimen sine praevia lege* (nothing is a crime except under previously existing law), and *nulla poena sine lege praevia* (no punishment may be imposed except under previously existing law).[249] These concepts constitute the criminal law principle against retroactivity which, as noted above, is recognized as one of the four elements of the WWPOL although its almost identical phrasing to the NCNP, has given rise to considerable overlap between them. In Australian jurisprudence this is reflected in the use of the term "principle against retrospectivity" as an independent concept,

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241 See above 1.2.

242 See e.g. the draft resolutions of the Preparatory Colloquium held in Verona 28–30 November 2012 for the 19th Criminal Law Conference of the Association International Droit Penal. Art. C on the Principle of Legality mirrors the four elements noted here.

243 This term is used to mean 'legal person'. The WWPOL applies to corporations and other legal entities that are the subjects of the criminal law.

244 *Polyukhovich v Commonwealth* 1991, pp. 609–610 per *Deane* J.

245 *R v Levkovic* 2013, [2].

246 See below 3.1.

247 For elaboration of this and the following section see *Cumes* 2015, pp. 80–81.

248 *Dana* 2009, p. 861.

249 *Gallant* 2009, p. 12.

rather than in terms of its association with the NCNP.[250] The difference between this position and the status of this principle in international and foreign law as an element of the WWPOL is highlighted by the alternative references to it in Australian law as either the principle against retroactivity or the principle against retrospectivity.[251] In fact it is argued there is a difference between the two terms; and for the purposes of this paper the term 'retroactivity' is used.[252] Notwithstanding this divergence there is no doubt that the "bias against (retroactive) penal legislation is deeply embedded in the common law" including that of Australia:[253] *ex post facto* criminal legislation and charges that are based upon it are inconsistent with "fundamental principle" stated by *Blackstone*.[254]

Despite its universal acceptance, the WWPOL is expressed in a number of alternative phrases and formulations throughout domestic and international criminal law. Apart from noting various permutations and expressions of the principle, *Gallant*, for example, notes there are eight rules that are argued as being applied by different states as the rules of the WWPOL in different forms and versions.[255] Sometimes

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250 See e.g. contemporary reference to the "principle against retrospectivity" in: *Toole* 2015; ALRC 2015, especially at Ch. 13.

251 The terms 'retroactivity' and 'retrospectivity' are used interchangeably in case law and literature. In the HCA the term retrospectivity is used to describe "the presumption against retrospectivity;" see e.g. *DPP (Cth) v Keating* 2013, [48]; *Agius v The Queen* 2013, [23, 47]. However alternatively, the term retroactive criminal law is used in: *Polyukhovich v Commonwealth* 1991, pp. 686–687 per *Toohey* J, p. 706 per *Gaudron* J; and similarly in: *Minister for Home Affairs v Zentai* 2012, [24, 32] per *French* CJ. The use of the term retrospectivity in Australian commentary is demonstrated by *Pearce & Geddes* 2011, [10.3]: "Legislation only operates *retrospectively* if it provides that rights and obligations are changed with effect prior to the commencement of the legislation" (emphasis added). In comparative literature, however, *Williams* 1961, refers to both terms; *Hall* 1960, on the other hand, refers only to retroactivity, reflecting perhaps a difference between English and US approaches.

252 *Dana* 2009, p. 868 fn 42 argues the term retroactivity means, "making a certain conduct, innocent at the time it was performed, criminal and punishable after the fact, in other words creating a new crime *ex post facto*." He argues this is the common meaning of the term within the context of the "prohibition on retroactivity" in the criminal law. It is distinguished from the term retrospectivity which "refers to an *ex post facto* change in the *legal* effect or consequence of a conduct that was *already* criminal" (emphasis added). See also for this distinction, *Haveman* 2003, p. 44 fn 14. This definition of retroactivity is consistent with *R v Kidman* 1915, 433 per *Isaacs* J, and with its use in Australian law as demonstrated in: *DPP v Keating* 2013, which notes *Kidman* at [44] fn 30. For Australian commentary on the distinction see ALRC 2015, 13.29–13.34.

253 *Hall* 1960, p. 59; see *Toole* 2015, pp. 291–296; ALRC 2015, 1.52.

254 *Polyukhovich v Commonwealth* 1991, pp. 610–611 per *Deane* J; see above 1.1.

255 *Gallant* 2009, pp. 11–13; see also *Haveman* 2003, p. 39 who refers to *nullum crimen, nulla poena sine praevia lege poenali*.

emphasis is given to the *nulla poena* aspect of the principle,[256] and each of its elements is described by reference to it e.g. *nulla poena sine lege scripta*. In its English title it is also referred to as the "legality principle"[257] and "principles of legality" which emphasizes that the concept comprises a number of connected principles.[258] All these alternative expressions are merely variations of the core maxim and reflect the various terminology of different academic analyses and legal systems. They do not change the common universal meaning of the WWPOL which equates it with the NCNP.

The significant common law analyses and discussion of the WWPOL recognize the existence of its four elements, although with variations, and none adopts all of them in exactly the same terms. Differing comparative systems also have different formulations of the elements of the principle. For example, in South Africa the principle is said to embody five rules, principles or components which include the central principle of *nullum crimen*, referred to as the *ius acceptum* principle. These principles are consistent with the common law concept of the WWPOL and the elements noted in this research.[259] The range of opinion reflects the differing approach in common law systems themselves, and significantly, the importance attached by the common law to case law as a source of law, the effect of which is that, in general terms, the common law is not limited by the requirement of *lex scripta*, namely, that written law is the sole source of criminal offences and penalties.[260]

In the most significant account of the WWPOL and the NCNP in English law, *Glanville Williams* posited the principle as a common law principle which requires that courts interpret criminal legislation restrictively according to its conditions.[261] He argued that the WWPOL embraces four propositions:

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256 See e.g *Hornung* 2002, p. 238 who refers to the maxim as *nulla poena, nullum crimen sine lege.* However, he also refers to the *nullum crimen* form of the maxim. In both forms *Hornung* defines it to mean, "no conduct may be held criminal unless it is precisely described in a penal law." He adds: "Although its scope remains controversial, the notion of *nulla poena* is, as a general principle, recognized worldwide."

257 See especially e.g. *Martyn* 2013, pp. 7–31 (who also refers to it as the "principle of legality," p. 9); see generally the chapters of *Martyn, Musson & Pihlajamäki* 2013, for interchangeable use of the terms 'principle of legality' and 'legality principle'.

258 See e.g. *Sautenet* 2000, [1]; see also reference to this term in: *Minister for Home Affairs v Zentai* 2012, [24] per *French* CJ, however whether he uses the term in this meaning is unclear; see for elaboration *Cumes* 2015, pp. 91–92.

259 See *Burchall* 2011, pp. 35–37; *Snyman* 2008, pp. 36–37; see particularly for analysis of the POL in South African criminal law, *Burchall* 2016, Part 1, pp. 1–38.

260 See for this well-known observation, *Ambos* 2006, p. 21; *Haveman* 2003, p. 40; refer Part 5, 5.1.

261 *Williams* 1961, p. 578; see above 1.2.

1. The principle of certainty.[262] This requires that "the law should tell us with reasonable clarity what it expects from us."[263]
2. "Non-retroactivity," namely, "the prohibition of retrospective penal laws."[264]
3. Penal laws should be accessible and intelligible. Criminal law should be available in a "compendious and authoritative statement" of the law.[265]
4. *Nullum crimen* forbids "the analogical *extension* of penal statutes."[266]

Williams' discussion of the WWPOL and its relationship to the NCNP has been recognized in Australian commentary. *Spigelman* CJ has noted, referring to *Williams*' analysis of the NCNP:[267]

> *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 certainty of draftsmanship.*

He has also observed:[268]

> *Professor Williams specifically identified the principle of non-retroactivity of penal statutes as an example of the principle of legality.*

In the USA, *Jerome Hall*, writing at about the same time as *Williams*, argued that *nullum crimen* includes the "specific definition of criminal conduct" (*lex certa*).[269] Most significantly, *nullum crimen* and *nulla poena* both include the "two important corollaries" of the WWPOL,[270] namely that "penal statutes must be strictly construed" (*lex stricta*)[271] and they "must not be given retroactive effect" (*lex praevia*).[272] With respect to these elements he argues that "in the common law of crimes

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262 As *Spigelman* notes, he refers to this as "certainty of draftsmanship," p. 578.

263 *Williams* 1983, p. 7.

264 *Williams* 1961, p. 579.

265 *Williams* 1961, p. 582.

266 *Williams* 1961, p. 586 (emphasis in original).

267 *Spigelman* 2009a, p. 29; refer Part 1, 2.4.

268 *R v JS* 2007, [35].

269 *Hall* 1960, pp. 35–36.

270 *Hall* 1960, p. 28.

271 See discussion with respect to the requirement of the "strict interpretation of penal statutes" in *nullum crimen Hall* 1960, p. 35, and for lengthy discussion on the requirement of strict interpretation generally, especially pp. 38–47.

272 *Hall* 1960, pp. 28, 58, 63; see for meaning of the prohibition on retroactivity *Hall* 1960, pp. 58–59; see also noting these two aspects of *nulla poena sine lege Allan* 1985, pp. 119–120.

the principle has meant strict interpretation of penal statutes"[273] and notes that the "enduring strength of the principle of legality" is that "strict interpretation continues to prevail in American penal law."[274] Similarly, the "function of non-retroactivity" is "an essential implication of the principle of legality."[275] The prohibition of retroactivity "expresses the essential temporal condition of the principle of legality: the required criminal law must have existed when the conduct in issue occurred."[276]

In other significant commentary, *Fitzgerald* argued that the WWPOL demands written law, certainty and the prohibition of "retrospective criminal legislation."[277] He explained that the principle requires "certainty with regard to the provisions of the criminal law" because only this aspect of the law "militates against retrospective criminal legislation." He argued this certainty can only be provided by Parliament because only it "almost invariably legislates for the future only."

In contemporary analysis, *Ashworth & Horder* argue that "the connotations of the principle of legality are so wide ranging that it is preferable to divide it into at least three distinct principles": the principle of non-retroactivity, the principle of maximum certainty, and the principle of strict construction of penal statutes.[278] Although not specifically stated, their criticism of the decision in *Shaw v DPP* suggests that the principle of written law is also an important aspect of these principles.[279] In other commentary, *Hallevy* argues that "English common law applies the principle of legality in criminal law through four secondary principles: (a) non-retroactivity, (b) maximum certainty, (c) strict construction and (d) the presumption of innocence."[280]

All of these writers acknowledge the reciprocal operation of these elements. Legislative criminal law (*lex scripta*) is a definitive statement of the law from its primary source – parliament. Written law provides the foundation for *lex certa* because the promulgated law is ipso facto anterior and known, and in this sense (subject to interpretation by the courts), certain and clear. It also provides restraints on interpretation of the law (*lex stricta*): the offence must be interpreted according to the text of the statute and cannot be supplemented by analogy. Hence clarity and certainty

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273 *Hall* 1960, p. 35.

274 *Hall* 1960, p. 48.

275 *Hall* 1960, p. 64.

276 *Hall* 1960, pp. 58–59.

277 *Fitzgerald* 1962, pp. 169–171 for this and the following quotations; see for reference to citation of *Fitzgerald's* work by *Heydon* J., Part 2, 1.8.

278 *Ashworth & Horder* 2013, p. 57; and see for discussion of the three principles, pp. 57–71.

279 *Shaw v DPP* 1962, pp. 57–61; see for further comment on this case Part 5, 1.

280 *Hallevy* 2010, pp. 12–13.

is secured by well-known principles of statutory interpretation that are applied by the courts.[281] Finally, law that is written, defined and interpreted according to established legal principle cannot be retroactive (*lex praevia*): it offends the basic prescripts of the criminal law because at the time of the offending conduct it is by definition, neither written, nor known, and therefore neither defined, clear nor certain. It is not, in other words, 'an offence known to law,' and is therefore not valid law.[282]

3. The world-wide principle of legality and the rule of law

3.1 Importance and scope

The WWPOL is a legal principle or "legal norm," as it is referred to in comparative literature,[283] which applies to both substantive and procedural criminal law. It demands the precise definition of prohibited conduct, procedures regulating criminal prosecution and sentencing practice.[284] As the legal principle which "qualifies the meaning of both crime and punishment,"[285] it is regarded as an "organizing principle of the criminal law"[286] which is "presupposed in all of criminal law theory."[287]

The WWPOL is "one of the most fundamental principles of the criminal law, if not the most fundamental one."[288] *Glanville Williams* posits it as one of the "fundamental requirements of form and promulgation in respect of the criminal law."[289] In Europe it is regarded as the starting point for a discussion of the general principles of the criminal law.[290]

The WWPOL is regarded as a constituent principle of the science of criminal law.[291] It is an integral element of the notion of law as a corpus of rules and principles which underpin legal doctrine, and which establish the law as a "coherent and

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281 See e.g. the reference to "well-understood principles," referring to principles of statutory interpretation in: *DPP (Cth) v Keating* 2013, [47].

282 See Part 5, 2. 3. & 4.

283 See e.g. *Hallevy* 2010, pp. 5–8 and Chs. 2–5.

284 *Dana* 2009, pp. 861–863, 924.

285 *Hall* 1960, p. 25.

286 *Burchall* 2011, p. 35.

287 *Hall* 1960, pp. 25, 27.

288 *Haveman* 2003, pp. 6, 39; see also *Dana* 2009, p. 858: *nulla poena* ranks "among the most fundamental principles of the criminal law."

289 *Williams* 1961, p. 575.

290 *Ashworth & Horder* 2013, p. 57.

291 *Hallevy* 2010, pp. 2, 6; see for comment on the science of law *Cumes* 2013f, pp. 94–95.

consistent whole."[292] This conception of the principle underpins its importance for the coherence of the criminal law. The scientific structure of the WWPOL is expressed in its four elements. They ensure that the individual has the maximum opportunity to know what does, and does not, constitute criminal conduct,[293] and in so doing define the "borderline" or "ground rules" of the definition of crime. This is recognized in Australian jurisprudence. In *Nulyarimma v Thompson*[294] the court observed,

> *in the realm of criminal law "the strong presumption nullum crimen sine lege (there is no crime unless expressly created by law) applies." In the case of serious criminal conduct, ground rules are needed ...*

3.1.1 Relationship to the right to liberty

The WWPOL sets the parameters of personal liberty.[295] It precludes arbitrary prosecution and the use of unlimited discretion, and establishes the criminal law as an essential safeguard for the protection of individual liberty. In this aspect of it, the WWPOL entrenches a fundamental function of the criminal law as a means of punishing accused persons for their conduct rather than their status[296] and underpins the criminal law principle of personal responsibility.[297] This aspect of the WWPOL associates it with the rule of law. The application of law independently of the status

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292 Refer Part 1, 2.5; see also Part 6, 1.

293 *Hallevy* 2010, pp. 4–5.

294 1999, [26] per *Wilcox* J (reference omitted).

295 See for elaboration *Cumes* 2015, pp. 98–99; refer also Part 6, 2.2 point 5.

296 *Allan* 1996, p. 15, noted in: *Bronitt & McSherry* 2010, [1.20]; see for extended comment *Cumes* 2015, p. 84, fn 47; see also *Kirby* 2011, p. 274 noting his dissenting opinion in: *Fardon v Attorney-General (Qld)* 2004, [187] that the preventive detention legislation in issue punished *Fardon* on the basis of his status, rather than for what he had done. *Kirby* argues that such legislation raises an analogy with the concept of "phenomenological punishment" of the kind used during the Third Reich.

297 This principle, which is also sometimes referred to in comparative literature as the 'guilt principle,' is an implied, though not named, common law principle in Australian criminal law; see for statement of the principle in the HCA (not referring to it as the 'personality principle'), *South Australia v Totani* 2010, [232] per *Hayne* J, and for recognition of this statement of the principle, *Kuczborski v Queensland* 2014, [107] per *Hayne* J, [265] per *Bell* J; see comment in: *Cumes* 2013d, p. 62. It requires that criminal responsibility attaches only to the offender in issue based on a finding of guilt for his/her conduct; it cannot be attributed to another only by association with the offender (the principle is not offended by the law of complicity which operates as a distinct form of criminal responsibility based on the guilt of the secondary offender), and cannot be grounded only on the status of the offender. A 'status offence' punishes an offender not because of certain behaviour, but for being of a certain status; see *Hallevy* 2010, p. 145; refer Part 4, 3.2.4 for comment on the relationship between the WWPOL, the personality principle, status and preventive detention legislation.

of the person represents a value of the rule of law – formal equality and consistency.[298]

The principle of liberty states that the right to personal liberty is a fundamental common law right which cannot be impaired or taken away without lawful authority, and then only to the extent and for the time prescribed by law.[299] The 'right to liberty' is recognized as a common law principle and is said to have a "constitutional dimension."[300]

The principle of liberty is the foundation for a wide range of civil and political human rights.[301] Although in Australian law the principle is not generally linked, or attributed, to the WWPOL, there is a deep and intrinsic connection between them. The principle of liberty underpins principles of law that are related to the rights of a suspect that arise before the trial with respect to investigation, detention, and interrogation, and the principles of sentencing. Each of these are founded in the WWPOL.[302]

With respect to the first of these categories, the right to liberty embraces principles developed with respect to police powers to stop and search for evidence relevant to

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298 *Jowell* 2011, p. 19.

299 See for this description *McSherry & Keyzer* 2009, pp. 53–54; and see *Williams v The Queen* 1986, p. 292; *Foster v R* 1993; *Minister for Immigration v Al Masri* 2003, [87–96]. For confirmation of this understanding of the principle see *Plaintiff M76 v Minister for Immigration* 2013, [138–140] per *Crennan, Bell & Gageler* JJ, noting limitations on the authority of the executive to detain non-citizens deriving from the decision in: *Chu Kheng Lim v Minister for Immigration* 1992, and that subject thereto, "(t)he common law does not recognise any executive warrant authorising arbitrary detention"; see Part 6, 2.3. For other references in the HCA to the importance and meaning of the right to liberty see *Gans et al.* 2011, [4.1–4.2]; see generally on the principle of liberty as noted in this section *Cumes* 2013c, pp. 44–46, 52; *Cumes* 2013d, pp. 62–64.

300 *French* 2010b, pp. 25–27; refer for comment Part 6, 2.2 point 5.

301 See *Evans v New South Wales* 2008, [72] per *French* J (as he then was) with *Branson & Stone* JJ.

302 See generally on principles of law related to the rights of a suspect that arise before the trial with respect to investigation, detention, and interrogation, and the principles of sentencing, *Gans et al.* 2011, [4.1], pp. 102–103; *Cumes* 2013c, pp. 51–55; *Cumes* 2013d, pp. 65–69. On police powers to stop and search see particularly *Findlay, Odgers & Yeo* 2009, pp. 38–43. On the right of liberty and the power of police to enter private premises see *Kuru v New South Wales* 2008, [37]. On the range of principles of law associated with the pre-trial criminal process see generally *O'Neill, Rice & Douglas* 2004, pp. 214–222; *Findlay, Odgers & Yeo* 2009, pp. 47–68; *Gans et al.* 2011, [4.1, 4.5–4.9, 5.1–5.6] and Ch. 6. On the right to liberty and the principle of proportionality see *Chester v R* 1988, [20]. On the fundamental importance of the principle of proportionality see *Freiberg & Murray* 2012, p. 336; *Bagaric* 2013, pp. 415–416.

the commission of a crime and to enter and search a person's premises. It also includes a wide range of principles of law associated with the pre-trial criminal process. These comprise: freedom generally from arbitrary arrest and detention; freedom from arrest or detention except for the commission of a criminal offence, that is, freedom from arrest for "questioning" only; the right at the time of arrest to be informed of the reasons for arrest and the charges to be faced; the right to silence; the right to be taken to a court without delay after arrest and not to be detained before doing so only for questioning; the right to test the legality of detention before a court; and the right to be treated with dignity throughout the criminal process. With respect to sentencing the right to liberty underpins the fundamental principle of proportionality as well as principles which derive from it such as the principles of consistency, parity and totality. It is also the foundation of the principle against double jeopardy and its corollaries, the principle of finality and of incontrovertibility of an acquittal.

The association of the WWPOL with the principle of liberty is an important aspect of its identification with the rule of law. *Allen*, noting the WWPOL through the two strands of *nulla poena sine lege,* the presumption against retrospectivity and the strict construction of penal statutes concludes, "(t)he rule of law therefore serves to protect individual liberty."[303]

3.1.2 Rationale and functions

The rationale of the WWPOL is founded in deterrence and legal protection. The concept of deterrence here requires that a person has to know what conduct is punishable in order to conduct him/herself in a way that avoids punishment. The notion of legal protection requires that the state may only intervene in a person's life when and insofar as the law allows it to do so.[304] These foundations of the rationale are "clear":[305]

> *It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards. … This is especially important in the criminal law, where citizens are potentially liable to a deprivation of liberty if their conduct is in conflict with the law.*

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303 *Allan* 1985, pp. 119–120; refer also Part 1, 2.4 & Part 6, 1.

304 *Haveman* 2003, pp. 51–52.

305 *R v Levkovic* 2013, [2], referring to the NCNP.

The characteristics of the WWPOL demonstrate its primary functions.[306] These operate at each of the levels of government and reflect the importance of the relationship between the principle and the separation of powers doctrine. With respect to its constraints on legislative power, *Hall* notes that the "central meaning" of the WWPOL in penal law is "as a definite limitation on the power of the state."[307] At the level of executive power the concern of the WWPOL is with procedural law, where its application is particularly directed to principles of fairness and procedural legality.[308] In this regard it is posited that "the essential quality and desire (of the WWPOL) is that the activities of law enforcement agencies are covered by law."[309] As a limitation upon the judiciary *Hall* argues "the common assumption … (of) *nullum crimen* … (is) that it is of paramount importance in the judicial process."[310] It requires that the judiciary is constrained by rules of interpretation.[311] "(T)he principle of legality requires judges to take a certain attitude towards penal laws especially to avoid the derivation of wide meanings … ," and it creates a "canon of construction of penal statutes … that includes several species of interpretation."[312]

3.2 Relationship with the rule of law

The functions of the WWPOL reflect its deep roots in the rule of law and its status as an expression of the rule of law. The WWPOL is described variously as being one manifestation of the more general notion of the rule of law,[313] as a "part and

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306 See for elaboration *Cumes* 2015, pp. 82–83; see generally *Dana* 2009, pp. 861–864; *Bronitt & McSherry* 2010, [1.20]; *Cumes* 2013d, pp. 61–62; and for expanded analysis of the purposes of the WWPOL and their relationship to the rule of law, *Gallant* 2009, pp. 19–30.

307 *Hall* 1960, p. 27. See also *Haveman* 2003, p. 51.

308 See for elaboration *Cumes* 2011, pp. 11–12; see also *Jowell* 2011, pp. 20–21. See also European Criminal Policy Initiative 2010, pp. 16–17, 232–239. This work argues that in procedural law the WWPOL requires two things: 1. The prevention of excessive infringement on rights of individuals and avoidance of arbitrary decisions. This is done through the regulation of prosecutorial powers. 2. Procedural principles are respected in the specific case. This is mainly achieved by a functional system of judicial review which regulates the judiciary. See further on the application of the WWPOL to statutory agencies *Martin* 2014, p. 117, noting that in Western Australia (WA) the Public Services Commissioner is not subject to laws of Parliament: it is argued that this is a modification of "the principle of legality in administrative action."

309 *Murphy* 2014, p. 46.

310 *Hall* 1960, pp. 35–36.

311 *Haveman* 2003, p. 48.

312 *Hall* 1960, pp. 37–38; see for discussion pp. 36–48.

313 *Gallant* 2009, p. 15; and see on the influence of the rule of law upon the WWPOL and the relationship between them, pp. 15–19; see also *Hall* 1960, p. 19.

parcel of the rule of law"[314] and as being "at the core of the rule of law."[315] It is posited that, in "a very wide sense" the WWPOL is the rule of law and embraces "not only a body of legal precepts but also supporting institutions, procedures and values."[316] *Hall* argues "(i)t would be … fallacious to think that the principle of legality is not an essential aspect of free constitutional government … (It) is a necessary, but not a sufficient, condition of such government … ."[317] This concept of the WWPOL is embraced within *Dicey's* third rule of law principle:[318] it is a common law principle, safeguarded by the courts within the constitutional framework established by the separation of powers.

More specifically, the WWPOL is an equivalent expression to the rule of law in the criminal law. It "constitutes the essence of the rule of law in the context of the criminal law."[319] The rule of law, "especially as regards *crime and punishment* is the greatest achievement of Western political experience … (and) (t)hat is the reason why the various meanings of the principle of legality have been carefully articulated."[320] In the criminal law, where the rule of law "is founded upon the formal meaning of legal wording,"[321] the WWPOL particularly emphasizes *Dicey's* first and second principles of the rule of law:[322] "… the absolute supremacy or dominance of regular law as opposed to the influence of arbitrary power," and "equality before the law." *Dicey's* 'essence' of the rule of law is that the law must be certain, predictable and consistent[323] and this is ensured by the central notions of the WWPOL of foreseeability and accessibility.[324] This relationship between the rule of law and the principle is captured in the words of *Fitzgerald*:[325]

> *[T]he idea of the rule of law ... is based on the demand that the citizen should be ruled by laws and not by the whims of men. In the sphere of criminal law this idea has become crystallized as the* principle of legality*, a principle according to which only breaches of existing criminal law should be punishable. The justification of this princi-*

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314 *Martyn* 2013, p. 10.

315 *Burchall* 2011, p. 35.

316 *Hall* 1960, p. 27.

317 *Hall* 1960, p. 65.

318 Refer above Part 1, 2.1 and Part 2, 1.3.

319 *Burchall* 2011, p. 34.

320 *Hall* 1960, p. 58 (emphasis added).

321 *Ambos* 2006, p. 20 noting the German theorist *Rudolf von Jhering*.

322 As set out in: Halsbury's Laws of England 1996, p. 14; refer above Part 1, 2.1.

323 *Jowell* 2011, pp. 18–19.

324 *Haveman* 2003, p. 50.

325 *Fitzgerald* 1962, p. 9, (emphasis added); and see also pp. 169–170. This passage was adopted by *Heydon* JA (as he then was) in: *Harris v Digital Pulse* 2003, [349]; refer Part 2, 1.8.

> *ple … is that the citizen should be able to know beforehand what conduct is permitted and what forbidden; for only in this way can he order his affairs with certainty and avoid coming into conflict with the law.*[326]

Similarly in their comments on the relationship between the WWPOL and the rule of law,[327] *Ashworth & Horder* refer to the concept of the rule of law as requiring that "citizens must be informed of the law before it can be fair to convict them of an offence."[328] Accordingly, they argue, "both legislatures and courts must apply the rule of law by not criminalizing conduct that was lawful when it was done."[329] This understanding of the rule of law is accepted in the Supreme Court of Canada:[330]

> *It is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act. The rule of law requires that laws provide in advance what can and cannot be done …*

These comments reflect the proposition as *Heydon* J put it in *PGA v The Queen*[331] that "(t)hose who seek to foster the rule of law prize certainty."[332] The same understanding of the rule of law informs *Bell* J's concept of the NCNP[333] and the concept

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326 *Fitzgerald* famously adds, p. 10: "Bentham long ago pointed out that when the judges make law … they are treating the citizen as a man treats his dog, hitting him every time he does something to which the master takes exception. Animals and young children can only be trained in this way. Sane and adult members of a free society, however, are entitled to demand first to be told what conduct is forbidden so that they may choose whether or not to keep within the law."

327 Refer above 1.3.

328 *Ashworth & Horder* 2013, p. 56.

329 *Ashworth & Horder* 2013, p. 57.

330 *R v Mabior* 2012, [14] per *McLachlin* CJ, noted in: *R v Levkovic* 2013, [3].

331 2012, [125].

332 See for further comment and elaboration on the importance that *Heydon* J attaches to certainty in the context of the principle against retroactivity Part 4, 4. In another context, *Heydon* J has considered the ambivalent meaning of the concept of certainty. In *Australian Crime Commission v Stoddart* 2011, [50] he noted the comments of *Griffith* CJ in *Riddle v The King* 1911, p. 629 who said "the law is always certain although no one may know what it is." *Heydon* J posited, a court can recognise a rule of the common law where it believes, after making due inquiries, that the rule exists. However, there is no requirement that the law be certain before its existence can be recognised. Thus, it is not necessary that the belief of a court that a rule of common law exists, rises to the level of certainty. For comment on the concept of certainty within the common law see also *Heydon* J in: *PGA v The Queen* 2012, [125–129].

333 See Part 4, 3.1.

of the WWPOL noted by *Bronitt & McSherry*.[334] The connection and overlap between these principles is summed up in the proposition that "the rule of law requires that criminal laws in particular should be specific and knowable in advance (*nulla poena sine lege*)."[335]

All of these observations on the rule of law support the proposition that the WWPOL is the representation of the rule of law "in its strict sense"[336]: that principle of it which requires that criminal responsibility, acts, and decisions of the legislature, executive and judiciary impacting upon it, must be based on fixed, certain and consistent rules that are part of a larger rule of law framework. This is the concept of the WWPOL that *Hall* refers to as "clear definite legal prescription."[337] It emphasises the rule of law values of legality, certainty, consistency, due process and access to justice[338] and is synonymous with that aspect of the rule of law that has been referred to as "formal legality."[339]

The prescriptions of the WWPOL and its identification with the rule of law demonstrate that its importance lies in the fact that it represents and articulates the central values of liberal societies. The notion of the WWPOL as a "value" was expressed by *Hart* in his description that the principle requires "criminal offences to be as precisely defined as possible so that it can be known with reasonable certainty beforehand what acts are criminal and what are not."[340] In his early work, *Hall* stated, "(t)he ultimate rationale of the principle of legality is the preservation of cherished ideals."[341] He adds, "(e)specially it should be remembered that in the last analysis *nulla poena* represents the most cherished of all the values involved in the administration of the criminal law."[342]

These comments demonstrate that the WWPOL demands compliance with "first principles" which lie "at the basis of democracy (and which) affirm the ineffable value of the individual human being."[343] It is "basic to respect for human digni-

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334 See Part 4, 1.

335 Model Criminal Code Officers Committee 1997, p. iii.

336 *Haveman* 2003, p. 39; see also for comment, *Cumes* 2011, pp. 3–4.

337 *Hall* 1960, p. 58.

338 *Jowell* 2011, pp. 17–24.

339 *Preston* 2012, pp. 178–186.

340 *Hart* 1963, p. 12, noted in: *Bronitt & McSherry* 2010, [8.135]. *Hart's* articulation of the WWPOL is made in the context of his critique of the decision in: *Shaw v DPP,* which he criticized as being directly contrary to the principle; see for elaboration of the critique of *Shaw* Part 5, 1.

341 *Hall* 1947, p. 59.

342 *Hall* 1947, p. 52.

343 *Hall* 1947, p. 59.

ty."[344] The State "must use legal channels of due process before any individual can be declared a criminal and punished."[345] And as *Fitzgerald* observes, "(d)ue respect for ... human dignity demands that (human beings) should be informed before-hand what may and may not legally be done, together with the penalties for breach of the law."[346] These comments demonstrate the "paramount significance"[347] of the WWPOL as a human right that is embedded in the rule of law.[348]

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344 *Burchall* 2011, p. 35.

345 *Hall* 1947, p. 59.

346 *Fitzgerald* 1962, p. 170; see also p. 164.

347 *Hall* 1960, p. 69.

348 Refer above 1.2.

Part 4

The World-wide Principle of Legality in Australian Law

1. Academic commentary

Despite the vast content of Australian criminal law academic literature, the existence of the WWPOL as a principle of the criminal law has been addressed briefly by only a few authors. In these works, the principle is described and discussed mainly in association with some of its elements. The relative absence of discussion of the WWPOL in Australian law differs from the treatment given to it in the criminal law texts of comparative legal systems where it is addressed in detail.[349]

Without specific mention of the term 'principle of legality' or the NCNP, *Bagaric*[350] notes the "proposition … that there is no crime or punishment except in accordance with the law." He notes that this "underpins the presumption against retrospectivity of the criminal law" and is "reflected in the principle of strict construction of penal statutes." More specifically[351] he notes that *Deane* J, referring to *Blackstone* as authority, "stated the … principle of legality" in *Polyukhovich v Commonwealth* when he said:[352]

> *(I)t is basic to our penal jurisprudence that a person who has disobeyed no relevant law is not guilty of a crime. Of its nature crime … necessarily involves a contravention of a prohibition contained in an existing applicable valid law.*

Fairall & Yeo[353] note that "nulla poena sine (lege) crimen" is "sometimes called the principle of legality" and requires that "a person is not subject to punishment

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349 For example on the significance attached to analysis of the WWPOL in South African criminal law texts see *Burchall* 2011, pp. 34–42; *Snyman* 2008, pp. 36–49; and refer Part 3, 2. For comment on the need for comparative analysis of the WWPOL see Part 6, 2.2 point 3.

350 1993, [9.1.50].

351 *Bagaric* 1993, [9.1.180].

352 1991, pp. 609–610.

353 2005, [1.16]; refer Part 3, 1.3.

except by reason of infringing a well-defined and pre-existing rule of the criminal law." They link this concept in "the Australian legal system" to rule "by the law and the law alone." This founding of the criminal law, they argue, has three consequences which mirror *Bagaric's* comments and the elements of the WWPOL: criminal legislation is "strictly construed," criminal laws "should be interpreted where possible to avoid retrospective effect," and new offences are made by Parliament, not the courts.

Bronitt & McSherry note "the legitimacy of punishment is addressed through the principle of legality or, as it is more traditionally known, the rule of law."[354] They then describe some attributes of the rule of law including that "no one may be punished except for a breach of the law established in the ordinary manner before the courts, (and) … equality before the law." They add:

> *Associated with these ideals of legality is the principle against retrospectivity which is embodied in the maxims such as nullum crimen sine lege (no crime without law) and nulla poena sine lege (no punishment without law). Fidelity to these ideals leads to the rejection of retrospective criminal laws and punishment without trial, as well as imposing constraints on judicial creativity in expanding the scope of criminal laws.*

They note further that the maxim "nullum crimen/nulla poena sine lege" is the "principle that a person should not be held liable or punished for conduct that was not clearly criminal at the time of its commission" and that this is a "fundamental human right protected by Art. 15 of the ICCPR."[355]

In contrast to these references to the WWPOL, the absence of reference to it in other academic literature, where it could be expected, is noteworthy. For example in a recent article examining the principle against retrospectivity in Australian law, *Toole* makes no mention of its relationship to the WWPOL or of its status as an element of the WWPOL.[356] Similarly in their comprehensive report on "Traditional Rights and Freedoms" the ALRC makes no reference to the WWPOL.

2. Legislation

The foundation of the WWPOL in Australian law is complemented by the adoption of English imperial statutes at and after Australian settlement. This was facilitated originally by the Australian Courts Act 1828 (Imp.), s. 24 of which provided that all Imperial statutes that existed at 25 July 1828 were incorporated into Australian

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354 *Bronitt & McSherry* 2010, [1.20] for this and the following quotation. For identical comments see *McSherry* 2005, p. 107; *McSherry* 2006, p. 269. Refer Part 3, 1.3 for similar comment by *Ashworth & Horder* 2013, and *Hallevy* 2010.

355 *Bronitt & McSherry* 2010, [2.140].

356 *Toole* 2015; refer Part 3, 2.

(then NSW and Tasmania) law.[357] Some of these statutes continue as part of Australian domestic legislation. The most famous of these is Magna Carta. These statutes incorporate important principles, rights, and freedoms into Australian criminal law. *Meagher* argues for example, that the 'ancient statutes' are a source of fundamental contemporary common law rights, and notes, "the origins of the common law rights to liberty, habeas corpus, property, a fair trial and due process might be traced to Magna Carta and the later Petition of Right 1628." [358]

Despite this opinion, the content and scope of the modern adoption of these statutes varies not only with the statute but also between jurisdictions.[359] This, together with the generally uncertain extent to which the statutes have been amended by subsequent domestic legislation, makes the scope of their contemporary operation unclear, and this leads to considerable complexity in the enunciation of the principles, rights, and freedoms which they articulate. This has led to a cautionary approach to the scope of their application in modern Australian law, and it is argued with respect to Magna Carta that it has limited operation in contemporary law.[360] This analysis, and importantly the adoption of the WWPOL through them, requires examination that is beyond the breadth of this research.[361]

More concretely, apart from this framework, specific Australian legislation contains important provisions which incorporate the WWPOL into the criminal law. Although not acknowledged as a legislative statement of it, the adoption of the principle within legislation gives it a strong status in Australian law. It confirms that the WWPOL exists as a written principle of the criminal law and simultaneously overcomes the uncertainty of locating it only in the common law, whilst also demonstrating that it is wrong, in fact, to do so.

In sections headed 'Retrospective criminal laws,' s. 25(1) Human Rights Act 2004 (ACT) (HRA) and s. 27(1) Charter of Human Rights and Responsibilities Act 2006 (Vic) (CHRRA) directly incorporate the WWPOL, via the principle against retroactivity, into the law of these jurisdictions. Further, ss. 25(2) HRA and 27(2) & (3) CHRRA establish the principle of *lex mitior*,[362] a corollary principle of the presumption against retroactivity, as a principle of the law. This principle states that a penalty cannot be imposed that is heavier than the penalty that applied when an offence was committed and that an accused should be given the benefit of a subsequently reduced statutory penalty.

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357 See for references and comment *Cumes* 2013b, pp. 29–30; *Cumes* 2013g, p. 102.

358 *Meagher* 2011, pp. 457–458.

359 See generally *Flynn* 2003, pp. 249–276; and for comment *Cumes* 2013c, p. 52.

360 *Clark* 2000, pp. 869–874; see also *Castles* 1989, pp. 122–125; *Clark* 2010, [12.20].

361 See Part 6, 2.2 point 4.

362 See on this principle and its development in German law *Bohlander* 2009, p. 26.

Human Rights Act 2004 (ACT) s. 25 Retrospective criminal laws (emphasis added)

(1) No-one may be held guilty of a criminal offence because of conduct that was *not* a criminal offence under Territory law *when it was engaged in*.

(2) A penalty may *not* be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence *when it was committed*. If the penalty for an offence is reduced after anyone commits the offence, he or she benefits from the *reduced penalty*.

Charter of Human Rights and Responsibilities Act 2006 (Victoria) s. 27 Retrospective criminal laws (emphasis added):

(1) A person must not be found guilty of a criminal offence because of conduct that was *not* a criminal offence when it was engaged in.

(2) A penalty must *not* be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence *when it was committed*.

(3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the *reduced penalty*.

The foundations of lex mitior are also recognised in the common law and underpin Australian legislation.[363] Despite this however, it is clear that, as far as the common law is concerned, the principle has a restricted scope. The HCA has held in *Elias v The Queen*[364] that

> *(t)here is no warrant under the common law of sentencing for a judge to take into account the lesser maximum penalty for an offence for which the offender could have been, but has not been, convicted.*

The retrospectivity principle is recognized in the Interpretation Acts of the states and the Commonwealth. For example s. 72 Interpretation Act 1987 (NSW) deals with**,** and limits**,** the retrospective commencement of continuing Acts. The effect of this provision is that if conduct punishable by a penalty occurs where there is no operative law (a temporary Act) it cannot become retroactively punishable with the commencement of the new law. The effect of this and similar legislation, it is ar-

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363 For analysis of the law see *Pearce & Geddes* 2011, [9. 17– 9.20], particularly [9.18] which deals specifically with this issue, noting legislation in all Australian jurisdictions, except South Australia, including the Commonwealth (s. 4F Crimes Act 1914 (Cth)) that gives effect to this principle; see also [10.5].

364 2013, [37].

gued, is that the common law rule against the operation of retrospective legislation "is largely codified."[365]

This position is reflected in the criminal law, although only within some jurisdictions and only to a limited extent. The Griffith Codes, the description generally given to the Criminal Codes of Queensland (Qld) (1899), Western Australia (WA) (1913), Tasmania (Tas) (1924) and the Northern Territory (NT) (1983),[366] as well as the Criminal Code (Cth) and the Criminal Code (ACT), establish some aspects of the WWPOL as elements of the criminal law and as principles of criminal responsibility. The effect is that the principle has been codified, although its scope is modified by the terms of the particular sections in the respective statutes. Notwithstanding this, the existence of these provisions contrasts to the absence of similar sections in the non-code jurisdictions. This is consistent with the approach of these jurisdictions to the existence of general principles of criminal responsibility, such as the WWPOL, which are founded only in the common law.

The following analysis sets out legislation, in particular jurisdictions, and the element of the WWPOL which it incorporates into the criminal law:

1. Each of the Codes noted above provides that the criminal law is contained in the Code and other statutes (including Cth and Imperial legislation) that operate in the respective jurisdiction. These provisions are supplemented by the Interpretation Acts of each jurisdiction. For example, the effect of s. 1.1 Criminal Code (Cth) is supplemented by s. 12 Acts Interpretation Act 1901 (Cth): "Every section of an Act shall have effect as a substantive enactment without introductory words." Although they differ in their wording, the codification of criminal law is achieved primarily through the following provisions:

Criminal Code Act 1899 (Qld) (ss. 2 & 5), Criminal Code Compilation Act 1913 (WA) (ss. 2 & 4), Criminal Code Act 1924 (Tas) (ss. 2(1), 4(1), 6 & 7 (with respect to indictable offences)), Criminal Code Act (NT) (ss. 5 & 6), Criminal Code (Cth) (s. 1.1), and Criminal Code 2002 (ACT) (s. 5(1)).

These sections are an acknowledgement by parliament that criminal law is founded on written law, and accordingly of the *lex scripta* principle.

2. The Griffith Codes provide that accused persons may only be found guilty and punished for crimes that are stated by laws which are in force at the time of the offence and which continue to be in force when the person is charged, or dealt with. Conversely, they also provide that what is lawful as set out by the law cannot be prosecuted as an offence. The sections are:

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365 *Pearce & Geddes* 2011, [10.36]; and see also [6.8] referring to the specific sections.

366 See for background and references on the distinction between the code and non-code jurisdictions in Australian criminal law, as well as their history, *Cumes* 2013f, pp. 85–89; *Cumes* 2013g, pp. 103–104.

Qld: Criminal Code Act 1899 (Qld) (s. 6(1)) and Criminal Code (Qld) (s. 11(1)); WA: Criminal Code Compilation Act 1913 (WA) (s. 5) and Criminal Code (WA) (s. 11(1)); Tasmania: Criminal Code Act 1924 (Tas) (s. 9(1)) and Criminal Code (Tas) (s. 7(1)); NT: Criminal Code Act (NT) (s. 7(1)) and Criminal Code 1983 (NT) (s. 14 (1)).

These provisions are not stated in the Criminal Code (Cth) or the Criminal Code 2002 (ACT): Criminal Code (Cth) (s. 2) and Criminal Code 2002 (ACT) (s. 6) are not in the same terms as the Griffith Code sections.

As written law, the sections of the Griffith Codes confirm and underpin the *lex scripta* principle and the *lex certa* principle. Most importantly, however, they state the *lex praevia* principle. Their clear intention and effect is that the criminal law cannot criminalize conduct that was not criminal at the time of the offence, or which does not continue to exist as an offence at the time of charging and arraignment.

3. Some of the Codes provide that, where the law has been amended or changed since the time of the offence and before a finding of guilt, the offender may not be punished to an extent greater than that provided by either law. This is set out in the following sections:

Criminal Code (Qld) (s. 11(2)); Criminal Code (Tas) (s. 7(2)); Criminal Code (NT) (s. 14(2)). It is noteworthy that, although they generally follow one another, there is no similar provision to s. 11(2) Criminal Code (Qld) in the Criminal Code (WA).

Although the sections are not stated in clear terms, their intent, it seems, is that if the law has been changed between the commission of the offence and the final judgment, guilt must be based on the most lenient law. If this is correct interpretation of the sections, it is a statement of the *lex mitior* principle.

In addition to this framework, Australia has ratified important international human rights instruments such as the ICCPR and the Rome Statute that adopt the WWPOL or elements of it.[367] The provisions of these treaties are applicable in the interpretation of domestic offences to which they are directed. For example, in the interpretation of domestic offences contained in Chapter 8, Criminal Code (Cth) (international crimes), the Rome Statute is incorporated into Australian law as Schedule 1 of the International Criminal Court Act 2002 (Cth).[368] Arts. 22–23 of the Statute, which respectively state the *nullum crimen* and *nulla poena* principles, have been applied in the interpretation of relevant Australian law. For example in *Zentai v*

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367 See for reference to some of these instruments and the sections in them that state the WWPOL, Part 3, 1.2.

368 For the effect of the Rome Statute in Australian criminal law see generally *Flynn* 2003, p. 118.

Brendan O'Connor,[369] *McKerracher* J noted that Art. 2 para. 5(a) of the extradition treaty between Australia and Hungary "gives expression not only to the principle of nullum crimen sine lege requiring the existence of criminal liability at the relevant time but also the principle of nulla poena sine lege (no punishment without law)."[370] He concluded that

> *it follows that not only must the law clearly define the elements of a crime so that an individual might know what acts and omissions will make him liable but it must also prescribe a penalty that is certain. This presupposes that the offence of war crime was both clearly defined in the relevant Hungarian written law and that the penalty was publicised in that statute or decree.*[371]

The incorporation of these and similar provisions in other international instruments into domestic legislation gives considerable scope for the adoption of the WWPOL within Australian criminal law.

3. Common law: jurisprudence in the High Court of Australia

The assertions of the existence of the WWPOL in legal commentary and its implementation in legislation are supported by jurisprudence in the HCA that establishes clearly, albeit indirectly, that the WWPOL is a common law principle that informs the criminal law. Although the court does not refer specifically to the term 'principle of legality' as a principle of Australian criminal law, and the references are individually discrete, their cumulative result is that Australian law recognizes the WWPOL as a concept that is equivalent to the NCNP. However, all these statements have ambivalent elements. Those that refer to the NCNP do not specifically link it to the concept of the WWPOL, the discussion is always brief, and where the term 'principle of legality' in this context is mentioned, its meaning is not explained. In summary, the references do not in specific terms state that the term 'principle of legality' is a principle of the common law that is equivalent to the NCNP.

The specific contexts in which the WWPOL and its elements have been referred to in the HCA include direct reference to the NCNP, commentary on the relationship between the criminal law and the concept of judicial power, and acknowledgment of the existence in Australian law of the concept of the presumption against retroactivity.[372] In comments that incorporate these references, *French* CJ and *Heydon* J have particularly contributed to this jurisprudence with important commentary on

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369 2010.

370 2010, [191].

371 *McKerracher* J did not refer specifically to Art. 24 Rome Statute which provides for non-retroactivity of criminal law.

372 For elaboration of the recognition of these aspects of the WWPOL in the HCA see *Cumes* 2015, pp. 87–94.

the principle of retroactivity, and the principle against analogy.[373] In references to these concepts, they, and other members of the HCA, have highlighted the principle of certainty as a fundamental related principle, and the association of each of these concepts with the rule of law. Despite these references, there is, on the other hand, no consideration of the constitutional standing of the WWPOL itself as a distinct principle, or of its importance for, and relationship to, criminal legislation, such as preventive detention legislation. This section addresses these issues.

3.1 The nullum crimen, nulla poena sine lege principle

The NCNP has been referred to in the HCA as a "fundamental principle" of the law. In *PGA v The Queen*[374] *Bell* J, referring to the maxim in terms that amount to a statement of the WWPOL, said:

> *The imposition of criminal liability on a person for an act or omission to which criminal liability did not attach at the date the act was done or omitted to be done is contrary to fundamental principle [286]*.

The principle which *Bell* J refers to in this passage is the NCNP. This is made clear by her footnote reference at [286] which reads: "Nullum crimen sine lege; nulla poena sine lege (no crime or punishment without law)."[375] This notion of the WWPOL as a fundamental principle is confirmed in subsequent comments in which she notes that the NCNP is associated with the rule of law and is grounded in the principle of certainty. She said, again noting the NCNP by footnote:[376]

> *person may be punished for a breach of the law and for nothing else [461] …Underlying the* principle *is the idea that the law should be* known and accessible*, so that those who are subject to it may conduct themselves with a view to avoiding criminal punishment if they choose.*[377]

Footnote [461] refers to footnote [286], i.e. the NCNP. It also refers among other references importantly to *Williams.*[378] Although *Bell* J does not in express terms use the term 'principle of legality,' the reference to *Williams* suggests she is clearly aware of its use in this context. In this sense it is a very different use and under-

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373 These comments are not set out in this research. They are noted extensively in: *Cumes* 2015, pp. 91–94.

374 2012, [165].

375 The footnote then notes as the reference *Dicey* 1959, p. 202.

376 2012, [245] (emphasis added).

377 Noting *Blackstone* 1765, Book 1, pp. 45–46; refer Part 3, 1.1.

378 *Williams* 1961, pp. 575–576. The other reference is to *Polyukhovich v Commonwealth* 1991, pp. 609–611 per *Deane* J, and pp. 687–688 per *Toohey* J.

standing of the term from that in which she refers to the APOL, which consistently with all members of the HCA, she has adopted as doctrine of the court.[379]

This statement of the WWPOL as a principle of the law which is based on the NCNP adds to other comment and analysis in the HCA that refers to the relationship.[380] It is supported by extra-judicial observations by members of the court, such as that of *Heydon* J where, referring to *Hayek*,[381] he examined the relationship between the NCNP and the rule of law.[382] He wrote that it is "generally accepted" that the "characteristics of a domestic legal system governed by the rule of law" are expressed by the following elements:

1. "(N)o person is liable to criminal sanctions or civil remedies" unless he/she "has been adjudged to be in breach of rules governing the system which are capable of being complied with … (T)he rules must be prospective, not retrospective."

2. "(T)he rules must be published at least to significant classes such as officials and the legal profession."

3. "(T)he rules must be clear."

4. "(T)he rules must be coherent, not radically flawed by anomaly, not internally contradictory, and not unstable by reason of constant change."

5. "(T)he rules regulating how the operative rules are changed must share these four characteristics."

He observes that, according to *Hayek*, the effect of these characteristics is that government is bound by "rules fixed and announced beforehand." They make it "possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances." He notes that these are "old ideas"[383] which "are shared by common law and civil law systems." They "have particular force for the criminal law" especially with respect to its retroactive operation. He concludes that they are "often summed up in the maxims, 'nullum crimen sine lege' and 'nulla poena sine lege': no crime or punishment without pre-existing law."[384]

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379 See Part 2, 1.1 for extended references and comment on this point.

380 See for elaboration *Cumes* 2015, pp. 88–89.

381 *Heydon* 2011, p. 645; see also *Heydon* J's reference to *Hayek* in: *PGA v The Queen* 2012, [129].

382 See *Cumes* 2015, pp. 93–94 where the following is also addressed.

383 Refer Part 1, 2.3.

384 *Heydon* 2011, p. 645 on this and the preceding quotations; see also as an example of *Heydon* J's acknowledgment of the importance of the NCNP his reference to it in: *PGA v The Queen* 2012, [151].

It is important to observe that the striking feature of *Heydon* J's list is its similarity and consistency with the WWPOL and its four elements.[385] According to *Heydon* J the characteristics of a legal system governed by the rule of law and the "old ideas" on which they are founded, exist in the common law and, within the criminal law, these are synonymous with the NCNP. This argumentation amounts to a strong formulation of the proposition that within common law systems governed by the rule of law, the criminal law is grounded upon the concept of the WWPOL. It adds to other HCA comments on this issue, all of which together demonstrate that the WWPOL, as derived from and grounded on the NCNP, is a fundamental principle of Australian law which is accepted as doctrine in the HCA.

3.2 Judicial power and the constitutional status of the world-wide principle of legality

3.2.1 Judicial power and criminal proceedings

The concept of judicial power (JP) is a complex concept that has defied precise definition.[386] It is a power that it vested only in the judiciary: the power to make a binding enforceable decision in a legal "controversy" which finalizes the existing rights, duties and liabilities of the parties in the litigation.[387] The "unique and essential function" of judicial power is "the quelling of ... controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion."[388] Its "hallmark" is "the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct."[389] It "is conferred and exercised by law and coercively" and "its decisions are made against the will of at least one side, and are enforced upon that side

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385 See Part 3, 1.4.

386 See *Cumes* 2015, p. 91; see *Love v Attorney-General (NSW)* 1990, p. 319; *TCL Air Conditioner v The Judges of the Federal Court* 2013, [27] per *French* CJ & *Gageler* J, and for their elaboration of the concept of judicial power [26–29]; see for similar comment *French* 2013a, p. 12. Amongst the vast case law and literature on the concept of judicial power see overview in: *DPP (Vic) v Debono* 2012, [45–62], and *Paphos Providores v Constable Ladha* 2015; and generally *Stellios* 2010, Ch. 4.

387 *Huddart, Parker v Moorehead* 1909, p. 357; *Re McBain* 2002, [4–6] per *Gleeson* CJ; ALRC 1998, [3.3, 3.8]. For summary of the indicia of judicial power that have been identified by the courts see *Bateman* 2009, p. 414; see also for confirmation of this concept of JP *Duncan v New South Wales* 2015, [41–42]. On the meaning and a critique of JP and the difficulty of defining it with "predictability and precision" (pp. 74–75) see *Welsh* 2013, pp. 73–78.

388 *State of NSW v Kable* 2013, [49] per *Gageler* J; *Magaming v The Queen* 2013, [65] per *Gageler* J; see for the same observation *South Australia v Totani* 2010, [131] per *Gummow* J; *Wilson v Minister for Aboriginal Affairs* 1996, [11].

389 *State of NSW v Kable* 2013, [49] per *Gageler* J noting *Ha v New South Wales* 1997, pp. 503–504.

in invitum."[390] It requires that a court must exercise its powers judicially, namely, "in a just and fair manner, with judicial detachment."[391]

This concept of judicial power includes the determination of guilt and the imposition of punishment for breach of the criminal law.[392] "The exercise of judicial power is ultimately the foundation of, or sanction for, any valid exercise of the coercive force of the State …,"[393] *Gummow* J has argued, and the HCA accepts,[394] that "involuntary detention of a citizen in custody by the state is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts."[395] This entrenched position of the court was re-stated and affirmed in *Plaintiff M68 v Minister for Immigration*:[396]

> *As a general proposition, the detention in custody of a citizen by the State is penal or punitive in character and exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.*[397]

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390 *TCL Air Conditioner v The Judges of the Federal Court* 2013, [28].

391 *Love v Attorney-General (NSW)* 1990, p. 322, noted in: *DPP (Vic) v Debono* 2012, [78].

392 *Polyukhovich v Commonwealth* 1991, p. 607 per *Deane* J; *Nicholas v The Queen* 1998, p. 207 per *Gaudron* J; *X7 v Australian Crime Commission* 2013, [110] per *Hayne & Bell* JJ; *Lee v New South Wales* 2013, [77] per *Hayne* J; *Magaming v The Queen* 2013, [47, 66]; see for confirmation of the principle stated in *Magaming*, *Kuczborski v Queensland* 2014, [233] per *Crennan, Kiefel, Gageler & Keane* JJ.

393 *Bell v Police (SA)* 2012, [76].

394 *Plaintiff M76 v Minister for Immigration* 2013, [206] per *Kiefel & Keane* JJ.

395 *Fardon v Attorney-General (Qld)* 2004, [80]. *Gummow* J argues that this formulation, which is subject to "exceptional cases," is consistent with *Polyukhovich v Commonwealth.* It is a re-phrased formulation of the proposition stated in: *Chu Kheng Lim v Minister for Immigration* 1992, p. 27 (hereafter *Lim*) which *Gummow* J refers to, to the extent that it is posited as a "constitutional principle," as containing "certain indeterminacies." [78]. For acceptance of this position of the law as stated by *Gummow* J see, *Plaintiff M76 v Minister for Immigration* 2013, [206] per *Kiefel & Keane* JJ. The limitations of the "constitutional holding" in *Lim* and the principles for which it "stands as authority" have been articulated by the HCA; see *Plaintiff M76 v Minister for Immigration* 2013, [138–140] per *Crennan, Bell & Gageler* JJ. For comment see Part 6, 2.3.

396 2016, [40] (footnotes deleted).

397 The court continued: "A qualification to this proposition is provided by the recognition that the Commonwealth Parliament has power to make laws for the expulsion and deportation of *aliens* and for their restraint in custody to the extent necessary to make their deportation effective" (emphasis added). The court referred for this proposition to *Lim,* pp. 27, 30–31. *Lim* is the leading authority on the exceptional position of the detention of aliens in Australian law, and its application and analysis is the subject of lengthy and detailed case law and opinion. This polemic and complex issue is beyond the remit of this research paper; see Part 6, 2.3.

It follows from this concept that the finding of guilt, and punishment by involuntary detention following criminal proceedings, is an exercise of judicial power which may only be undertaken by a court.[398] What amounts to a finding of guilt for this purpose depends on the nature and quality of the determination. It has been held, for example, that a declaration by the executive that an organization is a "criminal organization," is not an adjudication of guilt and is therefore not a usurpation of judicial power.[399]

3.2.2 Judicial power and the constitution

The "long accepted principle of Anglo Australian law that penalties for criminal offences should be judicially imposed" is, "at a Commonwealth level, constitutionally entrenched."[400] The constitutional foundation of judicial power is Ch. III of the Australian Constitution which has been referred to as "the Constitution's only guarantee of due process." The effect of Ch. III is that "the guilt of the citizen of a criminal offence … can be conclusively determined only by a Chapter III court … acting judicially."[401]

This expression of the concept of judicial power within criminal proceedings is intrinsically associated with the WWPOL.[402] The exercise of judicial power in the finding of guilt, and the imposition of punishment, must be based on pre-existing law. The essential nature of the criminal law is that it consists of laws that constitute a pre-existing legal framework; in order to be justified and permitted, criminal responsibility and punishment must be located in this law and no other.[403] Determinations of what the criminal law is, as well as any punishment for breach of it, are based only on the specific law that applies to the particular facts and circumstances of the offending conduct. The decision about this law and punishment is the core function of, and can only be exercised by, the judiciary.

The WWPOL requires firstly that this decision is made according to law, that is, the law that exists in a concrete, specific and knowable form at the time of the offence. Secondly, it demands that the decision of the judiciary is a final determination of the guilt of the accused – it is intrinsically a decision about the rights, duties and liabilities of the parties to a criminal prosecution. In a criminal trial this deci-

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398 See for elaboration and references below 3.2.2; *Duncan v New South Wales* 2015, [41].

399 *Kuczborski v Queensland* 2014, [232–236, esp. 233] per *Crennan, Kiefel, Gageler & Keane* JJ.

400 *Bell v Police (SA)* 2012, [66], noting *Fardon v A-G (Qld)*; see generally on the Australian Constitution *Cumes* 2013a, pp. 7–11; *Cumes* 2013c, pp. 43–52.

401 *Assistant Commissioner Condon v Pompano* 2013, [180] per *Gageler* J noting *Re Tracey* 1989, p. 580, and *Magaming v The Queen* 2013, [61–67] per *Gageler* J.

402 See for discussion *Cumes* 2015, p. 91.

403 *Keyzer* 2008, p. 105.

sion may follow the verdict of a jury. Public policy considerations require that the verdict of the jury is final. This is an application of the 'finality principle'.[404] The function of the judiciary is to act according to this determination and to finalize the dispute in accordance with it, either by releasing or sentencing the accused. This process of determining the dispute according to law is an exercise of judicial power which derives from the WWPOL.[405] On this interpretation, the concept of judicial power constitutes a framework for the application of the WWPOL in criminal proceedings. It follows that the HCA impliedly accepts the proposition that the WWPOL operates as a standard for the determination and punishment of criminal guilt and the source of this power lies in the concept of judicial power.[406]

This connection between JP and the WWPOL has a broader significant impact, namely that the constitutional foundation of JP is the basis for the proposition that the WWPOL is an implied due process constitutional principle within Ch. III of the Constitution.[407] The two concepts are mutually dependent: the imposition of guilt and punishment by a court based on the WWPOL represents the exercise of JP in criminal proceedings. The WWPOL has its roots in JP and therefore in Ch. III of the Constitution, even though it is not expressly stated in it.

The proposition that the WWPOL is an implied constitutional principle within the umbrella of due process rights[408] has not been examined in Australian criminal law. Its association with JP however is the basis for argument that it is. As an exercise of JP, the WWPOL is associated with the implied constitutional protection against the usurpation of judicial power[409] through the imposition of involuntary detention of a penal or punitive character by the legislature or executive.[410] This principle embraces the implied protection against Bills of Attainder and Bills of Pains and Penalties[411] which provides that parliament cannot enact a Bill of Attainder and

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404 See now on the scope of the finality of the jury verdict, *NH v DPP* 2016, [5, 20, 25–26, 70, 78, 94–99]; see also on the importance of the jury in the criminal law *R v Baden-Clay* 2016, [65] where it is described as the "constitutional tribunal for deciding issues of fact."

405 See *Polyukhovich v Commonwealth* 1991 p. 560 per *Deane* J.

406 See also for this argument *Cumes* 2015, p. 91.

407 See for comment Part 6, 2.2 point 5.

408 For the meaning of "due process rights" within the Constitution see *Cumes* 2013c, p. 50.

409 The distinction between usurpation of JP and infringement of JP was noted by *McHugh* J in: *Nicholas v The Queen* 1998, p. 220. Usurpation refers to the exercise of JP by the legislature. An infringement occurs when the legislature interferes with the courts exercise of JP e.g. by altering procedural rules which force the courts to exercise JP in a "manner" that is inconsistent with JP; see *Bateman* 2009, pp. 420–421.

410 *Williams* 1999, pp. 205, 208–209.

411 On the meaning of these concepts see *Stellios* 2010, 5.4; see also *McBain* 2011, pp. 867–871.

cannot order punitive detention without the intervention of a court.[412] This implied constitutional principle is merely a variation or alternative form of that expressed in the constitutional grounding of JP noted above, namely that involuntary detention of a penal or punitive character should only be a consequence of a finding of guilt by a court.[413] Both constitutional principles express the fundamental proposition of the WWPOL: the common thread between them and the WWPOL is that a finding of guilt and the imposition of punishment by a court must be based on pre-existing law.

To deduce that the WWPOL is a constitutionally implied principle within Ch. III follows from the inherent connection between it and these recognized constitutional principles. It can be argued accordingly that like these principles, the WWPOL is implied through the text and structure of the Constitution.

3.2.3 Implied constitutional rights

Central to the issue of the constitutional status of the WWPOL is the unsettled and controversial status of the concept of implied due process rights in the Constitution. The HCA has been circumspect about articulating or extending the range of constitutional implied rights generally, and has only given marginal support to the idea of constitutionally implied due process rights. The most that can be said is that some rights that, it is argued, may fit within the unique Australian concept of constitutional due process rights may be supported by the court, however these are very limited, and debated.[414]

The reticence of the court to venture along this path is associated with the constitutional status of implied rights. As constitutional principles they are stronger than other, mere, common law principles which, despite their constitutional association, do not have the same protection as constitutional principles. Whether express or implied, constitutional principles exist as part of constitutional law. They cannot be abrogated by legislation, and any legislation that attempts to do so is unconstitutional and invalid. Common law rights on the other hand are regarded as "constitutional rights … even if not formally entrenched against legislative repeal."[415] Thus

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412 *Stone* 2006, p. 141.

413 See for expression of this concept as a "general principle" *McSherry* 2005, p. 109; see for comment Part 6, 2.2 point 5.

414 See for elaboration *Cumes* 2013c, pp. 48–51.

415 *Evans v New South Wales* 2008, [72]; *Momcilovic v The Queen* 2011 per *French* CJ [45]; *French* 2010b, p. 32 – in each instance noting *Allen* 1996, p. 148; see also *Momcilovic v The Queen* 2011, [444] per *Heydon* J: "The fundamental rights or freedoms often relate to human rights and are sometimes described as having a constitutional character." For discussion of common law constraints on executive power see *Harris* 2010, p. 373. Consideration of the constitutional status of common law principles is beyond the scope of this research. See Part 6, 2.2 point 5 however where this

subject to the Constitution they can be modified or extinguished by Parliament if it expresses an unequivocal and clear intention to do so.[416] In this sense the APOL has a critical role in determining the validity of legislation that purports to interfere with constitutional and common law principles.

3.2.4 Preventive detention

Given this understanding of constitutional rights, the proposition that the WWPOL is an implied constitutional principle is contentious because of its potential effect. Legislation that breaches the WWPOL would be invalid and this could have wide-ranging consequences for legislative capacity. An example where the WWPOL as a constitutional principle may have this effect is preventive detention legislation.[417] This legislation exists in a number of forms.[418] The concern of this research is that form of it which is identified as legislating for "preventive detention in prison"[419] – referred to here as 'post-sentence preventive detention legislation' (PSPD) – particularly post-sentence involuntary prison detention of sex and dangerous offenders. The expanded enactment of this legislation, including now proposed Commonwealth legislation, makes its assessment particularly important.[420]

The application of this legislation to prisoners is demonstrated in *DPP (Vic) v JPH*.[421] This case dealt, inter alia, with s. 115 of the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic) which specifically recognizes that detention

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critical issue is noted as a broader aspect of the more specific issues of the constitutional status of the WWPOL and the principle of liberty.

416 *French* 2010b, p. 27; see also now *French* 2016, p. 407, "The courts protect our rights and freedoms to a degree, but are limited by the framework of the law … The Constitution provides for a limited range of express and implied guarantees. Ultimately, however, if the laws are valid and the language clear, the courts must apply them."

417 See for discussion and elaboration *Cumes* 2015, pp. 96–97.

418 *Keyzer* 2013, pp. 1–2 identifies four forms of preventive detention that are associated with the criminal law; see also for identification of forms of preventive detention *Orlandi* 2013, pp xiv–xvi; *Caianiello* 2013, pp. xxvi–xxix. The forms of detention noted by *Keyzer* do not include the polemic issue in Australia of the preventative detention of aliens and this issue is similarly not addressed in this paper; see for comment Part 6, 2.3.

419 *Keyser* 2013, [2.3]. See generally on the following and for critique of this legislation *Cumes* 2013e, pp. 79–80.

420 The Cth parliament intends to introduce a national post-sentence preventative detention scheme to enable a continuing period of imprisonment for high risk terrorist offenders. For comment, critique and analysis of relevant issues including overview of current legislation (pp. 164–166) see *Smith & Nolan* 2016; see below, Appendix, for further comment.

421 2014. For the operation and analysis of similar legislation in NSW, the Crimes (High Risk Offenders) Act 2006 (NSW) see *State of New South Wales v Donovan* 2015. Refer below in this section for further comment on this Act.

orders are made against an "unconvicted prisoner." The section reads (emphasis added):

Status of offender on detention orders or interim detention orders

(1) An *offender in custody in a prison* under a detention order or interim detention order must be treated in a way that is appropriate to *his or her status as an unconvicted prisoner* subject to any reasonable requirements necessary to maintain –

(a) the management, security and good order of the prison; and

(b) the safe custody and welfare of the offender or any other prisoners.

(2) Except as provided in subsection (3), an *offender in custody in a prison* under a detention order or interim detention order must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving custodial sentences.

(3) An offender may be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving custodial sentences –

(a) if it is reasonably necessary for the purposes of rehabilitation, treatment, work, education, general socialisation and other group activities of this kind; or

(b) if it is necessary for the safe custody or welfare of the offender or prisoners or the security or good order of the prison; or

(c) if the offender has elected to be so accommodated or detained.

The court noted the ambit of this section[422] and made a detention order. It held that the text and purpose of the legislation does not limit the court's discretion to make an order due to human rights considerations in the CHRRA 2006 (Vic) or other common law principles.[423] The court did not consider that detention in these circumstances could be classified as "arbitrary."[424]

This form of post-sentence detention legislation differs, in particular, from legislation that empowers an indefinite term of imprisonment which is imposed, following a finding of guilt, at the time of sentence. Such legislation may exist in differing forms, the common denominator of which is that the length of detention is a responsibility of the executive, the consequences of which can be continued detention well beyond the length of the maximum sentence for the offence. The constitutional validity of this legislation has been upheld by the HCA.[425]

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422 2014, [115, 134]

423 See summary point 4, and [33, 98, 138].

424 It determined that the meaning of "arbitrary" in Vic. is not decided, [121–127].

425 This legislation is not the focus of this section of the research; see amongst many references on the issues noted here and raised by this form of sentence *Freiberg & Murray* 2012, pp. 336, 347; *Cumes* 2013e, p. 80. For critique of the wide sentencing discretion associated with the development of indeterminate sentences see *Hall* 1960, pp. 55–58. For comment on this form of legislation, referred to as the "indeterminate prison sentence," in the Nordic countries see *Anttila* 2001, pp. 91–102.

These issues and characteristics of indefinite imprisonment legislation – and its serious consequences – are demonstrated by the case of *Yates v The Queen.*[426] This case dealt with s. 662 Criminal Code (WA) which provides (emphasis added):

Indefinite sentencing – s 662 of the Code

When any person is convicted of any indictable offence, … the court before which such person is *convicted* may, if it thinks fit, having regard to the antecedents, character, age, health, or mental condition of the person convicted, the nature of the offence or any special circumstances of the case – (a) direct that *on the expiration of the term of imprisonment then imposed upon him he be detained during the Governor's pleasure in a prison*; or, (b) without imposing any term of imprisonment upon him *sentence him to be forthwith committed to a prison, and to be detained there during the Governor's pleasure*.

The HCA recognized that this section allows an order to be made for indefinite detention. The validity of the legislation however was not raised as in issue, and it was not in question that parliament had the power to enact this section. With respect to the length of his detention, the HCA noted that:[427]

> *The applicant has now served six years more than the maximum sentence that a court could have imposed for the offence of aggravated sexual assault…. (He) has served the sentences for the serious offences of which he was convicted in 1987. The respondent's submission that to release him almost 20 years after completing those sentences would produce an anomalous result cannot be countenanced.*

The court held that the original court order imposing indefinite detention should not have been made.[428] But the approach of the HCA to the sentence and the length of detention was not that the appellant was sentenced pursuant to an invalid law – the constitutional legality of s. 662 was not in issue – but rather that there was a "manifest injustice"[429] arising out of the application of this law. In issue before the HCA was only the proper test that should be applied for the application of s. 662. It was held that the trial judge applied the wrong test and that this was incorrectly upheld by a majority of the appeal court.[430] The HCA approved of the reasoning of the dissenting judge in the appeal:[431]

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426 2013.

427 2013, [38–39].

428 2013, [42] per *Gageler* J.

429 2013, [42] per *Gageler* J.

430 2013, [22, 26].

431 2013, [36] (references omitted). See similarly [43–45] per *Gageler* J.

> *Burt CJ was plainly correct to conclude that the evidence did not support the making of the order. The evidence was not capable of demonstrating that the applicant was so likely to commit further crimes of violence, including sexual offences, that he constituted a constant danger to the community.*

The court held that the correct test in the circumstances of the case is that which was determined in *Chester v The Queen*[432], which approved the test of dangerousness noted in the previous decision of the WA Supreme Court in *Tunaj v The Queen*.[433] The court said:[434]

> *Tunaj held that an order under s. 662 should be made "only in very exceptional circumstances" and that those circumstances must "firmly indicate that the convicted person ha[d] shown himself to constitute a danger to the public"... The requirement of proof of dangerousness stated in Tunaj was affirmed by this Court in Chester v The Queen. In Chester it was said that the "extraordinary power" to make an order authorising indefinite detention is "confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm." Acceptable evidence of one or more of the matters specified in s. 662 was required to establish that the convicted person was "so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community."*[435]

The way in which the appeal was argued and decided did not take into account the NCNP/WWPOL and the consideration that the legislation lacks certainty because it permits continued detention beyond the expiration of the maximum sentence for the offence at the discretion of the executive. It is argued however that the indeterminate sentence violates the NCNP; notwithstanding this it has been upheld, on differing bases, in the USA and Europe.[436] In neither *Yates* nor other cases, has it been contested on this basis in Australia.[437]

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432 1988, pp. 617–619.

433 1984, p. 51.

434 2013, [6–7] (references omitted).

435 See also as an example of legislation and circumstances that allow an offender to be declared a serious repeat offender (as a sex offender) at time of sentencing and for an extended imprisonment order based on this declaration *R v M, STE* 2013. It was affirmed in this case that the declaration that a person is a serious repeat offender is an exceptional order.

436 On the NCNP argument in USA and Europe see *Pifferi* 2013, pp. 387–406. For criticism of preventive and indeterminate detention as a violation of the WWPOL see *Hall* 1960, pp. 55–58, 62–64; *Orlandi* 2013, pp. xvi–xviii. For recognition of this in Australia, without ascribing it to the WWPOL, see *Fardon v Attorney-General (Qld)* 2004, [155–166] per *Kirby* J; *Thomas v Mowbray* 2007, [355] per *Kirby* J.

437 The general position of the law as it is set out in *Yates* and similar cases with respect to continued detention in custody by the executive of citizens for the commission of crime has an interesting contrast with respect to the detention of non-citizens. This law is stated in *Lim*. For brief overview see Part 6, 2.3.

PSPD legislation, as it is concerned with "prevention" rather than "punishment", is regarded by the HCA as existing "outside the criminal law,"[438] and the court has also upheld its constitutional validity.[439] Although it varies between the jurisdictions, it shares the core feature that, unlike the indefinite imprisonment sentence, it permits a court to order continued detention in prison of an offender after the completion of a sentence, and in the absence of the commission of a new offence, based entirely on the perceived risk of harm to the community from the release of the detainee, namely that he/she might commit an offence in the future.

Notwithstanding the HCA's validation of this legislation, it is arguably a violation of the meaning and purpose of the WWPOL and is contrary to law. Although, like indefinite detention legislation, it has not been challenged on this basis in Australia, the extent to which it may be must be assessed according to text of each statute.[440] Subject to this, in general terms, the legislation operates as a retrospective imposition of increased punishment (i.e. continued involuntary detention in prison) which is not based on a finding of guilt by a court for a new, distinct crime. Further, it is an extension of punishment that is not based on a penalty prescribed for the commission of an offence by law.[441] It offends the principle of personal responsibility (the personality principle)[442] by penalizing an offender due to his/her status rather than any further criminal conduct. Additionally it offends the principle of certainty, the idea, as stated by the HCA, "that is fundamental to criminal responsibility"[443];

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438 *Muldrock v The Queen* 2011, [61] commenting on the Crimes (Serious Sex Offenders) Act 2006 (NSW).

439 *Fardon v Attorney-General (Qld)* 2004 (*Kirby* J dissenting) which dealt with Qld legislation. For critique and comment on this decision see among many references *Keyzer & Blay* 2006, pp. 408–417; *Keyzer* 2008, pp. 101–114; *McSherry & Keyzer* 2009, pp. 44–46; *Freiberg & Murray* 2012, p. 348 especially fn 113–114 for summary of arguments made and rejected in *Fardon*; *Gogarty, Bartl & Keyzer* 2013, pp. 124–135. Particularly, for critique which refers to the WWPOL, see *McSherry* 2005, pp. 107–108; *McSherry* 2006, pp. 269–271. The UN Human Rights Committee has held that the Qld and NSW legislation offends Art. 9 ICCPR; see *Keyzer* 2010, pp. 283–291; *Freiberg & Murray* 2012, p. 348 fns 114–116; NSW Sentencing Council 2012, [4.174, 4.180]; *Gogarty, Bartl & Keyzer* 2013, pp. 130–131; *Harrison* 2013, pp. 152–153. Note also further comment below in this section.

440 For example, the Crimes (High Risk Offenders) Act 2006 (NSW), the scope and operation of which was extended by amendments which commenced in 2013, provides inter alia that at sentence, the court must inform a prisoner of the existence of the Act and of its potential application (s. 25C(1)). Although this provision does not overcome the argument made here that this form of PSPD legislation offends the WWPOL as it amounts to a retroactive imposition of increased punishment, it at least gives notice that this may happen. This concession is, however, hardly consolatory and does not remedy the hypothesis presented here as to the invalidity of the legislation.

441 For similar argument see *Gogarty, Bartl & Keyzer* 2013, pp. 128–129, 132–135.

442 Refer Part 3, 3.1.1.

443 See below 4.

the effect of the legislation is that an offender cannot know at the time of sentence for the offence whether punishment will be extended beyond the date of the expiration of the sentence imposed for it.

These characteristics of the legislation offend the fundamental tenant of the WWPOL that punishment for a criminal offence must be certain: it is the sole preserve of the judiciary and must be based on the commission of an offence contrary to law. *Kirby* J stated this is a constitutional principle when he said, "by Australian constitutional law, punishment … is reserved to the judiciary for breaches of the law."[444]

The articulation of the WWPOL in this context, albeit without specific mention of it, has also been expressed by *Hayne* J who said, punishment "exacted in the exercise of judicial power" for the purposes of the criminal law means "punishment *for* identified and articulated wrong-doing."[445] Thus punishment "is not to be inflicted in exercise of the judicial power except upon proof of commission of an offence."[446] The extension of this aspect of the principle has been stated by *Kirby* J in the following terms:

> *(I)n Australia, judges in federal courts may not normally deprive individuals of liberty on the sole basis of a prediction of what might occur in the future.* Without an applicable anterior conviction *they may not do so on the basis of acts that people may fear but which have not yet occurred.*[447]

These expressions of the WWPOL as a constitutional principle that informs preventive detention legislation reflect *Dicey's* dictum, which, although in a very different context, has been recognized in the HCA:[448]

> *Every citizen is "ruled by the law, and by the law alone" and "may with us be punished for a breach of the law, but he can be punished for nothing else."*

The infringements of the WWPOL arising from PSPD mean that the legislation constitutes a violation of fundamental common law principle, namely the NCNP/WWPOL. In an appropriate case, this could constitute a miscarriage of justice (MOJ) where proceedings are, or a conviction is, based on the violation. In *Lee v*

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444 *Fardon v Attorney-General (Qld)* 2004, [162].

445 *Al-Kateb* 2004, [265] (emphasis in original).

446 *Al-Kateb* 2004, [265].

447 *Thomas v Mowbray* 2007, [355] (emphasis added).

448 *Polyukhovich v Commonwealth* 1991, p. 609 per *Deane* J; *Lim* 1992, pp. 27–28; see also *Fardon v Attorney-General* (Qld) 2004, [155] per *Kirby* J.

The Queen[449] the violation of a fundamental common law principle relating to the criminal law was held to be, of itself, a ground for finding that there was a MOJ in proceedings with respect to the validity of conduct based on that violation. Here the prosecution (DPP) use of the transcript of proceedings before the NSW Crime Commission was a violation of the fundamental principle of the common law that the prosecution must prove the guilt of an accused person. It was held for this reason that there was a MOJ as there was not a fair trial, and that the conviction should be quashed.

But even if this approach is not followed, there are other arguments that the legislation is invalid. Firstly, following the approach of the HCA,[450] it potentially violates general principles of statutory construction that underpin criminal responsibility, namely the principle of certainty and the principle against retroactivity. As elements of the WWPOL, the violation of these principles means that, by extension, and founded in an approach based on statutory interpretation congruent with that stated by *Williams*,[451] the WWPOL is a foundation for invalidating the legislation. Although this is not the current position of the court as it has not extended the scope of "general principles of statutory construction" to include the WWPOL itself, this argument about the status and application of the principle as a general principle of statutory construction follows from the acceptance by the HCA that its elements, the principles of certainty and retrospectivity, constitute such principles.[452]

Alternatively, but similarly based on statutory construction, the legislation infringes the APOL. Preventive detention legislation operates subject to the APOL and this is done at least through its protection of the right to personal liberty. In *Dodge v Attorney-General (Qld)*[453] it was held that because of this function of the APOL, the right to liberty could not be interfered with by the Qld Act in issue unless clear words permitted it. In the circumstances of this case this was not done by the legislation (referring to the definition of 'prisoner') and therefore it did not permit the accused's preventive detention.[454] More specifically, however, within the context of the WWPOL, PSPD legislation also interferes with another fundamental com-

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449 2014, [32–34, 43, 51]; see for comment on this case Digest of Criminal Law Cases 2014, 255.

450 *Construction Forestry Mining v Mammoet* 2013, [48]; see below 4.

451 Refer Part 3, 1.2.

452 See for further comment below 4.

453 2012, [20–23].

454 See similarly for an example of an application for a preventive detention order under Qld legislation which was refused by the court, *Attorney-General (Qld) v Kanaveilomani* 2013, p. 379 (summary). In this case the application for continued supervision was dismissed as the prisoner was serving a period of imprisonment until 2023, and the application could only be made within six months of that time.

mon law right, the NCNP (the WWPOL), which the legislature has not expressly and unequivocally stated to be abrogated.

Finally, but more controversially, because the argument was rejected by the HCA in *Fardon*, the legislation usurps Ch. III of the Constitution because it requires that the sentencing court exercise non-judicial power in criminal proceedings. Contrary to this proposition, the majority in *Fardon* decided that, although detention proceedings based on the preventive detention legislation in issue were classified as non-punitive preventive detention for the protection of the community, and not as an exercise of "punishment," the order for detention was an exercise of JP and the legislation was compatible with Ch. III of the Constitution.[455] The contrary argument based on the WWPOL to this is, as has been noted above in this section, that punishment "exacted in the exercise of judicial power" for the purposes of the criminal law means "punishment for identified and articulated wrong-doing."[456] Judicial power requires that punishment is founded on the WWPOL: it must be based on a criminal offence that is defined by pre-existing law. By definition, the imposition of continued detention pursuant to PSPD legislation after a sentence has been served is not punishment for a new act of "articulated wrong-doing" or "inflicted … upon the commission of an (new) offence." It is therefore not punishment "exacted in the exercise of judicial power" and cannot be inflicted by a court pursuant to such legislation.[457]

If, as this discussion argues, the WWPOL has a constitutional status and underpins a critique of PSPD legislation, to the extent to which it offends the principle, such legislation is invalid. A narrow interpretation of the scope of constitutional implied due process rights, and particularly the absence of any direct consideration about whether the WWPOL may be included within their limited scope, has so far avoided such a result. The most that can be said at present is that the constitutional status of the WWPOL is not explored or discussed in Australian law. It remains an important issue for further research.[458]

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455 Refer above 3.2.1. It is beyond the scope of this research to expand upon or explore the decision in *Fardon* beyond what is noted here, and above in this section. For the contrary argument to that of the HCA majority in *Fardon* see [147–194] per *Kirby* J; see also *Freiberg & Murray* 2012, p. 348. The issue of PSPD as an exercise of JP is the subject of analysis by *Stellios* 2014. For summary of this analysis, and comment, see below Appendix.

456 *Al-Kateb* 2004, [265].

457 See *Fardon v Attorney-General* (*Qld*) 2004, [162] per *Kirby* J.

458 See Part 6, 2.2 point 5.

4. The presumption against retroactivity[459]

Australian law recognizes the existence of a "general principle against retroactive municipal criminal law."[460] The principle has important consequences. Legislation that operates retroactively by imposing criminal liability and punishment for conduct that was not criminal at the time of the conduct may be held to be invalid. Whether it is or not, is a matter of statutory interpretation.[461] Further, a criminal charge that does not disclose an offence which is known to law at the time of the offending conduct cannot be "cured" by a retrospective change of the law either through legislation or a "new" interpretation of the common law, made before the charge is laid, and therefore may be quashed.[462] This position of the law however has not been attributed in Australia to the WWPOL, but rather to the 'presumption against retroactivity' (PAR) without acknowledgement that the presumption, or principle against retrospectivity, as it is often referred to, is an element of the WWPOL.[463]

In separate opinion members of the HCA have argued, without reference to the concept of the WWPOL, that retroactive criminal law is unconstitutional. In *Polyukhovich v Commonwealth*[464] *Deane* J and *Gaudron* J argued that retroactive criminal legislation amounts to a usurpation of Cth judicial power and violates Ch. III of

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459 See for discussion and elaboration of all the following in this section *Cumes* 2015, pp. 89–90.

460 *Minister for Home Affairs v Zentai* 2012, [32] per *French* CJ. For earlier comment in the HCA on the invalidity of retrospective criminal legislation see especially *Polyukhovich v Commonwealth* 1991, pp. 607–614 per *Deane* J; pp. 687–688 per *Toohey* J; pp. 706–707 per *Gaudron* J; see now on the PAR in Australian law, *Toole* 2015; ALRC 2015, 1.52–1.55, and Ch. 13.

461 See the following discussion of *DPP (Cth) v Keating* 2013.

462 See for this approach *Heydon* J [68, 163] and *Bell* J [166] in: *PGA v The Queen* 2012. They each held that the executive (prosecution) act of the laying of a charge of rape disclosed an offence that was not known to law at the time it was allegedly committed. It follows in their opinion that the charge was unlawful and should be quashed. Their decision focuses on the executive act of the validity of the laid charge, not retrospective legislation. Their lengthy reasons as to why the charge could not be "cured" are based on fundamental common law principle which is associated with the WWPOL; refer above 3.1. The majority opinion in this case did not dispute the position of the law posited by *Heydon* J or *Bell* J. They held that the charge was lawful because it was not contrary to the common law as it existed before, and at the time of the conduct: the (common) law did not at this time recognize a defence of spousal immunity to rape. For this reason they said that their judgment did not constitute a "retrospective variation or modification … of a settled rule of the common law" and accordingly there was no violation of the retroactivity principle [18]; see *Toole* 2015, p. 299.

463 See for confirmation of this current position of the law *DPP (Cth) v Keating* 2013; refer Part 3, 2.

464 1991, pp. 607–614 per *Deane* J; pp. 706–707 per *Gaudron* J.

the Constitution. *Deane* J argued that the effect of this is a breach of the separation of powers doctrine because it offends Ch. III through parliamentary use of judicial power. Thus he adopts a constitutional foundation for the invalidity of retroactive criminal legislation. The HCA however has not stated a definitive position on this issue. An opportunity to do so was raised in *DPP (Cth) v Keating*[465] however the court chose not to answer the question. On this occasion the HCA said that because of the decision it made in relation to the first question in this case (i.e. the legislation in issue did not operate to create the offence), the "constitutional" question did "not arise."

This result of this ambivalent approach of the court is that, rather than dealing with retroactive criminal law as an element of the WWPOL with constitutional associations, Australian law deals with its validity as an issue of statutory interpretation. Parliament has the power to create criminal laws which have retroactive operation.[466] The presumption against retroactivity operates however as a "sub-principle" of the fundamental common law principles presumption, the APOL,[467] to circumscribe this power unless the intention of the legislation to operate retrospectively is expressed clearly and unambiguously.[468] Several cases associated with the criminal law demonstrate that where this standard has been satisfied, the legislation is valid, and it has been upheld against challenges to it.[469] Although not strictly concerned with the criminal law, the approach of the courts is demonstrated in *Plaintiff M68 v Minister for Immigration*[470] where the HCA held by a majority of 6-1 that the retrospective migration legislation in issue was valid. The issue was stated succinctly by *Gageler* J:

> *The procurement of the plaintiff's detention … was therefore beyond the executive power of the Commonwealth unless it was authorised by valid Commonwealth law. Before 30 June 2015, there was no applicable Commonwealth law. On that day … s 198AHA was inserted with retrospective effect to 18 August 2012. It is necessary now to turn to consider the operation and validity of that section.*

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465 2013, [11, 51–52].

466 *R v Kidman* 1915, confirmed by the majority in: *Polyukhovich v Commonwealth* 1991; see particularly pp. 534–536 per *Mason* CJ; pp. 642–643 per *Dawson* J. On the following in this section see generally *Pearce & Geddes* 2011, [9.18, 10.9–10.12]; *Toole* 2015, pp. 291–296.

467 Refer Part 2, 1.4 & 1.5.

468 *Williams* 1961, p. 580; see *Victrawl v Telstra* 1995, pp. 622–624 per *Deane, Dawson, Toohey & Gaudron JJ*; *Australian Education Union v General Manager* 2012, [30]; *Faheem Khalid Lodhi v R* 2006, [22–29].

469 See for example, *Hamzy v Commissioner of Corrective Services* 2011, [139–146]; *Bell v Police (SA)* 2012, [6–9, 23–48]; *WBM v Chief Commissioner of Police* 2012, [64–75]; *Duncan v ICAC* 2015.

470 2016; see for the following quotation *Gageler* J, [175].

Gageler J held this section to be valid.[471] His reasoning with respect to this is based on the construction of the section which, he held, gave statutory authority for the conduct in issue.

The leading authority on the statement of the common law principle against retroactive legislation is *Maxwell v Murphy*:[472]

> *The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.*

In the same vein, *Deane* J in *Polyukhovich v Commonwealth* said:[473]

> *Prima facie, the relevant substantive law for determining rights and liabilities is the law which operated at the time of the circumstances from which those rights and liabilities are alleged to arise. Thus, it is a* rule of construction *that it is to be* presumed *that it was* not *the legislative intent that a statutory provision which affects rights or liabilities should operate retrospectively.*

This traditional approach of the law to retrospective legislation has been confirmed by the HCA, and, in the criminal law, extended in terms that are synonymous with an approach founded in the WWPOL and *Williams*' opinion of its application in common law systems where it is not an express provision of the Constitution. In these circumstances, the WWPOL and the PAR operate, as *Williams*[474] notes specifically with respect to the WWPOL, as common law principles which require that courts interpret criminal legislation restrictively according to their conditions.

This conclusion with respect to the WWPOL, as an extension of the analysis of the PAR, follows from the joint judgment of the HCA in *DPP (Cth) v Keating*.[475] In

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471 2016, [176–185]; see similarly *Keane* J [264]; only *Gordon* J held the section is invalid, [388–403]; refer Part 6, 2.3.

472 1957, p. 267 per *Dixon* CJ, noted in: *DPP (Cth) v Keating* 2013, [40] fn [27]; see also e.g. *WBM v Chief Commissioner of Police* 2012, [67], adopting this authority for the description of the "presumption against retrospectivity." For this statement see also *Chang Jeeng v Nuffield* 1959, pp. 637–638 per *Dixon* CJ, noted among many references in: *Australian Education Union v General Manager* 2012, [26–27]. For an examination of the scope of the principle with respect to statutes that affect judicial decisions see this case, [33–35, 50, 74–87].

473 1991, p. 608 per *Deane* J. (emphasis added).

474 Refer Part 3, 1.2.

475 2013. This case is posited here an example of *Williams*' approach to the application of the WWPOL.

this case the court held that a provision that was deemed by the Cth parliament to have retrospective application to a criminal offence was invalid to the extent to which it purported to apply to conduct that occurred before it came into force.

The section in issue, s. 66A(2) Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011 (Cth) received Royal assent (came into force) on 4 August 2011. Schedule 1 of the Act provided however that, "s. 66A applies to an event or change of circumstances that occurs on or after 20 March 2000."[476] The offence alleged against the accused was that between 2005 and 2009 she obtained a financial advantage from the Cth knowing or believing that she was not eligible to receive it, pursuant to s. 135.2(1) Criminal Code (Cth). The court noted that s. 66A was an example of a "statutory fiction."[477] It said:[478]

> *A clear statement of legislative intention is required before the courts will find that liability for a serious Commonwealth offence is imposed by means of a statutory fiction. The ascertainment of such an intention proceeds by the application of well-understood principles.*

The references noted by the court for this statement (footnotes [33 & 34]) imply the APOL without directly saying so, but the reference for the "well-understood principles" is the standard principles of statutory interpretation including fairness, not the APOL.

The decision is based on the interpretation of sections ss. 66A and 135.2(1), together, critically, with the interpretation of s. 4.3 *Criminal Code* (Cth). The court held that s. 4.3(b) was not silent as to the time at which it operated, and that it imposed an obligation on the accused in respect of "the failure to act where there is a *presently* existing legal duty to act."[479] This section confined criminal responsibility "to the failure to do a thing that *at the time of the failure* the law requires a person to do."[480] In this case, at the time of the conduct which gave rise to the charges against the accused, there was no law that imposed a legal duty on her to inform the authorities of a change in her circumstances. As s. 66A(2) came into force after this time, it could not operate retrospectively to impose that obligation and make the failure to perform the duty, an offence.

This decision of the court is clearly based on an approach founded on statutory interpretation. The court importantly however supported this approach by recogniz-

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476 2013, [5].

477 The court [46–47], noted the discussion of this concept in: *Hunter Douglas v Perma Blinds* 1970, pp. 65–66 per *Windeyer* J.

478 2013, [47].

479 2013, [49] (emphasis added).

480 2013, [49] (emphasis in original).

ing that the construction of criminal legislation is based on fundamental legal principle and, particularly in this case, a rationale that is based on the principle of certainty. The importance of certainty in the application of the criminal law was previously stated by the HCA in *Taikato v The Queen*[481] and affirmed in *DPP (Cth) v Poniatowska:*[482] According to the court, noting *Williams*, the principle is[483]

> *an idea that is fundamental to criminal responsibility: that the criminal law should be certain and its reach ascertainable by those who are subject to it.*

In *Construction Forestry Mining v Mammoet*[484] the court noted that this statement of the principle of certainty is a "general principle of statutory construction" that applies to the imposition of both criminal liability and civil penalties.

Significantly, the certainty principle is directly related to the PAR. The relationship between these principles, the foundations of which were recognized and discussed by *Heydon* J in *PGA v The Queen,*[485] was affirmed in *DPP (Cth) v Keating*, where the court stated that the certainty principle and rationale upon which it is grounded[486]

> *underpins the strength of the presumption against retrospectivity in the interpretation of statutes that impose criminal liability.*

This identification of the relationship between the principles of certainty and retroactivity is important for understanding the scope and function of the WWPOL. Although it does not explicitly say so, the HCA accepts that – where the text and structure of criminal legislation, as a matter of construction require – the WWPOL, by way of its elements of certainty and the PAR, is an operative principle that underpins statutory interpretation. In this sense it operates in the terms described by *Williams*, noted above, as a principle that imposes a set of conditions for the interpretation of criminal legislation. This conclusion is supported by the confirmation by the court that the principle of certainty, an element of the WWPOL, is a "general principle of statutory construction."

The failure of the HCA in this context to explicitly state that the WWPOL is the underlying principle which informs this approach to statutory construction of criminal legislation, despite its acknowledgement of the source of its analysis in *Wil-*

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481 1996, p. 465, noted in: *Beazley & Pulsford* 2015, pp. 164–165.

482 2011, [44].

483 2013, [48], noting *Williams* 1961, pp. 579–580, fn [36].

484 2013, [48] noting *DPP (Cth) v Keating,* fn [23].

485 2012, [129] where he articulates the relationship between the principle of certainty and the PAR; refer Part 3, 3.2.

486 2013, [48].

liams, is consistent with the non-recognition of the use of the term in Australian criminal law. Notwithstanding this absence of explicit comment, it follows from the court's recognition of the importance of the principles of certainty and retroactivity that the WWPOL is a recognized principle of Australian law and that it has a critical role in the interpretation and application of criminal legislation.

Appendix

Analysis and comment on *Stellios, J.* (2014): Kable, Preventative Detention and the Dilemma of Chapter III. ALJ 88/1, pp. 52–70 (numbers in the following refer to page numbers in this article)

This article examines the decision in *New South Wales v Kable* 2013 (referred to as *Kable 2*). It argues, although it is not clear in the plurality judgment (53, 56, 69), that in this case the HCA "re-conceptualized" (60) the exercise of power in *Kable 1* as an exercise of judicial power, and that the HCA now regards the power to make a preventative detention order as being judicial in character (56, 57, 60, 66, 69). In this regard, the judgment of *Gageler* J is the most clear: the power exercised by *Levin* J in *Kable 1* was judicial in nature (57). This position is different from the formulation of the *Kable 1* power in *Fardon* where the court considered that the power exercised in *Kable 1* was non-judicial (60).

The core issue that the article raises in this context is whether preventative detention legislation could be enacted by the federal parliament (53). It could only do so if it constituted a federal 'matter' and it could only do this if it involved an exercise of judicial power (56). Parliament cannot confer non-judicial powers on federal courts (the *Boilermakers* principle, 62). On this issue there are two competing positions in the HCA following *Fardon* (namely of *McHugh* J and *Gummow* J) and there was "no majority view … as to whether a preventative detention power could be given to a court by the federal parliament" (59–60).

The decision in *Kable 2* however adopts the view of *McHugh* J in *Fardon* over that of *Gummow* J (69–70) and therefore suggests that preventative detention legislation could be promulgated by federal parliament. It extends the decision in *Fardon* which established that preventative detention regimes could be enacted by state parliaments (69), and from which it was unclear (because the case was not concerned with it) as to whether federal parliament could enact such legislation (70). Thus *Kable 2* "opens the door for federal preventative detention regimes provided they are drafted in a way to preserve the judicial process" (70).

Despite this, the article argues "there are difficulties in trying to support the view that preventative detention involves an exercise of judicial power" (65). This opinion supports the approach set out above at 3.2.4 that PSPD legislation confers non-judicial powers and therefore cannot be exercised by federal courts. The article notes however that the current approach of the HCA, in *Kable 2*, is that such legis-

lation invokes the exercise of judicial power rather than non-judicial power. The article also confirms, whether it invokes judicial or non-judicial power, state PSPD legislation is valid (this is the result of *Fardon*).

The argument of this research is that *Fardon* is wrong and that the WWPOL is one further untested approach that supports that argument. The conclusion of this article, that *Kable 2* is authority for the proposition that preventative detention legislation invokes the exercise of judicial power, creates a further impediment for my argument. However the conclusion in *Kable 2* is inconsistent, in my view, with the nature of judicial power as that concept is informed by the WWPOL. This is therefore a further reason why the conclusion of *Kable 2* is unsound.

Part 5

The Application of the World-wide Principle of Legality in Australian Criminal Law

1. Introduction

The fundamental proposition of the WWPOL that crime and punishment must be based on pre-existing law establishes it as a necessary foundational principle of Australian criminal law.[487] In common law systems such as Australia, apart from specific legislation such as that noted above, the WWPOL is articulated and developed through the process of case law, or common law.[488] *Hall* argued that, "there is a vast body of case-law which defines criminal conduct. It is highly probable that this renders the principle of legality much more effective than does the generality of codes." He gives as an example, the development of law with regard to offences of acting in a manner contrary to public decency and the refusal of case law to follow the decision in *R v Manly*[489] by imposing "definite limitations" (of certainty and strict construction) on penal statutes.[490]

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487 See for discussion and elaboration of this and all the following in this part *Cumes* 2015, pp. 94–99.

488 See for this argument, and the following quotation *Hall* 1960, p. 52, referring to America and England. See also for overview of the importance of the common law as a source for limiting judicial extension of criminal law *Williams* 1961, pp. 592–600.

489 1933.

490 *Hall* 1960, p. 53. *Williams* 1961, pp. 596–600 also discusses this case in the context of the WWPOL. However, two years after the publication of *Hall* 1960, and one year after *Williams*, the decision of *Shaw v DPP* 1962 reversed the trend of decisions for which both authors argued; see for overview *Fitzgerald* 1962, pp. 8–10, 171. This decision was rejected some years later, restoring *Hall's* faith in the common law; see *Williams* 1983, p. 7, and the revised edition of this work, *Baker* 2012, [7] which notes further that "the courts have neither the power to invent or abrogate offences" noting *R v Rimmington* 2006. It is recognized in the UK that the power to change the law, as a power that can only be exercised by Parliament, is grounded on "fundamental constitutional principles," *Nicklinson v A Primary Care Trust* 2013, [154–156]. For comment on, and critique of *Shaw,* and that it no longer represents the law, see inter alia *PGA v The Queen* 2012, [141–150, 156] per *Heydon* J. Significantly, the WWPOL has figured importantly in the critique of *Shaw* and the subsequent direction of the law; see for overview *Bronitt & McSherry* 2010, [8.135].

Whether through the common law or legislation, however, the WWPOL is articulated in Australian law in a piecemeal way: it is established by discrete provisions, rules, principles and presumptions, as well as processes of the criminal law. The extent to which case law and legislation state, implement and develop the principle in Australian law has not been articulated and constitutes an important issue of the WWPOL that requires further argument, research, and development.

This section of the research notes the issue of the implementation of the WWPOL through its four elements as an example of this proposed analysis. Through a number of case examples, it suggests an alternative approach to the resolution of criminal law cases that may be based on the WWPOL. The intention of this section is to posit how the criminal law concept of the principle informs, or may inform, a range of criminal law circumstances, and to suggest some issues which may inform the scope of future research and the application of the WWPOL in practice.

2. The four elements

The four elements of the WWPOL are established principles of Australian criminal law. There is however little, or no articulation, of their identification with the WWPOL. Rather, like the *lex praevia* principle, the principle against retroactivity, noted above,[491] each of the elements of the WWPOL is discerned through examination and consideration of legal principle, and analysis and interpretation of legislation and case law which does not in any specific terms refer to them as elements of the WWPOL.

The principle of *lex scripta* is exemplified by the codification of offences and penalties in the code jurisdictions and, in the non-code jurisdictions, the consolidation of crimes and punishment in legislation with the concomitant diminishment of the scope of common law offences and penalties. This movement is underpinned by the clear recognition that it is for Parliament to create criminal offences and determine punishment for them, not the courts.[492]

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491 See Part 4, 4.

492 See footnote above for comment with respect to English law. For Australian law, see particularly *PGA v The Queen* 2012, [125–162], especially [129–145] per *Heydon* J; *Magaming v The Queen* 2013, [104] per *Keane* J. Among other comments on the absence of criminal law-making power of courts, see *PGA v The Queen* 2012, [242] per *Bell* J: it is for Parliament to determine that a rule or exemption from criminal liability is no longer suited to the needs of the community; see also *Khazaal v R* 2013, [84]: "Where a court's powers are confined to those conferred by the parliament, the community must look to the parliament, and not the court, to address any anomalous want of power." Specifically with respect to the power of courts to retrospectively change the law see *Likiardopoulos v The Queen* 2012, [43] per *Heydon* J: "To alter the criminal law retrospectively and adversely to the interests of accused persons is a course not open to the courts, only to the legislature." This extends to defences as well as to of-

This position of the law is demonstrated in the observation that:[493]

> *Although the criminal law initially developed as part of the common law it must now be viewed as primarily the province of the Parliament, both to define the conduct which will constitute an offence and the parameters within which an appropriate penalty for that offence may be determined by a court. It cannot be doubted that Parliament can fix the maximum penalty which may be imposed.*

The exclusion of courts and case law as a source of criminal law-making, as opposed to their legitimate role in its development and interpretation, is recognized, albeit in differing degrees, across the common law system and indeed worldwide.[494]

The principle of *lex stricta* is incorporated into Australian law through the application of the principle of strict interpretation of criminal offences.[495] It is also incorporated by the fundamental common law principles presumption, the APOL. As noted in Part 2 of this research[496] the APOL has particular application in the criminal law and operates to preserve common law principles and the common law criminal justice system from legislative interference by requiring a narrow interpretation of criminal legislation. It accordingly operates within the criminal law as a limiting principle, and in doing so, gives effect to the *lex stricta* principle.

Lex certa is underpinned by written criminal law (*lex scripta*) and the *lex stricta* principle, through the principle of strict construction of penal statutes.[497] This principle has, however, other important foundations in Australian law which are associated with the common law principle that governs the formulation of charges, namely that offences and penalties upon which charges and criminal law processes

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fences. Thus courts should not make retrospective changes to the criminal law by abolishing defences, *PGA v The Queen* 2012, [135] per *Heydon* J. For academic commentary on the absence of criminal law-making power in the courts see *Fairall & Yeo* 2005, [1.16] noting *R v Isaacs* 1996, pp. 523–524; *Bronitt & McSherry* 2010, [8.135]; and *Bagaric* 1993, [9.1.70] both noting *R v Rogerson* 1992, p. 305 per *McHugh* J.

493 *Karim v R* 2013, [129] per *McClellan* CJ at CL, who continued: "If Parliament can provide the maximum penalty I would presently be inclined to the view that it may also provide the minimum penalty which may be imposed."

494 *Gallant* 2009, p. 35. Only in Scotland does the High Court claim the declaratory power to create new law, see *Haveman* 2003, p. 41; *Ashworth & Horder* 2013, p. 58. For broader argument that "there is some uniformity worldwide … that judicial decisions are not a legitimate legal source for creating criminal norms" see *Hallevy* 2010, p. 41.

495 For overview and operation of the principle in Australian law see *Pearce & Geddes* 2011, [9.8–9.14]; see for confirmation of the principle *Monis v The Queen* 2013, [59] per *French* CJ.

496 Part 2, 1.6; see also Part 1, 1.

497 *Haveman* 2003, p. 48.

are founded must be stated with certainty and clarity. This is regulated through the 'charge document'. The nomenclature used for this document in Australian criminal law varies between the jurisdictions, however in general it is referred to as an 'indictment' for an indictable offence, or as an 'information', 'complaint' or 'court attendance notice' for summary offences.[498] The charge document establishes the jurisdiction of the court to deal with the charges against an accused.[499] It is a written document, given to the accused, which contains a statement of the offence, and has the distinct functions, founded in common law and legislation, of notifying the accused of the charge, defining the issues to be prosecuted and creating a record for subsequent proceedings.

In these functions, the charge document operates as an important safeguard for ensuring that the accused clearly understands the charge alleged and that he/she has an opportunity to answer it with certainty and without confusion.[500] Unless the charge document is valid, including with respect to the time period (with respect to summary or minor offences) in which it must be filed, there cannot be a valid trial, verdict or sentence.

These characteristics of the charge document underpin important rules of the criminal law, particularly the rule against duplicity and the requirement that the charge document must identify all of the essential factual elements of the allegation against the accused. The rule against duplicity prohibits a single count in a charge document that charges a person with the commission of more than one offence.[501] The object of the rule is that there should be certainty with respect to the offence charged.[502] If an accused is convicted as a result of duplicity, the conviction is set aside as being uncertain, as he/she could not know of the charge upon which the conviction is grounded.[503] The rule against duplicity is associated with the requirement that the charge document must identify the essential factual elements of

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498 See for overview generally of the meaning and importance of the charge document *Hunter, Cameron & Henning* 2005, [13.12–13.22].

499 *John L v Attorney General (NSW)* 1987, p. 519.

500 *Busby v Burrow* 2012, [71].

501 *Walsh v Tattersall* 1996; *DPP (UK) v Merriman* 1973, p. 607.

502 *Chapman v R* 2013, [19].

503 See for overview, *Hunter, Cameron & Henning* 2005, [13.31–13.36].

the allegation.[504] This is reflected in the proposition, which underpins the prosecutor's duty of disclosure[505], and is founded in the principle of fair trial,[506] that[507]

> *(t)he law requires that a defendant in criminal proceedings be told of the legal nature of the alleged offence and of the particular act, matter, or thing alleged to be the foundation of the charge.*

These elements of the *lex certa* principle underpin critical requirements of the common law. Firstly, it follows from the requirements of the charge document, that the charge must disclose an offence known to, and punishable by, law.[508] It must be based on a statutory or common law offence and the statement of the offence in the charge document must precisely replicate the terms of the offence. Secondly, subject to few exceptions in the common law, the punishment that may be imposed on an offender must have a statutory foundation and a court cannot impose a penalty unless it is grounded in a pre-existing legislative provision which authorizes it.[509] This principle of the law is founded in the proposition:[510]

> *A court that derives its power exclusively from statute cannot supplant the statute with its own sense of what should be done.*

Failure to comply with any of the requirements of *lex certa* is not a mere technical infringement of the law. It is regarded as fundamental, with the result that the

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504 See for discussion of the law and authorities, *Faheem Khalid Lodhi v R* 2006, [78–104] per *McClellan* CJ at CL, noting especially *John L v Attorney General (NSW)* 1987, pp. 519–520 and *Johnson v Miller* 1937, p. 489; see also *Kirk v Industrial Relations Commission* 2010, [14, 26]; *Walker Corporation v Director General* 2012, [16–17] per *McClellan* CJ at CL; *Construction Forestry Mining v Grocon* 2014, [301]; *Hunter, Cameron & Henning* 2005, [13.23–13.30].

505 See for overview of the principles, *R v Lipton* 2011 noting in particular that the duty of disclosure of the Crown or prosecution is grounded in the duty to act fairly and accordingly, the principle of fair trial. For comment that the obligation of the prosecutor to disclose relevant material in its possession to an accused is fundamental see *R v Cannon* 2013. Accordingly, the effect of breach of the duty to disclose can be a miscarriage of justice and lead to a quashing of an accused's conviction, *TWL v The Queen* 2012, [54].

506 *Lee v New South Wales* 2013, [190] per *Kiefel* J.

507 *Walker Corporation v Director General* 2012, [16].

508 See *Fairall & Yeo* 2005, [7.20] noting *R v Mai* 1992, pp. 377–378; see for consideration and application of the principles which inform this proposition *Tonari v R* 2013.

509 See for formulation of the principle *Whan v McConaghy* 1984, p. 635, the principles of which are noted and applied in: *R v Hall* 2004, [28–49] and *Khazaal v R* 2013, [78–84]; see further *Magaming v The Queen* 2013, [47].

510 *Khazaal v R* 2013, [84].

charge or punishment is of no effect and may be quashed, as it does not disclose an offence, or impose a penalty, that is known to law. These legal requirements demonstrate that Australian law with regard to charging, prosecution and punishment of accused persons is founded in the *lex certa* principle and the WWPOL: crime and punishment must be based on law and the elements of the charge and its penalty must be stated with certainty.[511]

Notwithstanding this grounding of the law, these principles of the law have not been attributed to the WWPOL and it has not been explicitly stated or recognized in Australian law in this context. Rather, this position of the law is grounded in the requirement that a charge must disclose an offence known to law, and is associated with the quashing of a conviction due to a miscarriage of justice (MOJ). The operation of the concept of MOJ and its association with the WWPOL can be examined through case studies. The way in which the concept of 'an offence known to law' operates, and an alternative approach to it founded in the WWPOL and the *lex certa* principle, is also demonstrated by the case studies that follow.

3. Relationship to the concept of miscarriage of justice

Where a conviction is founded on an offence that an accused could not have, in law, committed, it may amount to a MOJ. The multiple circumstances in which this may occur is beyond the scope of this research.[512] With respect to the certainty of the charge document and the specific offence of which the accused is convicted on the basis of it, a MOJ may occur if he/she pleads guilty to an offence which, as a matter of law, he/she could not have been convicted if there had been a trial.[513] Framing this argument in terms of the WWPOL, it is contrary to the principle to convict in circumstances where an accused pleads guilty to offences of which he/she could not in law be convicted. There is no crime in such circumstances and thus any conviction is contrary to law. It follows that any punishment imposed would also be contrary to law. The pleas of guilty are contrary to the WWPOL because there was no crime with respect to the offence(s) to which they were made. The effect of such a determination for the purposes of the law is that this breach of the WWPOL amounts to a MOJ and the convictions and punishment based on it are quashed.[514] This however is not how the decision in such cases is stated in Australian law. In *Beqiri* for example, there is no reference to the WWPOL/NCNP as being the foundation for the MOJ. The decision is based on the finding that the accused could not have been convicted in law of the charge to which he pleaded

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511 *Ambos* 2006, p. 21 refers to the *lex certa* principle as requiring "certainty of the elements of the offence"; see similarly *Haveman* 2003, p. 40.

512 See inter alia on the concept of MOJ, *Weiss v The Queen* 2005; *Lindsay v The Queen* 2015, [43, 86].

513 See e.g. *Beqiri v The Queen* 2013, [38–45].

514 See *Bequiri v The Queen* 2013, [46].

guilty, and this grounds the MOJ. That the principle of law that underpins this is the WWPOL is not stated.

Mehajar v The Queen[515] is grounded in similar considerations. Here a direction was given to the jury that on the evidence presented they could convict of a charge for which the accused was not indicted. It was held this was a MOJ because the jury had considered the accused's guilt or innocence for an offence that he was not actually charged with, and alternatively did not consider his guilt or innocence for the charge with which he was indicted. In terms of the WWPOL, the accused was convicted for a crime for which he was not in fact charged, even as an alternative offence. Accordingly, there was no pre-existing stated crime with respect to the accused's conduct that could found a conviction. The conviction offends the *lex certa* principle.

4. Relationship to the concept of 'an offence known to law'

There is a "constant trickle" of cases in the HCA that are based on "charging irregularities" which deal with the validity of the charge and, whether as a result of an invalidity, the charge or penalty should be quashed on the basis that it does not disclose an offence known to law.[516] Although the core issue in these cases is the *lex certa* principle, namely that the offence must be stated clearly and with certainty, and this must be reflected in the charge document which states an offence known to law, these cases have not been decided by an approach based on this principle or the WWPOL.

Rather, the general approach of Australian law to these cases is that these issues are governed by the law of statutory interpretation, and common law principle, which is sometimes noted or, often, merely implied. This approach is demonstrated by the unanimous decision of the HCA in *Muslimin v The Queen,*[517] and other HCA judgments. Despite this approach, in each of these cases the WWPOL states a universal principle of law that underpins the judgments and provides a foundation for their legitimacy. It states a rationale that legitimates why the charge in such cases is invalid. Although the principles of law relied on in the circumstances of such decisions actually inform the operation of the WWPOL, and in this sense operate as sub-principles of it, the WWPOL itself is not mentioned. This absence of any acknowledgment of the WWPOL by the HCA underscores the position of Australian law that its application in such cases remains a matter for further research, exploration and argument.[518]

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515 2014.

516 *Hunter, Cameron & Henning* 2005, [13.3].

517 2010, joint judgement of *French* CJ, *Gummow, Hayne, Heydon & Kiefel* JJ. References in the following section are to paragraphs of this judgment.

518 See Part 6, 2.2 points 1 & 2 for brief comment.

4.1 Muslimin v The Queen

In this case the HCA was concerned with the interpretation of a statutory offence, s. 101(2) of the Fisheries Management Act 1991 (Cth) (FMA). This section provided inter alia that it was an offence to be in possession of foreign boat within the Australian Fishing Zone (AFZ) equipped with nets, traps or other equipment for fishing [5]. As interpreted by the HCA the gravamen of s. 101 was that the alleged illegal activity had to have taken place inside the AFZ in order for an offence to be sustained.

The appellant was indicted for being in possession, at a place in the waters above the Australian continental shelf but not within the AFZ, of a foreign boat equipped with nets, traps or other equipment for fishing for sedentary organisms [1, 4]. The indictment alleged that this was an offence under s. 101(2) FMA and relied on the extended meaning of "fishing in the AFZ" as provided in s. 12(2) [4, 7, 8]. This section stated that provisions in the FMA "made in relation to fishing" in the AFZ extended, to the extent capable of doing so, to fishing for sedentary organisms in or on any part of Australian continental shelf "not within AFZ as if they were within AFZ." Section 4 of the FMA defined "fishing" as one or more forms of identified activity.

The issue that the HCA was asked to consider was simply whether the indictment disclosed an offence [3]. It was, in other words, required to deal with whether the charge document identified and expressed the elements of the offence with which the accused was in fact charged. The appellant argued, relying on its words, that s. 101 FMA did not apply outside the AFZ [2, 3]. He therefore argued that, as the indictment specifically alleged that his conduct occurred outside this zone, no offence was alleged by it and therefore the indictment should be quashed and he could not be convicted. To put this in other words, the argument was that the indictment did not frame a charge known to law – it alleged something for which the law (s. 101) did not provide and which it did not penalize. In this sense the central question was the statutory interpretation of s. 101 and what it requires as a matter of law. The secondary question was whether the indictment provided for this. The HCA accepted the appellant's submission: the indictment did not as a matter of law state an offence known to law [3].

The determinative question for the HCA was how s. 12(2) applied to s. 101, and specifically whether it extended the operation of s. 101 to waters above the Australian continental shelf that were not within the AFZ [4]. This in turn required consideration of related terms which were defined in s. 4 FMA, namely "Australian fishing zone" (AFZ) and "fishing" [4]. Depending on the interpretation of these provisions a determination could be made as to whether s. 101 was a provision made "in relation to fishing" as required by s. 12(2) [13]. The HCA considered that this determinative question was one of statutory construction of the FMA [14] and proceeded to analyse the relevant statutory provisions in accordance with basic

principles of the law of statutory interpretation. Of particular importance for the court in this regard was the "trite" law that the statute must be construed as a whole with proper regard to the context provided by the entirety of the FMA.[519]

The court determined that s. 101 was not a provision directed to fishing. Rather it was directed to the existence of a state of affairs, namely having possession or charge of a particular kind of boat, namely a foreign boat equipped for fishing. It therefore held that s. 101 was not a provision of the FMA "made in relation to fishing in the AFZ" within s. 12(2) and this section did not apply to it. The effect of this finding was that the prosecution could not use s. 12(2) to extend the meaning of conduct that amounted to fishing within the AFZ. The section could not be used to make conduct that was outside of the AFZ into conduct that was within it for the purposes of satisfying s. 101, and it could not support the allegation under s. 101. Accordingly, as submitted by the appellant, the indictment alleged an offence (conduct outside the AFZ) which was not supported by the section upon which the law (the offence in issue) was based. The HCA found therefore that the indictment went beyond what the law alleged as an offence – it alleged an offence which was not covered by the law on which it was supposedly based. In other words, as stated by the HCA, the indictment preferred against the appellant did not disclose an offence known to law [18]. Therefore it was invalid and inoperative as a basis for the operation of the law upon which it purported to be based and it could not found criminal liability or punishment.

4.1.1 Comment

The rationalization of the exclusion of criminal liability by the HCA is an expression of the WWPOL, specifically the *lex certa* principle. It expresses the fundamental proposition of this element of the WWPOL, namely that a criminal offence must be founded on pre-existing, clearly defined law. Law which does not satisfy the fundamental criteria of clarity and precision is invalid as a foundation for establishing criminal liability. Yet, although this is what the HCA means, it is not what it says. The *lex certa* principle is not used as a legal norm, a principle of law, that is relied on for the purpose of legal analysis of this issue. There is no mention of the NCNP or the WWPOL in the short HCA judgment. It is simply not a legal consideration that the court feels compelled by the law to address.

Notwithstanding this, the legal method of the HCA in resolving the issue of this case demonstrates a level of equivalence to the *lex certa* principle which underpins a much broader understanding of a concept of the WWPOL in Australian criminal law. The indictment in this case alleged something (fishing outside of AFZ) that the law in issue (s. 101) did not cover or address. The allegation and the section on

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519 See for comment on this fundamental principle of statutory interpretation e.g. *Spigelman* 2005, p. 772 with references to HCA decisions, p. 773, fn 28.

which it was founded did not disclose an offence that was committed by the appellant. Within the facts of the case s. 101 was not law that was anterior (antecedent), certain, and known. It applied to other factual situations, not to those which related to the conduct of the appellant. It was, whether the approach is based on the interpretative approach of the HCA or on the application of the *lex certa* principle, an invalid law.

Another issue for comment in the context of this case is that of analogy. The principle against analogy is the element of the WWPOL that imposes specific rules of statutory interpretation as a foundation for the validity of criminal legislation. It states that legislation cannot be broadly interpreted to include conduct which is not within its terms: it cannot by analogy be expanded to criminalize conduct which is outside of the conduct which it in fact criminalizes. Whether it does this or not is a matter of interpretation: whether the provision in issue criminalizes, or applies to, the specific conduct which is purportedly covered by it. The HCA gave no consideration in this case to the issue whether the conduct of the appellant could be criminalized by the analogous extension of s. 101 to circumstances it did not specifically address. The core legal function for the court was interpretation of the law in issue (s. 101). Once that had been determined and found to be inoperative to the facts in issue, the legal analysis was concluded. There was not in other words an attempt to use analogy within the terms of s. 101 to find criminal liability. This issue demonstrates an implied application of the WWPOL through the principle against analogy, although there is no mention of it either in the case or in the standard approach to the resolution of similar factual circumstances. Yet the decision and others like it that are founded on 'an offence not known to law' are expressions of the strict interpretation of penal statutes and its corollary, the principle against analogy. In this sense they may be seen as being grounded in the WWPOL.

There is equivalence between an approach, presently followed in Australian law, of deciding the issue of whether an offence is known to law, by following a method of statutory interpretation and measuring it against the wording of the charge document, and that which is founded on the universal meaning of the WWPOL. In both, statutory interpretation is used as the method by which legislation is analyzed and the decision is made, and in both the charge document is invalid if it does not disclose an offence that is covered by legislation. However the rationale and foundation of the determination is subtly different. According to the WWPOL approach, the reasoning of the decision is the WWPOL, the NCNP itself: legislation cannot be interpreted to cover an offence which is beyond its strict terms, and in purporting to do so, an element of the WWPOL is offended. According to the current approach of Australian law, however, the finding based on statutory interpretation operates exclusively and inclusively. Although it is implied in the methodology, there is no structural and foundational approach founded in legal theory that legislation cannot be interpreted to cover an offence which is beyond its strict terms. Rather the legislation is simply interpreted and found to cover the allegation con-

tained in the indictment or not, and this is a question of fact and law. The fundamental legal principle that is offended is that an indictment must state an offence known to law, and this is a common law principle which has its roots in the rule of law. But this is not articulated in the decisions, and the concept of a WWPOL that might inform this reasoning is not mentioned.

4.2 Other cases

4.2.1 DPP (Cth) v Poniatowska[520]

In this case the accused did not inform the relevant authority, Centrelink, of her change of circumstances which would have reduced her welfare payments. She was charged with offences under s. 135.2(1) Criminal Code (Cth) (CCC). This section provides that the offences it covers may be committed by the omission to perform an act, but it did not, at the time of the offending (the section was subsequently amended before the HCA decision)[521] proscribe the omission of any specified act, i.e. it did not make the omission of an act a physical element of the offence within s. 4.3(a) CCC [37].

It was accepted that in these circumstances the failure of the accused to notify Centrelink, the omission, was not one that was specified by existing Cth law as required by s. 4.3. It was outside of both ss. 4.3(a) & (b) because the latter section requires that in order for an omission to act to be implied as a physical element of an offence the law that does so must be Cth law, not a general legal obligation at common law. As the Cth law in issue, s. 135.2(1), did not do this, there was no law that established the act that was omitted to be done [36]. Accordingly, the HCA accepted that the counts against the accused did not disclose an offence known to law [4, 44].

With respect to the interpretation of s. 4.3, the court said that the CCC incorporates the general law principle that criminal liability does not attach to an omission except for the omission of an act that a person is under a legal obligation to perform [29]. Pursuant to s. 4.3 an omission to perform an act cannot be a physical element of an offence unless the law creating the offence makes it so, either expressly (s. 4.3(a)) or impliedly (s. 4.3(b)) [32–33, 35]. This law must be a Cth law. In this sense the CCC adopts a more restrictive approach to liability for omission than the common law. In particular the 'law' to which s. 4.3(b) applies does not include obligations under general law – they must be obligations under Cth law. Thus s. 4.3 does not extend to criminalizing the omission of any act which is able to be causal-

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520 2011, by majority of 4-1, *Heydon* J dissenting. Paragraph references here and in the following cases noted in this section are those of the respective judgment; see for comment on this case, *Geary & Wong* 2012, pp. 80–82.

521 2011, fn 10.

ly related to a result of conduct. It only criminalizes acts that are required to be performed under Cth law [44].

The reasoning of the HCA in reaching this conclusion is based on statutory interpretation – here specifically the interpretation of s. 4.3 and s. 135.2(1) CCC. This is used as the foundation for the finding that the indictment failed to disclose an offence known to law. Specifically, the court held that each count against the accused failed to identify the specific omission to perform an act that she was required by Cth law to perform [36]. In its rationale for this finding the court said that the principles of criminal responsibility in the CCC are based on "the view that the criminal law should be certain and that its reach should be able to be ascertained by those who are the subject of it" [44].[522] This statement reflects the WWPOL as a functioning principle of Cth law that underpins the operation of the CCC. However this is not stated by the court. There is no reference to the WWPOL as a foundation in law for the judgment. Rather the court states a principle that is associated with the WWPOL (such as that at [44]) but doesn't attribute that principle to it: it ignores that the principle it states as a foundation for its judgment is associated with underlying fundamental principle, the WWPOL.

4.2.2 Handlen v The Queen[523]

This case concerned the prosecution of offenders as parties in a joint criminal enterprise proscribed by CCC [1]. However at the date of the appellants' trial, participation in a joint criminal enterprise was not a basis for the attachment of criminal responsibility with respect to a substantive offence under the laws of the Commonwealth [1]. This position of Cth law was amended with the introduction of s. 11.2A on 20.2.2010 [5]. Until then, and importantly, at the date of the trial in this case, however, guilt of a substantive Cth offence could only be established in one of three ways, either by proof of the physical and fault elements of the substantive offence, or by reliance on the doctrine of innocent agency, or by proof that the accused aided, abetted, counseled, or procured the offence [6]. As the prosecution of the appellants was based on a ground other than these, namely participation in a joint criminal enterprise, the prosecution was founded on a basis that was not known to law, or as the court stated, on a basis for which the law did not provide [47]. The court considered that this constituted a departure from the proper conduct of the trial by conferring an evidentiary advantage on the prosecution [3, 42, 47, 51]. It held moreover that this departure was fundamental [3] and constituted a MOJ. Accordingly it ordered that the convictions be quashed and the accused should have a new trial [3, 51].

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522 Refer Part 4, 4.

523 2011, by majority of 6-1, *Heydon* J dissenting.

The reasoning of the court is based on analysis of the charge as measured against the existing law. The pre-existing law did not allow the formulation of the alleged grounds of the offence – the law that was relied on could not do this because it did not exist at the time of the offence. This rationalization of the approach of the court in the WWPOL is however not recognized by the HCA. There is no reference to the principle in the judgment as a foundational principle which underpins its approach to its finding.

4.2.3 Crump v New South Wales[524]

In this case the HCA upheld sentencing legislation that, it was argued, reduced the appellant's eligibility for parole. This legislation was introduced subsequent to the determination of the appellant's adjusted sentence in earlier proceedings, before *McInerney* J, which left his parole eligibility open. The decision of the HCA was based on the interpretation of s. 154A of the new legislation which it held was valid and did not alter or vary the earlier sentencing determination, including the consideration with respect to the possibility of parole. It was held that the sentence by *McInerney* J did not create any right or entitlement in the plaintiff to release on parole, and s. 154A did not therefore impeach, set aside, alter or vary that sentence.[525] The main reason given in the separate judgments of the court was that once the sentence had been imposed the exercise of judicial power was completed and the release of the plaintiff on parole or not became a matter for the executive. Section 154A was directed toward this exercise of power, not that of the judge, and therefore did not interfere with it.[526]

The plaintiff's constitutional argument was noted but dismissed. *Heydon* J noted [68–69], that "the plaintiff argued that it was beyond the power of the New South Wales legislature to enact a law that detracts from a right or entitlement created by a judicial order, or that alters its effect."[527] Like *French* CJ [34], who said "(i)t is not necessary to decide these large questions," he said, "(i)t is unnecessary to decide whether that last submission is correct. Even if it is correct, the crucial question is whether s. 154A altered or varied *McInerney* J's sentence" [69]. He held it did not [73–74].

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524 2012; see Digest of Criminal Law Cases 2013, pp. 9–10 noting the case upheld the power of the executive to determine the release of offender on parole; see also comment by *Freiberg & Murray* 2012, p. 347 regarding the sanctioning of this power generally by the courts.

525 *French* CJ [34], *Gummow, Hayne, Crennan, Kiefel & Bell* JJ [60], *Heydon* J [69].

526 *French* CJ [35–38], *Gummow, Hayne, Crennan, Kiefel & Bell* JJ [60], *Heydon* J [71–75].

527 See also *French* CJ [33].

There is no consideration in the judgments that in adversely changing the appellant's eligibility for parole from that which existed at the time that he was resentenced by *McInerney* J, the new legislation potentially offended fundamental common law principle, namely the principle against retroactivity. It also possibly offended the intent, if not the reality, at least in the circumstances of this case, of the *lex mitior* principle.[528] Whether, with regard to either principle, it did or not, is, as noted in this research, a matter of statutory interpretation.[529] Section 154A should have been considered in these terms because it altered the appellant's legal position from that which existed at the time that the original punishment was imposed. This required acknowledgment of the WWPOL as a working principle of the law and whether because of it, the legislation was an invalid exercise of legislative power. Not only was this not done, but the court also did not consider its own principle, the APOL. This principle, as noted in this research, embraces the principle against retroactivity,[530] and requires consideration of legislation which purports to abrogate or interfere with it. The failure to consider the principle in this case is in contrast to *Pierson*.[531] In his comment on this case *Jowell* notes that Lord *Steyn* held that the "decision to increase the tariff retrospectively – contrary to an earlier indication that the lesser sentence would be imposed – offended the rule of law in its substantive sense."[532] As he observes, Lord *Steyn* held that the POL, referred to by *Jowell* as the "presumption in favour of the rule of law," operated in such circumstances to override the executive decision of the Home Secretary.

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528 See Part 4, 2.

529 See Part 4, 4.

530 See Part 2, 1.5.

531 *R v Secretary of State* 1997, p. 587; refer Part 1, 2.1.

532 *Jowell* 2011, pp. 25–26.

Part 6

Conclusion and Research Issues

1. Conclusion

The WWPOL is recognized internationally and in foreign domestic legal systems as a fundamental principle of the criminal law. In Australia it is recognized in legislation, and, as a fundamental common law principle that is founded in the rule of law. Despite this however, there is no explicit recognition of the term 'principle of legality' as the contemporary meaning of the NCNP.

This position of the law stands in direct contrast to the meaning of the 'principle of legality' developed in modern jurisprudence in the HCA and other superior courts. This construction of the POL is one that equates it with the fundamental common law principles presumption. The result is that in Australian law the POL is defined as an interpretative principle of the law of statutory interpretation that prescribes limits on legislative power with a view to preserving common law principles and the common law system of law.

The problem of incoherence and uncertainty which follows this approach of the law is a central theme of this research. The Australian meaning of the POL is not the worldwide meaning – and this difference needs to be stated. The absence of acknowledgement of the WWPOL as a norm of Australian criminal law – as the principle of legality – undermines its significance as a distinct principle of the criminal law. The result is that it does not have the legislative and judicial recognition, status or wide use and application that it has in other legal systems – or, critically, that it should have in Australian law.

Notwithstanding this, as has been argued in this research, the WWPOL should be recognized as a distinct principle of Australian criminal law. It is the most fundamental principle of the criminal law. Australian jurisprudence, via the concept of the NCNP, has recognized that it has an ancient lineage in the common law, and that it operates as an independent legal norm, establishing the foundations for other criminal law principles and the integrity of the criminal law itself. Furthermore, the principle operates together with other broad legal principle. In determining the validity of legislation, it operates as a general principle of statutory construction together with the fundamental common law principles presumption, the 'Australian

principle of legality,' and consistently with it, is subject to the principle of parliamentary sovereignty. Thus parliament can make law which offends the WWPOL, such as retroactive criminal law; but it is subject to the 'political cost' of doing so. Therefore the WWPOL, like the APOL, is a limit on parliamentary sovereignty but does not subvert it.[533]

These characteristics of the WWPOL indicate that it satisfies the conditions that, in broad terms, are set by Australian law, to determine whether a 'new' or 'novel' law or principle may be adopted, or existing law and legal principles expanded.[534] Accordingly it is open and proper for Australian law, in appropriate cases, to adopt international and foreign practice and jurisprudence with respect to the WWPOL. This could begin with explicit recognition by the judiciary and legislature of the worldwide meaning, elements and importance of the principle, and acknowledgment that these characteristics apply to a concept of Australian criminal law called the 'principle of legality'. The points of reference from which this development of the WWPOL in Australian law might begin, are considered in this research.

2. Research issues

This research has identified and referred to a number of issues for further research, development and argument. These are noted briefly here.

2.1 The Australian principle of legality

This principle, referred to in this work as the APOL, is analysed extensively in Part 2 of this research. Issues for research with respect to it include the following. An important component of this research is the extensive reference to the APOL in ALRC Report 129, 2015. The extent to which the Report refers to issues noted in this research paper is an important reference point for the issues dealt with in Part 2 and the further matters noted here.

- Consideration of the constitutional status of the APOL. See for observation especially Part 2, 1.3;
- The content and extent of common law principles, and especially principles of the criminal justice system, within the scope of the APOL. See particularly Part 2, 1.5;
- The scope of the APOL as a principle that operates in the criminal law, and its relationship to the WWPOL. See especially Part 1, 2.4.

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533 Refer Part 1, 2.4, and Part 3, 3.1.1.

534 See Part 1, 2.5.

2.2 The world-wide principle of legality

With respect to the WWPOL important research issues are focused on its scope and extent of application in Australian criminal law. This comprises:

1. Research that examines the four elements of the WWPOL. Of particular interest in this regard are the following issues:

   - The presumption against retroactivity is not acknowledged in Australian law as an element of the WWPOL. See Part 3, 2. and Part 4, 4.

   - The lex certa principle: analysis of case law where a charge is quashed due to a charging irregularity and where the WWPOL, via *lex certa*, is arguably an underlying reason for the decision. Although the WWPOL is not mentioned in Australian law in this context, case law should be examined using the principle as the underlying premise for research of relevant decisions. Examples of such case law are given at Part 5, 4. where this research sets out an hypothesis of the relationship between the concept of 'an offence (un)known to law' and the WWPOL.

2. Analysis of its four elements raises the broader issue of examination of what, and how, Australian case law might be viewed, analyzed, understood and re-interpreted in terms of the WWPOL.

3. Research that undertakes a comparative analysis of the WWPOL in other legal systems. Some aspects of the WWPOL in South African law are noted briefly in this research, but the law of other important systems for Australia, e.g. the UK, Canada, and USA is not addressed. This comparison of common law systems is important. Generally, this research could commence by reference to the Max Planck Institute (MPI) research on the principle of legality which was undertaken as part of the International Max Planck Information System for Comparative Criminal Law project. This work is published in *Sieber, Forster & Jarvers* 2011 where the broad scope and purpose of the project is also described. This and other publications of the project are now accessible online at http://infocrim.org.

4. Historical research that examines the reception of the WWPOL into Australian law at and after British settlement in 1788. What was the common law with respect to the WWPOL in English law at this time? How was the reception of this law supplemented by received Imperial Statutes? Given that *Blackstone's* Commentaries were published before settlement (refer Part 3, 1.1), why has the WWPOL not featured more prominently in the history and development of Australian criminal law?

These considerations raise the broader issue of the scope and application of Imperial statutes in contemporary Australian law, and the extent to which they articulate the WWPOL, and other foundational criminal law principles. See brief comment Part 4, 2.

Of particular interest in this regard is Magna Carta. The 800th anniversary of Magna Carta 1215, in 2015, has led to a resurgence of interest in it, and this is reflected in contemporary judicial and academic literature. Usefully this analysis deals with the status of Magna Carta in the centuries after it was written, its application in 19th and 20th centuries, its current status in Australian law, and its contemporary legal influence.[535] It does not address the WWPOL in this context. Notwithstanding this, this work forms the foundation for further research which specifically considers the incorporation of the WWPOL into Australian law via the Magna Carta and other Imperial statutes. An interesting project in this regard is the Magna Carta Committee Project of the NSW Law Society whose goal was to "consider preparing a comprehensive catalogue of fundamental rights and freedoms developed and, in the absence of clear legislative language, preserved over many centuries."[536]

5. Research that focuses on the relationship between the WWPOL and the concept of judicial power. Particularly of interest is consideration of whether, due to this relationship, the WWPOL is an implied due process principle, or right, within Ch. III of the Constitution. If so, what are the consequences? This issue is discussed in this research at Part 4, 3.2.2 and 3.2.3. It is particularly raised in the context of post-sentence preventive detention legislation which is discussed at 3.2.4. The validity of this legislation in the context of the WWPOL is an important research issue. As noted in these sections the relationship between the WWPOL and judicial power, and whether the WWPOL may be an implied due process constitutional principle within Ch. III, has not been expressed in Australian law. Whether it is or not is controversial.[537] This research puts forward an opinion. Further consideration is a matter of further research and argument.

An important research issue that is related to this is the constitutional dimension of the principle of liberty and the relationship between this principle and the WWPOL, via the rule of law. This issue is discussed in this research at Part 3, 3.1.1. As common law principles, consideration of the constitutional status of the WWPOL and the principle of liberty is a special, particular instance of the consideration of the broader issue of the constitutional standing of common law principles. This is a particularly important issue in Australian law, consideration of which is now supplemented by ALRC Report 2015.[538] See for reference to this issue, Part 2, 1.3 and 3.2.3.

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[535] See for example, inter alia, *Clark* 2015; *Crennan* 2015; *Spigelman* 2016.

[536] *Browne* 2011, pp. 76–77.

[537] See for general appraisal of constitutionally implied rights *Stellios* 2010, 5.12–5.30.

[538] See especially 2.22–2.29, 2.42–2.50.

2.3 Detention of aliens

A particular issue for the WWPOL, the APOL and Australian law generally is the issue of the application of the APOL with regard to the detention of aliens (non-citizens). The issue of particular concern in this context, indefinite detention, is the subject of recent academic analysis.[539] The APOL rather than the WWPOL is invoked in this area of migration law because the detention of aliens is not seen as an issue of the criminal law, even though the central concern is whether the detention may be a punitive imposition of punishment that arguably offends Ch. III of the Constitution. The result of this approach is that the criminal law principle of legality (the WWPOL) has not been considered as having direct application. However principles shared by the APOL and the WWPOL, particularly the principle against retroactivity where it arises, may be very important in reform and critique of the current law.

The validity of legislation that gives power to indefinitely detain aliens is strongly debated. This is demonstrated by recent comments that *Al-Kateb*, which determined the current law, should not be followed. These matters are extensively addressed in *Burke's* article and are noted only briefly in this comment. Within the context of the APOL as a foundation for this position, *Gummow* J and *Bell* J in *Plaintiff M47 v Director General of Security*[540] suggest that the "principle of legality," here referring to the APOL, could provide support for statutory interpretation of migration legislation that continued detention is a fundamental abrogation of fundamental rights, freedoms and immunities.[541]

Notwithstanding these comments, in *Plaintiff M76 v Minister for Immigration,*[542] the HCA confirmed the authority of *Al Kateb* and declined to overrule it. The position of the court is stated by *Kiefel & Keane* JJ:[543]

> *(T)here is much force in the view of the majority in Al-Kateb that the Act does not leave room for the possibility that an unlawful non-citizen who does not hold a visa, but who cannot practicably be removed to another country because he or she is not yet welcome in Australia, is entitled to be at liberty within the Australian community, either generally or until removal might become practicable. Indeed, with great respect to those who*

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539 *Burke* 2015.

540 2012, [119–120] per *Gummow* J; [532] per *Bell* J.

541 See for analysis of *Al-Kateb*, *Thwaites* 2014, especially Ch. 3 and 3.3 regarding the constitutionality of indefinite detention, and Chs. 4–5 for analysis and critique of *Al Kateb* including comment in *Plaintiff M47*.

542 2013.

543 2013, [189]; and see for their argument [184, 190–199]. For other references in *Plaintiff M76* which confirm the authority of *Al Kateb*, and which note the circumstances in which the HCA may depart from its previous decisions, see *French* CJ, [31], and *Hayne* J, [34–36, 124–125, 128–129].

> *thought otherwise, it is difficult to accept that it is not the better view of the relevant provisions of the Act.*

Crennan, Bell & Gageler JJ, who note the constitutional authority for the decision in *Lim* (see below), agreed that in the present case, the issue that was decided in *Al Kateb* did not arise because on the facts, the case had not reached the same set of circumstances as those in *Al Kateb*.[544]

Burke's article provides a foundation for further analysis and development of these issues. Apart from brief comment, which follows, of the HCA's consideration of the decision in *Lim,* the foundational case in this context, these issues are not developed in this research. See however for reference to this issue, Part 4, 3.2.1 and comments on *Yates v The Queen* noted at Part 4, 3.2.4.

The authority of the decision in *Lim*[545] in relation to the detention of non-citizens has been addressed in recent HCA decisions. The limited scope of the decision was clarified in *Plaintiff M76 v Minister for Immigration* where *Crennan, Bell & Gageler* JJ noted that *Lim* is authority for the proposition that[546]

> *laws authorising or requiring the detention in custody by the executive of non-citizens, being laws with respect to aliens within s 51(xix) of the Constitution, will not contravene Ch III of the Constitution, and will therefore be valid, only if* [noting Lim at p. 33]*: "the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered."*

Subject to such limitations, they stated as a general principle, that[547]

> *(t)he common law does not recognise any executive warrant authorising arbitrary detention. A non-citizen can therefore invoke the original jurisdiction of the Court under s 75(iii) and (v) of the Constitution in respect of any detention if and when that detention becomes unlawful. What begins as lawful custody under a valid statutory provision can cease to be so.*

They concluded:[548]

> *The constitutional holding in Lim was therefore that conferring limited legal authority to detain a non-citizen in custody as an incident of the statutory conferral on the executive of powers to consider and grant permission to remain in Australia, and to deport or remove if permission is not granted, is consistent with Ch III if, but only if, the detention*

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544 See for this discussion *Plaintiff M76* 2013, [137–149].

545 *Chu Kheng Lim v Minister for Immigration* 1992.

546 2013, [138].

547 2013, [139] (references omitted).

548 2013, [140].

> *in custody is limited to such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to those purposes.*

Lim was also considered in *Plaintiff M68 v Minister for Immigration*[549] where the HCA said:

> *The principle established in Lim is that provisions of the Migration Act which authorised the detention in custody of an alien, for the purpose of their removal from Australia, did not infringe Ch. III of the Constitution because the authority, limited to that purpose, was neither punitive in nature nor part of the judicial power of the Commonwealth. As a general proposition, the detention in custody of a citizen by the State is penal or punitive in character and exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt [14]. A qualification to this proposition is provided by the recognition that the Commonwealth Parliament has power to make laws for the expulsion and deportation of aliens and for their restraint in custody to the extent necessary to make their deportation effective [15].*[550]

For other references to the discussion of *Lim* and issues noted in this case, see *Bell* J[551] and *Gageler* J whose analysis of executive power and liberty includes consideration of common law principles affecting liberty, especially the application of the principle of habeus corpus.[552] In extensive comment, *Gordon* J also examines the aliens power in the Constitution.[553]

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549 2016, [40]; refer Part 4, 4.

550 References [14] and [15] are to *Lim* at pp. 27 and 30–31 respectively.

551 2016, [78–103] especially [98].

552 2016, [147–175].

553 2016, [375–403].

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This research deals with a topic that has not previously been examined and articulated in depth in Australian criminal law, the principle of legality. Building on the author's previous study, it aims to address this lacuna and demonstrate that despite diverse references to it, the principle has not, in explicit terms, been stated or recognized as a fundamental criminal law principle that is based on the nullum crimen, nulla poena sine lege principle. This ambivalent approach stands in strong contrast to the exhaustive and long-standing articulation of the principle in other legal systems and in international criminal law.

The work has its genesis in two factors. The author was a contributing researcher on Australian criminal law to the International Max Planck Information System for Comparative Criminal Law project. The discovery and realization, reflected in the paucity of the law and literature, that the principle of legality, the topic of one of the chapters of the research, was almost unknown in Australian criminal law, provoked the need for an in-depth analysis to which this research seeks to contribute. The second factor is that, contrastingly, in numerous decisions over the last decade, the High Court of Australia has articulated a concept of the principle of legality as a principle of statutory interpretation that is distinct from, and not defined by, the nullum crimen, nulla poena sine lege principle. The use of the term in this context confuses its application and origins in the criminal law and creates a problem of legal coherence which needs to be dealt with and clarified.

The purpose of this work is to rectify these shortcomings and formulate a concept of the principle of legality for contemporary Australian criminal law which is grounded in the nullum crimen, nulla poena sine lege principle. It analyses the definition and scope of the principle as a term of statutory interpretation and contrasts this to its meaning and significance within the criminal law, noting possible areas of mutuality. It then explores the existence and status of the principle in Australian criminal law and sets out points of reference that form a foundation upon which the principle might be conceived and adopted as a functional legal norm. Finally, the work identifies a number of areas for further research and analysis.

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