The Principle of Legality: Protecting Statutory Rights from Statutory Infringement?

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Abstract

The principle of legality has been described as a presumption that Parliament does not intend to abrogate or curtail fundamental common law rights, freedoms, immunities and principles (collectively 'fundamental common law protections'), and depart from the general system of law, except by clear and unambiguous language. It is a common law interpretive principle that protects fundamental common law protections from infringing statutes. Nevertheless, a question arises as to whether the principle can and should be extended beyond the realms of the common law, to protect certain statutory rights in Australia. This is yet to be considered at length in academic commentary and is presently unresolved. Such a development would exponentially increase the principle's potential scope of application. This article seeks to examine comprehensively the issue by reference to the principle of legality's origins and rationale, the concept of parliamentary sovereignty and doctrine of implied repeal, and analogous instances where statutory rights are protected through interpretation. This article argues that, on balance, the principle of legality should not be utilised to protect statutory rights from statutory infringement.

I Introduction

The principle of legality is a common law interpretive principle, most frequently associated with the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms and immunities (hereafter referred to collectively as 'fundamental common law protections'), except by clear and unambiguous language. The principle's roots 'lie firmly in the common law'.[1] Several commentators have observed that the principle has sprung from the increasing ubiquity of statutes. The principle was in 'respon[se] to the avalanche of legislation which regulates our conduct'[2] and 'developed … in an age of expanding

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1 Mark Elliott, 'Constitutional Legislation, Fundamental Rights and Article 50' on Mark Elliott, *Public Law for Everyone* (8 September 2016) <https://publiclawforeveryone.com/2016/09/08/brexit-constitutional-legislation-fundamental-rights-and-article-50/>.

2 John Doyle and Belinda Wells, 'How Far Can the Common Law Go towards Protecting Human Rights?' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (1999, Oxford University Press) 17, 18.

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legislative activity, when the proliferating functions of the State might have inadvertently or benignly impinged on rights'.[3] In recent times, some have gone so far as to describe the principle of legality as a common law bill of rights. For example, it has been said that the principle's 'significance is that in this age of statutes, our courts have developed a common law bill of rights, freedoms and principles that is strongly resistant to legislative encroachment'.[4]

However, with the proliferation of statutes in the contemporary Australian legal system, the 'rights of citizens are as likely nowadays to be founded in statutory statement as in the common law'.[5] This gives rise to the question: can and should the principle of legality equally be applied to protect certain statutory rights? The implication being that a statutory provision could be interpreted restrictively, pursuant to the principle of legality, to prevent it from infringing another statutory provision that confers a right.

This notion is of fairly recent history. The leading Australian authority is the 1996 decision of Finn J in the Federal Court of Australia case of *Buck v Comcare*.[6] Only a few years earlier, prior to his appointment to the Court, Finn had remarked on the 'large encroachment by statute on the traditional domains of the common law'.[7] Finn described how '[f]rom the 1970's we have witnessed the proliferation of statutes which have entrenched directly upon areas of governmental, commercial and social life which for the most part were regulated, if at all, by common law doctrines'.[8] He was also cognisant of the 'reaffirmation'[9] of the common law principle of legality.

Likely inspired by the above trends, in *Buck* Finn J enlarged the principle of legality's protective scope to encompass statutory rights. That case concerned statutory rights to workers' compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('*SRC Act*'). His Honour said (in obiter dicta):

> That right does not fall into the category of 'common law' rights which traditionally have been safeguarded from legislative interference etc in the absence of clear and unambiguous statutory language … Yet it is a right of sufficient significance to the individual in my view, that, where there may be doubt as to Parliament's intention, the courts should favour an interpretation which safeguards the individual. To confine our interpretative safeguards to the protection of 'fundamental common law rights' is to ignore that we live in an age of statutes and that it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society.[10]

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3 Philip A Joseph, 'The Principle of Legality: Constitutional Innovation' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 27, 31–2.

4 Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36(3) *Sydney Law Review* 413, 415.

5 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 245.

6 (1996) 66 FCR 359 ('*Buck*').

7 Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *Western Australian Law Review* 7, 7.

8 Ibid 11.

9 Ibid 28.

10 *Buck* (1996) 66 FCR 359, 364–5.

The references to '"common law" rights which traditionally have been safeguarded from legislative interference etc in the absence of clear and unambiguous language', and 'interpretative safeguards to the protection of "fundamental common law rights"', are undoubtedly references to what is commonly known as the principle of legality. Justice Finn extended the principle beyond the common law, to protect statutory rights to workers' compensation.

The principle of legality is evolving and growing in scope. While there is some support for extending the principle to protect statutory rights, academic commentary has yet to consider it at length and the issue is presently unresolved in the jurisprudence. This is a topic of much significance and controversy. The extension of the principle of legality to protect statutory rights would represent an immense expansion of the principle, particularly with the proliferation of statutes in modern Australian society as described by Finn J. As to the principle's impact on statutory interpretation, it has greatly risen in prominence in recent times.[11] It has become central to the process of statutory interpretation and been applied quite robustly by the courts.[12] Presumably then, a principle of legality that extends to statutory rights would make it more difficult for Parliament to amend or repeal those rights. The test of clear and unambiguous language for rebutting the principle is 'weighty';[13] it is not of 'a low standard'.[14]

Part II of this article outlines the rationale of the principle of legality. Part III examines Australian commentary and jurisprudence, to ascertain the level of agreement on whether the principle of legality applies to statutory rights and, if so, in what circumstances and to which rights. Part IV discusses whether an extended principle of legality is consistent with the rationale of the principle. Part V examines consistency with the concept of parliamentary sovereignty, including what is commonly described as 'the doctrine of implied repeal'. That doctrine provides that '[i]f a later Act makes contrary provision to an earlier, Parliament (though it has not expressly said so) is taken to intend the earlier to be repealed'.[15] Whether this is a key obstacle to an extended principle of legality is considered.

Parts VI to VIII of this article consider existing approaches that are analogous to a principle of legality that protect statutes or statutory rights, and might support the principle's extension. Part VI analyses a notion being developed by the courts in the United Kingdom ('UK') that there are 'constitutional' statutes, such that subsequent statutes ought to be interpreted strictly so as not to repeal or amend those earlier constitutional statutes. Part VII discusses statutory bills of rights, such as the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*'), which set out human rights in statute and require legislation to be interpreted compatibly with them where possible. Part VIII considers other

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11 See Bruce Chen, 'The French Court and the Principle of Legality' (2018) 41(2) *University of New South Wales Law Journal* 401.

12 Ibid.

13 George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 43.

14 *X7 v Australian Crime Commission* (2013) 248 CLR 92, 153 [158] (Kiefel J).

15 Francis Bennion, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 5th ed, 2008) 304.

interpretive presumptions that fall within the scope of the principle of legality and have been taken to protect certain statutory rights.

Finally, Part IX of this article concludes that the question of whether the principle of legality should extend to statutory rights is a complex issue and the arguments pull in different directions. However, the principle of legality ultimately should not be extended to statutory rights because it would leave it vulnerable to arguments that it is inconsistent with the principle's origins and rationale, and introduces a large and undesirable element of uncertainty. Moreover, there is an actual lack of demonstrable utility in extending the principle in this way.

It is beyond the scope of this article to consider the interaction between federal and state legislation where there is inconsistency.[16] Rather, this article focuses on the principle of legality's possible application where there is potential conflict within a statute or between statutes enacted in the same jurisdiction.

II The Rationale of the Principle of Legality

Recent commentary has heavily critiqued the principle of legality's rationale.[17] The 'original rationale' of the principle has been outlined in several cases. In the seminal High Court of Australia case of *Potter v Minahan*,[18] Justice O'Connor quoted approvingly from *Maxwell on Statutes*,[19] which stated that '[i]t is in the last degree improbable' that Parliament would abrogate or curtail fundamental common law protections 'without expressing its intention with irresistible clearness'.[20] This was endorsed by six members of the High Court in *Bropho v Western Australia*.[21] In *Coco v The Queen*,[22] four members of the High Court said that the legislature must have 'not only directed its attention' to the question of abrogation or curtailment of the fundamental common law protection, but 'also determined upon abrogation or curtailment of them'.[23] As if to reinforce the point, Gleeson CJ in *Al-Kateb v Godwin*[24] added that Parliament must do so 'consciously' — the legislature must have '*consciously* decided upon abrogation or curtailment'.[25] The principle of legality is therefore, in the author's view, a presumption concerned with actual legislative intention[26] — Parliament's state of mind is such that it is unlikely to enact legislation that abrogates or curtails fundamental common law protections.

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16 See *Australian Constitution* s 109.

17 See, most recently, Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017).

18 (1908) 7 CLR 277 ('*Potter*').

19 J Anwyl Theobald (ed), *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905).

20 (1908) 7 CLR 277, 304.

21 (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Bropho*').

22 (1994) 179 CLR 427 ('*Coco*').

23 Ibid 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). See also *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310 [314] (Gageler and Keane JJ), cited in *North Australian Aboriginal Justice Agency v NT* (2015) 256 CLR 569, 606 [81] (Gageler J).

24 (2004) 219 CLR 562.

25 Ibid 577 [19] (emphasis added).

26 See also Jeffrey Goldsworthy, 'The Principle of Legality and Legislative Intention' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 46, 58; Philip Sales, 'Rights and Fundamental Rights in English Law' (2016) 75(1)

Whenever Parliament legislates, it does not do so 'in a vacuum'[27] or 'on a blank sheet'.[28] Rather, Parliament is taken to be aware of standing principles of statutory interpretation, including the principle of legality. Thus, the principle of legality is said to be grounded in an institutional relationship between Parliament and the courts. In an influential passage in *Electrolux Home Products Pty Ltd v Australian Workers' Union*,[29] Gleeson CJ said that the principle of legality is 'known both to Parliament and the courts, upon which statutory language will be interpreted'.[30] The High Court has subsequently cited this obiter dictum in several cases,[31] to the point that it 'reflect[s] orthodoxy'.[32]

The 'original rationale' of the principle has come under scrutiny. One of the reasons for this is the identification of another rationale (at least, arguably) for the principle of legality — the '*Simms* rationale'.[33] In *R v Secretary of State for the Home Department; Ex parte Simms*,[34] Lord Hoffmann said that

> the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[35]

Cambridge Law Journal 86, 99, citing *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 (Gleeson CJ).

27 Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*' (2009) 125 (Oct) *Law Quarterly Review* 598, 600, citing Rupert Cross, John Bell and George Engle, *Cross: Statutory Interpretation* (Butterworths, 3rd ed, 1995) 165. See also *Brown v Tasmania* (2017) 261 CLR 328, 494 [535] (Edelman J); Susan Glazebrook, 'Do They Say What They Mean and Mean What They Say? Some Issues in Statutory Interpretation in the 21st Century' (2015) 14(1) *Otago Law Review* 61, 69.

28 Lord Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25(1) *Sydney Law Review* 5, 18.

29 (2004) 221 CLR 309.

30 Ibid 329 [21].

31 See *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 622 [182] (Crennan, Kiefel and Bell JJ); *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 135 [30] (French CJ, Crennan and Kiefel JJ); *Monis v The Queen* (2013) 249 CLR 92, 209 [331] (Crennan, Kiefel and Bell JJ); *Lee v NSW Crime Commission* (2013) 251 CLR 196, 264 [171] (Kiefel J), 309–10 [312] (Gageler and Keane JJ); *North Australian Aboriginal Justice Agency v NT* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225, 248 [84] (Edelman J) ('*Probuild*').

32 Matthew Groves and Dan Meagher, 'The Principle of Legality in Australian and New Zealand Law — Final Observations' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 258, 261. Cf John Basten, 'The Principle of Legality — An Unhelpful Label?' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 74, 76; Sir Anthony Mason, 'The Interaction of Statute Law and Common Law' (2016) 90(5) *Australian Law Journal* 324, 329.

33 See Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372.

34 [2000] 2 AC 115 ('*Simms*').

35 Ibid 131.

Lim has said this is a 'normative justification'.[36] It 'places less emphasis'[37] on actual legislative intention, and arguably this rationale is 'not really motivated by genuine uncertainty about Parliament's intentions'[38] (although this can be disputed). Rather, Lim said, the '*Simms* rationale' is 'concerned with enhancing the parliamentary process' through 'political transparency and the amenability of the legislature's decision to democratic scrutiny and electoral discipline'.[39] The above passage from *Simms* has been widely cited, such that it has obtained the status of a 'definitive modern restatement of the principle'.[40]

The 'original rationale' is also under challenge by the High Court of Australia bringing into doubt the notion of actual legislative intention. In *Lacey v Attorney-General (Qld)*,[41] the High Court controversially determined that the concept of legislative intention is a product of the statutory interpretation process itself, rather than something that is pre-existing and subsequently ascertained through the statutory interpretation process.[42] However, there are some indicators that more recent appointments to the High Court might recognise the existence of actual legislative intention.[43] Commentators have also argued, convincingly, that *Lacey* rejects traditional understandings of legislative intention, undermines the rationale of the principle of legality,[44] and that 'judges continue to habitually speak *as if* legislative intentions (really) exist'.[45]

Moreover, the High Court has not resiled from the 'original rationale', and its close association with actual legislative intention. In *Lee v New South Wales Crime Commission*,[46] Gageler and Keane JJ said that '[m]ore recent statements of the principle in this Court do not detract from the rationale identified in *Potter*, *Bropho* and *Coco* but rather reinforce that rationale'.[47] In *North Australian Aboriginal Justice Agency v Northern Territory*,[48] French CJ, Kiefel and Bell JJ

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36 Lim, 'The Normativity of the Principle of Legality', above n 33, 374.

37 Ibid.

38 Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 308.

39 Brendan Lim, 'The Rationales for the Principle of Legality' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 2, 7.

40 Matthew Groves, 'The Principle of Legality and Administrative Discretion' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 168, 168.

41 (2011) 242 CLR 573 ('*Lacey*').

42 Ibid 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Momcilovic v The Queen* (2011) 245 CLR 1, 141 [341] (Hayne J) ('*Momcilovic*').

43 See Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1; *Graham v Minister for Immigration and Border Protection* (2017) 347 ALR 350, 369 [76] (Edelman J) in relation to both constitutional and any other (legislative) texts; *Probuild* (2018) 351 ALR 225, 247–8 [84], 249 [87] (Edelman J).

44 See Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39, 42–5; Jeffrey Goldsworthy, 'Is Legislative Supremacy under Threat? Statutory Interpretation, Legislative Intention and Common-Law Principles' (2016) 60(11) *Quadrant* 56; Goldsworthy, 'The Principle of Legality and Legislative Intention', above n 26, 55–6.

45 Goldsworthy, 'The Principle of Legality and Legislative Intention', above n 26, 55 (emphasis in original).

46 (2013) 251 CLR 196.

47 Ibid 309 [312].

48 (2015) 256 CLR 569 ('*North Australian Aboriginal Justice Agency v NT*').

treated the normative justification as entirely consistent with the 'original rationale',[49] which it acknowledged was 'longstanding'.[50] In *Brown v Tasmania*,[51] Edelman J referred to the 'original rationale' first set out in *Potter*.[52] As such, the '*Simms* rationale' is currently better understood as a corollary of the 'original rationale'. This issue has been dealt with at greater length elsewhere.[53]

In any event, even if the '*Simms* rationale' were accepted, actual legislative intention is still relevant, as this article argues in Part IV. The principle of legality is motivated by a search for Parliament's actual legislative intention, which is what *Simms* must still be referring to when it says that 'Parliament must squarely confront what it is doing'.[54] The significance of actual legislative intention to whether the principle of legality should apply to statutory rights will soon become apparent.

III Statutory Rights

A *Existing Commentary on the Principle of Legality and Statutory Rights*

This article now turns to ascertain the level of agreement that the principle of legality can protect certain statutory rights in Australia. Academic commentary has acknowledged that statutes can influence the development of fundamental common law rights and freedoms.[55] However, this article is concerned with the question of whether the principle of legality should be extended *directly* to statutory rights — such that the principle goes beyond protecting the common law.

Elsewhere in the academic commentary, there is some support for this proposition. Pearce and Geddes acknowledge that '[t]he same approach' to fundamental common law protections 'could be adopted in relation to statutory rights — clear words would be necessary to limit them'.[56] Lim goes further, advocating for a shift from 'fundamental' common law protections, toward

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[49] Ibid 581–2 [11].

[50] Ibid 581 [11].

[51] (2017) 261 CLR 328.

[52] Ibid 498 [544] citing *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15], which quoted *Potter* (1908) 7 CLR 277, 304.

[53] See Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329, 338–9 and the citations therein.

[54] See Goldsworthy, 'The Principle of Legality and Legislative Intention', above n 26, 58; Dan Meagher, 'The Principle of Legality and Proportionality in Australian Law' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 114, 135–6; Williams and Hume, above n 13, 37–8, 46.

[55] Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449, 457; Meagher, 'The Principle of Legality as a Clear Statement Rule', above n 4, 430; Kris Gledhill, 'Rights-Promoting Statutory Interpretive Obligations and the "Principle" of Legality' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 93, 93. See further James Spigelman, *The McPherson Lecture Series: Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) vol 3, 29.

[56] Pearce and Geddes, above n 5, 245. See also George Williams and Daniel Reynolds, 'The *Racial Discrimination Act* and Inconsistency under the *Australian Constitution*' (2015) 36(1) *Adelaide Law Review* 241, 250–1.

'vulnerable' rights,[57] being a 'mode of analysis or framework for argument' with respect to protecting 'rights which the political process is inherently inapt to protect, because they are claimed by a politically weak minority, or because they go to the substance of the political process and democratic representation itself'.[58] He considers that there is no reason this ought to be limited to the common law, and can be extended to 'vulnerable' statutory rights.[59]

By contrast, Basten JA of the New South Wales Court of Appeal has expressed doubt extra-curially that the principle of legality can be extended to statutory rights.[60] In his Honour's view, such a development 'offers the potential to destroy the principle as a freestanding doctrine'.[61] Justice Basten has pointed to the fact that '[w]hen statute affects statute we are within that growing and challenging area of conflict resolution where the conflict is between laws of the same polity'.[62] Developing Basten JA's thoughts further — that polity is Parliament. An extended principle of legality would mean that certain statutory rights receive favourable treatment over other statutory provisions, despite all being enacted by Parliament. This links with the concept of parliamentary sovereignty, which is discussed in Part V of this article. Moreover, Basten JA has said that, in practice, 'the principle of legality cannot necessarily provide useful guidance in determining whether one particular statutory provision derogates from another'.[63] That is because where there is conflict between laws, the principle of harmonious construction and the doctrine of implied repeal may already be raised.[64] Part V of this article also discusses these concepts.

B *Statutory Rights within the Context of their Act*

The notion that the principle of legality can protect statutory rights has been 'followed on occasion by courts'.[65] As noted above, the leading authority is *Buck*[66] regarding workers' compensation rights under s 57(2) of the *SRC Act*. In *Australian Postal Corporation v Sinnaiah*, the Full Court of the Federal Court applied *Buck*.[67] *Sinnaiah* dealt with a different provision of the same Act (s 37(7)), which suspended an employee's compensation rights for workplace injury, and their ability to institute and continue compensation proceedings, for refusal or failure to undertake a

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57 Lim, 'The Normativity of the Principle of Legality', above n 33, 398–409; Lim, 'The Rationales for the Principle of Legality', above n 39, 10.

58 Lim, 'The Normativity of the Principle of Legality', above n 33, 413. See also Lim, 'The Rationales for the Principle of Legality', above n 39, 10–11.

59 Lim, 'The Normativity of the Principle of Legality', above n 33, 409–12.

60 [2018] NSWCA 123 (8 June 2018). Cf his Honour's judgment in *Elliott v Minister Administering Fisheries Management Act 1994* (2018) 357 ALR 175 ('*Elliott*'). See also below Part IIIB.

61 Basten, above n 32, 84.

62 Ibid 84–5.

63 Ibid 85.

64 Ibid.

65 Pearce and Geddes, above n 5, 245.

66 (1996) 66 FCR 359.

67 (2013) 213 FCR 449 ('*Sinnaiah*').

rehabilitation program.[68] A constructional question arose where a person claimed compensation for multiple injuries but only failed to undertake rehabilitation for one injury: did the suspension take hold in respect of all of the injuries? The Full Court (Cowdroy, Buchanan and Katzmann JJ) in *Sinnaiah* considered that Finn J's obiter dicta remarks 'apply with equal force here'.[69] The Court observed that a broad interpretation of the provision would result in the suspension of various rights to compensation under the Act.[70] It rejected the broad interpretation.

In these cases,[71] the possibility of infringement of the statutory right lay in the same legislative scheme that granted the right in the first place. The right to compensation under the same statute could be suspended due to failures to comply with requirements under the *SRC Act* — in *Buck*, to attend a medical examination and, in *Sinnaiah*, to undertake a rehabilitation program. On one view, a parallel may be drawn between the recognition of fundamental common law protections and the recognition of certain statutory provisions within the context of their Acts, for the purposes of the principle of legality. Some common law protections can be taken to be more fundamental than others and deserving of special protection. Not all common law protections fall within the scope of the principle of legality. As Kirby J has said, '[t]he key word is "fundamental"'.[72] Similarly, a statutory provision might be considered more significant or valuable (see below Part IIID) than another provision and deserving of special protection. That may be so even if the two provisions in question were enacted at the same time in the same statute.

However, in a recent case the New South Wales Court of Appeal (Basten JA, Beazley P and Payne JA agreeing) was much less enthusiastic about the principle of legality's application to statutory rights. In *Elliott*,[73] the appellant was a commercial fisherman who had his catch entitlements limited pursuant to a new quota shares scheme. He challenged this, submitting that the statutory provision under the *Fisheries Management Act 1994* (NSW) which gave the power to issue 'further classes of shares'[74] should be construed narrowly, so as not to allow for impairment of existing property rights without clear and unambiguous language.

The Court considered that the right was more accurately described as a statutory right to participate in fisheries. It referred to the principle of legality's

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68 *SRC Act* s 37(1) provides that a rehabilitation authority may make a determination that an employee who has suffered an injury resulting in an incapacity for work or an impairment should undertake a rehabilitation program.

69 (2013) 213 FCR 449, 458 [34].

70 Ibid 458–9 [35].

71 See also *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, 442–3 [105]–[107], 443 [110], 444 [114] ('valuable' visa rights); *Tassell v Hayes* (1987) 163 CLR 34, 41, 44 (Mason, Wilson and Dawson JJ) (right to be tried by jury); cf *PPHF v Director-General of Security* (2011) 193 FCR 436, 441 [38] (Robertson J, Perram J agreeing) (the right to merits review) where the principle was rebutted as there was no 'doubt as to Parliament's intention'.

72 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 328 [121], citing *Potter* (1908) 7 CLR 277, 304 (O'Connor J). See also Chief Justice J J Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79(12) *Australian Law Journal* 769, 781. Although it has been suggested that this designation should be discarded: see *Momcilovic* (2011) 245 CLR 1, 46 [43] (French CJ); *Tajjour v New South Wales* (2014) 254 CLR 508, 545 [28] (French CJ). Cf Groves, above n 40, 171.

73 (2018) 357 ALR 175.

74 Section 71A.

'original rationale' and '*Simms* rationale'.[75] Significantly, it considered that under either, 'there is no necessary constraint depriving the holder of *statutory* rights of the benefit of the principle'.[76] This can be contrasted with the views expressed in this article. Nevertheless, the Court remained ambivalent, couching the principle of legality's application in uncertain terms: '[t]o the extent that the principle applies'[77] and '[e]ven conceding some limited operation'[78] to it. Should the principle apply, the Court considered it had 'muted'[79] or 'limited'[80] application because the right 'being one conferred by statute, is inherently liable to alteration by statute'.[81] Notably, the Court drew upon analogous authority about a person's rights under a fishing licence being 'subject to certain powers conferred on the Director of Fisheries by the Act, and subject to other statutory provisions'.[82]

Elliott highlights that it is at least questionable whether the principle of legality should be applied in these contexts. Arguably, the principle should have no role to play when statutory rights are bestowed by Parliament subject to qualification. The improbability of Parliament curtailing a statutory right is significantly negated when the right is enacted as curtailed in the first place. Such a right must be read in the context of the Act as a whole, including other statutory provisions. One should query the justification for treating a right as being subject to special protection from its qualifications. The principle of legality is applied to statutes against a background of external standards — historically, it has been fundamental common law protections. In *Sinnaiah*, the principle was applied to statutory rights against a previously non-existent internal standard — that is, provisions within the same Act. This is not akin to the principle of legality's usual operation. The objection is not necessarily the constructional outcome reached in *Sinnaiah*, but rather that the Court applied the principle of legality in doing so.

C *Statutory Rights and Subsequent Legislation*

By contrast, there are several authorities where the courts have applied *Buck* to safeguard statutory rights from *subsequent* legislative developments.[83] The subsequent statute is interpreted restrictively, so as not to infringe the earlier

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75 *Elliott* (2018) 357 ALR 175, 184 [36]–[37].

76 Ibid 184 [38] (emphasis in original).

77 Ibid 185 [39].

78 Ibid 189 [60].

79 Ibid 185 [39].

80 Ibid 185 [42], 189 [60].

81 Ibid 185 [39].

82 Ibid 187 [47], quoting *South Australian River Fishery Association Inc v South Australia* (2003) 85 SASR 373, 387 [74] (Doyle CJ, Besanko J agreeing).

83 See *Re Schofield; Ex parte Rangott v P&B Barron Pty Ltd* (1997) 72 FCR 280 (restriction on admissibility of transcript of examination in bankruptcy proceedings); *SB v Parramatta Children's Court* (2007) 39 Fam LR 132 (right of a parent to appear and examine and cross-examine witnesses in Children's Court proceedings); *Davies v Barancewicz* (2011) 5 ACTLR 305 (right to sue for workers' compensation for negligence on the part of someone other than their employer); *Oxenbould v The Solicitors' Trust* [2011] TASSC 57 (3 November 2011) (overturned on appeal to the Full Court of the Tasmanian Supreme Court, but not on this point) (claims for payment pursuant to the *Legal Profession Act 1993* (Tas) for investment losses suffered from the failure of a law firm's mortgage loan scheme); *Anglican Care v NSW Nurses and Midwives' Association* (2015) 231 FCR 316 ('*Anglican Care*').

statutory right. The principle of legality is being applied to a subsequent infringing statute against a pre-existing external standard — that is, an earlier statutory right. That right, having been conferred earlier in time and deemed protected, is shielded from subsequent legislative infringement. This is not dissimilar to the principle's application to fundamental common law protections.

The most authoritative decision in this respect was again by the Full Court of the Federal Court in relation to workers' compensation: *Anglican Care*.[84] Section 130 of the *Fair Work Act 2009* (Cth) removed an employee's entitlement to accrue leave while receiving workers' compensation. Section 130(2) provided an exception where the accrual of such leave is 'permitted by a compensation law'. Justices Bromberg and Katzmann applied *Buck* and *Sinnaiah* to construe the words 'permitted by', such that s 130 did not remove an employee's 'previously enjoyed' statutory right to accrue leave while receiving workers' compensation under the earlier *Workers Compensation Act 1987* (NSW).[85]

There are other cases where the principle of legality's application to statutory rights has been found to be rebutted, due to there being clear and unambiguous language in the subsequent statute and no doubt as to Parliament's intention. This is consistent with the usual operation of the principle of legality. Does this mean, though, that in these cases the courts have actually accepted that the principle can extend to statutory rights? These cases may be divided into three categories. The first category is where the courts have accepted this proposition.[86] The second category is where the courts have not positively approved or otherwise objected to the notion.[87] The third category is where the courts have expressly raised uncertainty regarding the proposition, but in any event found that the principle was rebutted.[88]

In summary, the issue of whether the principle of legality extends to protect statutory rights from subsequent legislation remains to be finally determined. The High Court has yet to decide the issue. Acceptance of the proposition by lower courts has been infrequent. Most significantly, the Full Court of the Federal Court endorsed

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84 (2015) 231 FCR 316.

85 Ibid 327 [58]–[61], [64]; cf 320 [15] (Jessup J).

86 *DPP (WA) v GTR* [2007] WASC 318 (20 December 2007) [28]–[29]) (right of certain young offenders not to be regarded as convicted; outcome upheld on appeal to Western Australia Court of Appeal); *Humphreys v Mulco Tool & Engineering Pty Ltd* (2006) 4 DDCR 389, 409 [77]–[78] (rights to claim workers' compensation); *Tabcorp Holdings Ltd v Victoria* [2014] VSC 301 (26 June 2014) [1], [97], [99] (right to terminal payment on grant of new gambling licences; appealed, but this point left unaddressed).

87 *Calimoso v Minister for Immigration and Border Protection* (2016) 70 AAR 503, 510 [28]–[30] (right to merits review); *Minister for Immigration and Citizenship v Islam* (2012) 202 FCR 46, 55 [54] (special leave refused by the High Court) (right to merits review); *The Owners – Strata Plan No 72357 v Dasco Constructions Pty Ltd* (2010) 77 NSWLR 607, 611 [24] (right to sue the builder for breach implied warranties); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, 472 [81]–[83], 474 [89] (right of Australian citizenship); *Harvey v Minister Administering Water Management Act 2000* (2008) 160 LGERA 50, 71–2 [65] (rights to extract and use groundwater).

88 *Brett v Director General, Department of Education* [2015] WASCA 66 (7 April 2015) [18]–[20] (Buss, Le Miere and Murphy JJ) (right to bring a claim for unfair dismissal): 'It is not clear that the court should apply the same approach to limitations on statutory rights as to limitations on common law rights'.

and applied the proposition in *Anglican Care*. However, there remains an air of doubt and uncertainty.

D *Which Statutory Rights are Protected?*

So far, this article has referred to whether the principle of legality can extend to certain statutory rights. It is clear that there is no support for the application of the principle to *all* statutory rights. In *Buck*, Finn J spoke of statutory rights of 'sufficient significance to the individual',[89] observing that such rights can 'secure the basic amenities of life in modern society'.[90] Alternatively, the language of 'valuable' statutory rights has been used in this context.[91] This terminology of 'significant' or 'valuable' statutory rights can be contrasted with 'fundamental' common law protections, although it is arguably a distinction without a difference. Pursuant to the principle of legality, the courts presume Parliament to be aware of, and committed to, respecting 'fundamental' common law protections because of their significance and value.[92]

The difficulties in identifying 'fundamental' common law protections have previously been articulated.[93] There is no authoritative statement of fundamental common law protections, since their recognition is 'ultimately a matter of judicial choice'.[94] While attempts have been made to identify the range of fundamental common law protections, no two lists are identical — nor can they be. Recognition of a fundamental common law protection may be contestable or controversial, and thus prone to accusations of judicial activism, given its implications for the statutory interpretation process. It is 'never really made clear'[95] how the courts determine whether a common law protection is fundamental or not. To uphold actual parliamentary intention and sovereignty, and the democratic nature of lawmaking, 'one needs reasonably determinate criteria to identify the fundamental rights which are going to be the basis to create these interpretive effects'.[96]

Similar criticisms apply to 'significant' or 'valuable' statutory rights. There is no authoritative statement of significant or valuable rights under statute law; such rights also being subject to judicial recognition. It follows that there is uncertainty about which statutory rights are actually significant or valuable and thus protected

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89 *Buck* (1996) 66 FCR 359, 364. See also *Sinnaiah* (2013) 213 FCR 449, 458 [32]: 'significant statutory rights'; *DPP (WA) v GTR* [2007] WASC 318 (20 December 2007) [28] (McKechnie J): 'right of significance to the individual'; *Humphreys v Mulco Tool & Engineering Pty Ltd* (2006) 4 DDCR 389, 409 [77] (McColl JA dissenting): 'significant statutory entitlements'.

90 *Buck* (1996) 66 FCR 359, 365.

91 See *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, 443 [110]. See also *Tabcorp Holdings Ltd v Victoria* (2016) 328 ALR 375, 389 [68]; *New South Wales v Macquarie Bank Ltd* (1992) 30 NSWLR 307, 318, 319–20 (Kirby P).

92 See further Chen, in response to the supposed distinction between 'important' and 'fundamental' common law protections: 'The Principle of Legality: Issues of Rationale and Application', above n 53, 350.

93 Ibid 343–53. As to Lim's conception of 'vulnerable' rights, 'a criterion of "vulnerability" may give rise to as many questions as one of "fundamental"': Groves, above n 40, 172 n 25.

94 Dan Meagher, 'The Common Law Principle of Legality' (2013) 38(4) *Alternative Law Journal* 209, 211; Meagher, 'The Common Law Principle of Legality in the Age of Rights', above n 55, 459.

95 Meagher, 'The Common Law Principle of Legality in the Age of Rights', above n 55, 458.

96 Sales, 'Rights and Fundamental Rights in English Law', above n 26, 92.

by the principle. Whether a statutory right is significant or valuable (or even a statutory *right* at all), may be contestable and controversial. For example, in *Vikpro Pty Ltd v Wyuna Court Pty Ltd*,[97] Holmes CJ in the Queensland Court of Appeal simply said in obiter dicta that a lessee's right to resist payment of land tax under the *Land Tax Act 1915* (Qld) was not a 'right of such significance' as to attract the principle of legality.[98] The reasons for this conclusion were unarticulated. Cases to date have not fleshed out the process and criteria for the identification of significant or valuable statutory rights.[99]

There is potential for a far broader range of significant or valuable statutory rights, as compared with fundamental common law protections. With the proliferation of statutes in modern Australian society, there are hundreds, if not thousands, of rights on the statute books, awaiting potential judicial pronouncement that they attract the protection of the principle of legality. Until these rights receive such pronouncement, and in the absence of a clear process or criteria for identification, their status is unclear. This causes difficulty for the operation of the principle of legality. How are parliamentarians to enact legislation (and parliamentary drafters to draft legislation) with this degree of uncertainty? This is an issue further explored below in Part IV in the context of the principle of legality's rationale.

An additional question is whether the recognition of significant or valuable statutory rights, like fundamental common law protections, may be 'weakened or removed'.[100] In respect of fundamental common law protections, McHugh J in *Malika Holdings Pty Ltd v Stretton*[101] stated that '[w]hat is fundamental in one age or place may not be regarded as fundamental in another age or place'.[102] The High Court has recognised that the weakening or removal of fundamental common law protections may occur,[103] including by subsequent legislative incursions.[104] So, presumably, the same may also occur with significant or valuable statutory rights.[105]

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97 (2016) 103 ATR 787.

98 Ibid 796–7 [29].

99 It is also not clear how to reconcile protection of a significant or valuable statutory right pursuant to the principle of legality, against competing valuable or significant non-statutory rights. See, eg, *Vikpro Pty Ltd v Wyuna Court Pty Ltd* (2016) 103 ATR 787, 796–7 [29] (Holmes CJ). As to the principle of legality and fundamental common law protections, see Chen, 'The Principle of Legality: Issues of Rationale and Application', above n 53, 362–73; and as to s 32(1) of the *Victorian Charter* and human rights, see Bruce Chen, 'The Principle of Legality and Section 32(1) of the Charter: Same Same or Different?' on Gilbert + Tobin Centre of Public Law, *AUSPUBLAW* (26 October 2016) <https://auspublaw.org/2016/10/same-same-or-different/>.

100 *Bropho* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

101 (2001) 204 CLR 290.

102 Ibid 298 [28].

103 *Bropho* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). In that case, the High Court held that the presumption that the Crown is not bound by legislation was weakened. Historical reasons underlying the presumption were considered much less relevant in Australian contemporary conditions, since the activities of the Crown now 'reach into almost all aspects of commercial, industrial and developmental endeavour' and it commonly 'compete[s] and ha[s] commercial dealings on the same basis as private enterprise': at 19.

104 See Chen, 'The Principle of Legality: Issues of Rationale and Application', above n 53, 356–8, 359–61.

105 As to 'constitutional' statutes in the UK, discussed in Part VI below, it has been said that their '[c]onstitutional force may be acquired, or may conceivably come to be lost': Sales, 'Rights and Fundamental Rights in English Law', above n 26, 100 n 72.

If that is correct, then only those statutory rights that are not regularly subject to amendment should be able to attract the protection of the principle of legality.

IV Consistency with Rationale of the Principle of Legality

The principle of legality's 'original rationale', as set out earlier, is that '[i]t is in the last degree improbable' that the legislature would abrogate or curtail fundamental common law protections 'without expressing its intention with irresistible clearness'.[106] Parliament must have both 'directed its attention' to, and 'determined' or 'consciously decided' upon, abrogation or curtailment.[107] Arguably, it could also be said it is in the last degree improbable that the legislature would repeal or amend certain statutory rights. There are likely to be statutory rights so 'significant' or 'valuable' that they ought not be taken to be easily abrogated or curtailed.

However, Australian commentator Meagher has explained that the principle of legality 'can only operate as articulated in *Coco* if parliaments in Australia have prior notice as to the content of the common law bill of rights'.[108] Parliament cannot direct its attention to, and determine or consciously decide upon, abrogation or curtailment of something to which it is not alert. This is also consistent with the notion that the principle of legality reflects the institutional relationship between Parliament and the courts. The principle of legality is meant to be known to both Parliament and the courts for the purposes of statutory interpretation.

There are potentially significant difficulties with extending the principle of legality to certain statutory rights. As noted above, this is not within the principle's traditional scope. There is a lack of certainty about whether the principle can extend to significant or valuable statutory rights (and what those rights are). Given this absence of widespread agreement and acceptance, Parliament arguably cannot have determined or consciously decided upon repeal or amendment of certain statutory rights, when it is not even aware that it is required to do so. Arguably, nor does extending the principle of legality beyond its conventional understanding reflect the institutional relationship between Parliament and the courts. The principle must be grounded in an awareness from both institutions as to how it will operate. Thus, an extended principle of legality would likely lead to accusations of judicial activism. As Goldsworthy has said: 'judges do not possess the same relatively unfettered authority to change these interpretive principles'.[109]

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106 *Potter* (1908) 7 CLR 277, 304 (citation omitted).

107 See above nn 23, 25 and accompanying text.

108 Meagher, 'The Common Law Principle of Legality', above n 94, 213. See also Meagher, 'The Principle of Legality as a Clear Statement Rule', above n 4. By contrast, a bill of human rights provides greater clarity about what rights it protects: see Chen, 'The Principle of Legality and Section 32(1) of the Charter: Same Same or Different?', above n 99. See further Sales, 'A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*', above n 27, 610 in the UK context.

109 Goldsworthy, 'Is Legislative Supremacy under Threat?', above n 44, 60, citing *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 322 (Brennan J). See also Jeffrey Goldsworthy, 'The Constitution and its Common Law Background' (2014) 25(4) *Public Law Review* 265, 270–1. Cf *Probuild* (2018) 351 ALR 225, 239 [58] (Gageler J).

Lim relies on the '*Simms* rationale' — the normative justification that the principle of legality is concerned with enhancing the parliamentary process — to argue that the principle can extend to certain statutory rights.[110] He has argued that since the '*Simms* rationale' is animated by this purpose, the principle of legality should be directed away from its application to 'fundamental' common law protections, and towards, 'vulnerable' rights, which might be sourced in legislation. Lim conceptualised such rights as those 'vulnerable to casual abrogation'.[111] They 'may not be adequately protected by ordinary political processes, in the sense that there is a real risk they might be abrogated by Parliament without effective opportunity for electoral discipline'.[112]

However, even if the '*Simms* rationale' were accepted as a new and different rationale, actual legislative intention is still relevant.[113] Lord Hoffmann said that 'Parliament must squarely confront what it is doing'.[114] As Goldsworthy has pointed out, his Lordship 'wrote as if legislatures can have intentions'.[115] Indeed, Lim made a rather significant concession — 'if Parliament is unaware that a particular right in a particular context will be regarded' as fundamental, then it 'it may be accepted' that Parliament 'may not be moved "squarely [t]o confront what it is doing"'.[116] This is consistent with some UK commentary. The principle of legality 'has no application "if the necessary contextual backcloth of a relevant basic common law principle is absent"'.[117] The fundamental common law protection must be 'already present'.[118] Speaking extra-curially, Justice Philip Sales (as his Lordship then was) adopted the words in *Simms* to say that

> if Parliament cannot be taken to *have been squarely on notice* of the existence of [a fundamental common law protection], then the process of 'reading down' or modifying the natural meaning of the words used would undermine rather than promote Parliament's intention as expressed in the legislation.[119]

Along those lines, Parliament cannot be taken to be 'squarely on notice' about the existence of certain statutory rights that are protected by the principle of legality, and to 'squarely confront' them in enacting legislation. The 'necessary contextual backcloth' is not there; there is no common understanding and acceptance that the principle of legality extends to certain statutory rights.[120]

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110 Lim, 'The Normativity of the Principle of Legality', above n 33, 398, 409.
111 Ibid 403.
112 Ibid.
113 See Goldsworthy, 'The Principle of Legality and Legislative Intention', above n 26.
114 *Simms* [2000] 2 AC 115, 131.
115 Goldsworthy, 'The Principle of Legality and Legislative Intention', above n 26, 58.
116 Lim, 'The Normativity of the Principle of Legality', above n 33, 409.
117 Sales, 'A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*', above n 27, 605, quoting *R v Secretary of State for the Home Department; Ex parte Stafford* [1999] 2 AC 38, 49 (Lord Steyn).
118 Oliver Jones, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6th ed, 2013) 754.
119 Sales, 'A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*', above n 27, 605 (emphasis added).
120 As to what implications this line of reasoning has for newly recognised fundamental common law protections, see further Chen, 'The Principle of Legality: Issues of Rationale and Application', above n 53, 347–53.

V Consistency with Parliamentary Sovereignty and Implied Repeal

Whether an extended principle of legality is consistent with parliamentary sovereignty is a foundational issue. We have already seen the implications for parliamentary sovereignty that arise from the uncertainty about which statutory rights might be protected by the principle of legality. There are further questions, explored below, regarding whether an extended principle of legality might impermissibly limit legislative power.

The writings of Dicey loom large when it comes to the concept of parliamentary sovereignty. In his seminal work, *Introduction to the Study of the Law of the Constitution*,[121] Dicey said that it was a trait of parliamentary sovereignty that the legislature had the power 'to alter any law, fundamental or otherwise, as freely and in the same manner as other laws'.[122] No bill is 'legally speaking, a whit more sacred or immutable than the others, for they each will be neither more nor less than an Act of Parliament'.[123] Thus, on the Diceyan view, all statutes are equal and Parliament can legislate to repeal or amend existing statutes.[124]

Further, Dicey said that 'a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment'.[125] It would contradict the notion of parliamentary sovereignty. Dicey approved the statement that a 'Parliament cannot so bind its successors by the terms of any statute, as to limit the discretion of a future Parliament'.[126] Hence, on the Diceyan view, the doctrine of implied repeal is integral to parliamentary sovereignty.[127] The doctrine stands for the proposition that '[i]f a later Act makes contrary provision to an earlier, Parliament (though it has not expressly said so) is taken to intend the earlier to be repealed'.[128] The High Court of Australia has endorsed this proposition.[129] Thus, if the principle of legality is applied to protect *earlier* significant or valuable statutory

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121 A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1960).

122 Ibid 91. See also 88.

123 Ibid 88–9.

124 See further discussion in Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) 302; Sir John Laws, 'Constitutional Guarantees' (2008) 29(1) *Statute Law Review* 1, 3; Mark Elliott, 'Embracing "Constitutional" Legislation: Towards Fundamental Law?' (2003) 54(1) *Northern Ireland Legal Quarterly* 25; Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing, 2009) 9–10; Geoffrey Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?' (2006) 17(3) *Public Law Review* 188, 193, 198, see also 199–200.

125 Dicey, above n 121, 68 n 1.

126 Ibid 67, quoting Alpheus Todd, *Parliamentary Government in the British Colonies* (Little, Brown, and Company, 1st ed, 1880) 192. See also 68 n 1.

127 Kavanagh, above n 124, 297; Young, above n 124, 32–3; Elliott, above n 124, 25; Lindell, above n 124, 189, 193. Cf Goldsworthy, *Parliamentary Sovereignty,* above n 38, 182, 299; Daniel Kalderimis and Chapman Tripp, '*R v Pora*' [2001] *New Zealand Law Journal* 369.

128 Bennion, above n 15, 304. Rather than 'implied repeal', Pearce and Geddes prefer to say 'the later Act displaces or supersedes the earlier': above n 5, 328.

129 See, eg, *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603, 616, 617 (Latham CJ), 623 (Starke J), 625 (Dixon J), 633–4 (Evatt J, in obiter dicta); *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 137–8 [18] (Gummow and Hayne JJ) ('*Ferdinands*'); *Firebird Global Master Fund II Ltd v Nauru* (2015) 258 CLR 31, 60 [82] (French CJ and Kiefel J).

rights from *subsequent* infringing statutes, concerns would undoubtedly be raised that this approach is contrary to the doctrine of implied repeal and challenges parliamentary sovereignty.[130]

It is true that the principle of legality's extension to significant or valuable statutory rights would mean that some statutory provisions are, in Dicey's words, 'more sacred or immutable' than others and Parliament cannot 'as freely and in the same manner' repeal or amend such provisions.[131] This does create a hierarchy of statutory provisions. It is only those that are more significant or valuable that are protected by the principle of legality. But otherwise, the protection of significant or valuable statutory rights pursuant to the principle of legality is consistent with Dicey's conceptualisation of parliamentary sovereignty. Parliament retains the ability to repeal or amend such statutory rights, provided that it has used clear and unambiguous language to do so in the subsequent infringing statute. After all, the principle of legality is considered an orthodox principle of statutory interpretation that 'operat[es] consistently with the principle of parliamentary supremacy'.[132] It 'can be defeated … by a sovereign legislature'.[133]

Moreover, the so-called doctrine of implied repeal does not pose a difficulty for extending the principle of legality to significant or valuable statutory rights. Implied repeal is a 'comparatively rare phenomenon'.[134] Commentators have recognised as much — it is expressed more accurately as a presumption *against* implied repeal,[135] it is a 'measure of last resort',[136] its operation is 'much more limited than is often assumed',[137] and it 'is not the rule, but the exception'.[138] In Australian jurisprudence, it is said that the courts firstly presume that 'statutes do not contradict one another',[139] and seek to apply a 'principle of harmonious construction'[140] so that both statutes can operate harmoniously.[141]

The respective thresholds for rebutting the principle of legality and the presumption against implied repeal are perhaps not so different. Both would apply at the point of resolving apparent conflict. In Australia, pursuant to the principle of legality 'the implication must be necessary, not just available or somehow thought

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130 Although noting that, in the Australian context, some prefer to use the term 'parliamentary supremacy' rather than 'parliamentary sovereignty', since parliaments across Australia are subject to the *Australian Constitution*.

131 See above nn 122–3 and accompanying text.

132 Chief Justice Robert French, 'The Courts and the Parliament' (2013) 87(12) *Australian Law Journal* 820, 827.

133 Alexander Williams and George Williams, 'The British Bill of Rights Debate: Lessons from Australia' [2016] *Public Law* 471, 484.

134 *Butler v A-G (Vic)* (1961) 106 CLR 268, 275 (Fullagar J), cited in *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1, 14.

135 Bennion, above n 15, 305. See also Young, above n 124, 36–7.

136 Kavanagh, above n 124, 298.

137 Ibid.

138 Young, above n 124, 36. See also at 37.

139 *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 19 [48] (Crennan, Kiefel and Bell JJ) citing *Ferdinands* (2006) 225 CLR 130, 137–8 [18], 146 [49], 148 [54]–[55].

140 *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 33 [98] (Gageler J) citing *Butler v A-G (Vic)* (1961) 106 CLR 268, 276, *Saraswati v The Queen* (1991) 172 CLR 1, 17, *Ferdinands* (2006) 225 CLR 130, 133–4 [4], 137–8 [18].

141 See also Young, above n 124, 43; Kavanagh, above n 124, 297–8 in the UK context.

to be desirable'.[142] The predominant approach[143] is to ask whether rebuttal of the principle is necessary to 'prevent the statutory provisions from becoming inoperative or meaningless'[144] by reference to their purpose. The approach to the presumption against implied repeal is also stringent in the Australian cases. For instance, in *Saraswati v The Queen*,[145] Gaudron J stated: 'It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is *necessarily to be implied*.'[146] A necessary implication under the presumption against implied repeal will arise where 'the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together';[147] they 'cannot be reconciled'.[148]

The same terminology of 'necessary implication' is used in both the presumption against implied repeal and the principle of legality. As Basten has said, the 'strength' of the presumption against implied repeal 'reflects the language used to describe' the principle of legality.[149] Both the presumption against implied repeal and an extended principle of legality would afford stringent protection to earlier statutes. That being the case, a principle of legality that protects significant or valuable statutory rights is consistent with the presumption against implied repeal. Thus, implied repeal — since it is the exception to the rule — presents no theoretical obstacle. The principle of legality is in addition to, and reinforces, the existing proposition that an earlier statute is not to be impliedly repealed without clear and unambiguous language.[150] An extended principle of legality would be another interpretive principle relevant to resolving apparent conflict between statutes.[151]

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142 *X7 v Australian Crime Commission* (2013) 248 CLR 92, 149 [142], cited with approval in *Lee v NSW Crime Commission* (2013) 251 CLR 196, 265 [173] (Kiefel J). See also *Plenty v Dillon* (1991) 171 CLR 635, 654: 'inconvenience in carrying out an object authorised by legislation is not a ground for eroding fundamental common law rights'.

143 See further Chen, 'The French Court and the Principle of Legality', above n 11, 428–32.

144 *Coco* (1994) 179 CLR 427, 436, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ).

145 (1991) 172 CLR 1.

146 Ibid 17 (emphasis added). See also *Goodwin v Phillips* (1908) 7 CLR 1, 10, quoting Walter S Scott, *Craies on Statute Law* (Sweet and Maxwell, 4th ed, 1936) 303; *Hack v Minister for Lands (NSW)* (1905) 3 CLR 10, 23–4 (O'Connor J); *Ferdinands* (2006) 225 CLR 130, 134 [4] (Gleeson CJ), 163 [109]–[110] (Kirby J); *Shergold v Tanner* (2002) 209 CLR 126, 136–7 [34] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ). See further the general tenor of *Butler v A-G (Vic)* (1961) 106 CLR 268, 275–6 (Fullagar J), 280 (Kitto J), 290 (Windeyer J).

147 *Hack v Minister for Lands (NSW)* (1905) 3 CLR 10, 23 (O'Connor J), quoting *Kutner v Phillips* [1891] 2 QB 267, 271–2. See further *Butler v A-G (Vic)* (1961) 106 CLR 268, 276 (Fullagar J), 280 (Kitto J). See also Young, above n 124, 36–7 in the UK context.

148 *Firebird Global Master Fund II Ltd v Nauru* (2015) 258 CLR 31, 61 [87] (French CJ and Kiefel J).

149 Basten, above n 32, 86.

150 See also Williams and Hume, above n 13, 19; Lim, 'The Normativity of the Principle of Legality', above n 33, 412. Cf Basten, above n 32, 85; Lim, 'The Normativity of the Principle of Legality', above n 33, 411.

151 There are of course other interpretive principles that do not necessarily point in the same direction, such as *generalia specialibus non derogant* — the presumption that general laws do not derogate from special laws.

VI 'Constitutional' Statutes

The remainder of this article focuses on analogous instances where statutory rights are protected through interpretation and whether they provide support for extending the principle of legality to significant or valuable statutory rights. The analysis shows that an extended principle of legality is not as revolutionary for Australia as it might first seem; however, difficulties remain.

First, a parallel may be drawn between the principle of legality protecting statutory rights and the recognition and protection of 'constitutional' statutes in UK jurisprudence. Judicial commentators have observed how the strict interpretation of subsequent statutes safeguards these constitutional statutes.[152] In obiter dicta, French CJ of the High Court of Australia said that the classification of constitutional statutes in the UK

> has been used, albeit not without controversy (159), to attract to them the protection of a rule constraining their amendment by mere implication in a way which is analogous to the operation of the principle of legality in respect of common law rights and freedoms (160).[153]

Lord Neuberger as President of the UK Supreme Court has remarked (extra-curially) that the protection of constitutional statutes 'may in fact be no more than an extension of the principle of legality'.[154] Similarly, Lord Justice Sales (extra-curially) has said that the interpretive process requires respect for constitutional statutes 'in the interpretation of later legislation in much the same way as by reference to fundamental rights under the principle of legality'.[155] Since the UK approach applies the principle of legality or something close to it to statute, this provides a useful comparator for considering whether to extend the principle of legality to statutory rights in Australia.

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[152] Lord Neuberger, 'The Constitutional Role of the Supreme Court in the Context of Devolution in the UK' (Speech delivered at the Lord Rodger Memorial Lecture 2016, Glasgow, 14 October 2016) <https://www.supremecourt.uk/docs/speech-161014.pdf> [18]–[20]; Sales, 'Rights and Fundamental Rights in English Law', above n 26, 91; *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 217–8 [55] (French CJ) ('*Cadia Holdings*'); Robert French, 'Foreword' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) v, viii; Laws, above n 124, 7–8, in commentary on his own judgment in *Thoburn v Sunderland City Council* [2003] QB 151 ('*Thoburn*').

[153] *Cadia Holdings* (2010) 242 CLR 195, 217–8 [55].

(159) See *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 419–20 [62] (Lord Rodger); 'Editorial: Constitutional Statutes', (2007) 28(2) *Statute Law Review* iii; Geoffrey Marshall, 'Metric Measures and Martyrdom by Henry VIII Clause', (2002) 118 (Oct) *Law Quarterly Review* 493, 495–6, 501.

(160) *Thoburn* [2003] QB 151, 185–7 [60]–[64] (Laws LJ); Daniel Greenberg (ed), *Craies on Legislation* (9th ed, 2008) 581–2.

[154] Neuberger, above n 152, [20].

[155] Sales, 'Rights and Fundamental Rights in English Law', above n 26, 91.

A *United Kingdom Jurisprudence*

Thoburn[156] is the 'novel'[157] and 'controversial'[158] decision that is 'usually credited as being the source of the idea'[159] that constitutional statutes are subject to special protection through interpretation. The High Court of England and Wales (Laws LJ, Crane J agreeing) defined a 'constitutional statute' as one that '(a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights'.[160] Notably, the first limb of this definition makes the concept of constitutional statutes in the UK broader than the notion of significant or valuable statutory rights espoused in Australia.

The Court in *Thoburn*, referring to the principle of legality, extended it to encompass constitutional statutes. The Court said:

> In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental … And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes.[161]

The Court considered that the *European Communities Act 1972* (UK) was a constitutional statute.[162]That Act incorporated European Community law into UK domestic law and was at the heart of the 'Brexit' debate about the UK's decision to leave the European Union. Thus, the Court thought that the repeal or significant amendment of the Act would require 'express words in the later statute, or … words so specific that the inference of an actual determination to effect the result contended for was irresistible'.[163] '[G]eneral words could not be supplemented, so as to effect a repeal or significant amendment to a constitutional statute'.[164] Repeal or significant amendment of the *European Communities Act 1972* (UK) could not be by mere implication in a subsequent statute. It needed to be by *necessary* implication.

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156 [2003] QB 151.

157 Adam Tomkins, *Public Law* (Oxford University Press, 2003) 124; Goldsworthy, *Parliamentary Sovereignty*, above n 38, 312; Elliott, above n 124, 28, 31; Christopher Forsyth and Mark Elliott, 'The Legitimacy of Judicial Review' [2003] *Public Law* 286, 298.

158 Mark Leeming, 'Equity: Ageless in the "Age of Statutes"' (2015) 9(2) *Journal of Equity* 108, 109 n 5. See also Nicholas Bamforth, 'A Constitutional Basis for Anti-discrimination Protection?' (2003) 119 (Apr) *Law Quarterly Review* 215, 220; Matthew Zagor, 'Judicial Rhetoric and Constitutional Identity: Comparative Approaches to Aliens' Rights in the United Kingdom and Australia' (2008) 19(4) *Public Law Review* 276, 277.

159 David Feldman, 'The Nature and Significance of "Constitutional" Legislation (2013) 129 (Jul) *Law Quarterly Review* 343, 345.

160 *Thoburn* [2003] QB 151, 186 [62].

161 Ibid.

162 This was subsequently confirmed by the UK Supreme Court in the 'Brexit' litigation: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, 145 [67].

163 *Thoburn* [2003] QB 151, 187 [63]. Some commentators have taken the view that the dicta in *Thoburn* stands for the proposition that constitutional statutes can only be repealed or significantly amended by express words. However, in light of the second limb of this quotation, such a reading is mistaken.

164 Ibid.

The *Thoburn* approach has gained some support in the ensuing jurisprudence.[165] The UK Supreme Court went further in *H v Lord Advocate*.[166] Lord Hope, who gave the leading judgment, observed the 'fundamental constitutional nature of the settlement' achieved by the *Scotland Act 1998* (UK).[167] When it came to overriding this statute, 'only an express provision to that effect could be held to lead to such a result'.[168] The fact that the *Scotland Act* was a constitutional statute 'in itself must be held to render it incapable of being altered otherwise than by an express enactment'.[169]

While Lord Hope did not refer explicitly to the principle of legality or *Thoburn*, significantly, his Lordship accepted that constitutional statutes were subject to special protection. Moreover, Lord Hope considered that a constitutional statute could only be rebutted by express words, and not by necessary implication. This goes beyond *Thoburn* and the principle of legality — the latter of which can be rebutted by necessary implication. In that respect, *H v Lord Advocate* is 'quite radical'.[170]

There are other statutes considered to be constitutional.[171] But there is limited case law on whether subsequent statutes are to be interpreted strictly so as to protect these constitutional statutes. The UK position remains to be finally determined. The discussion in *Thoburn* and *H v Lord Advocate* was only obiter dicta. As Lord Neuberger has said (extra-curially): 'It remains to be seen whether the notion of entrenched legislation with special constitutional status … is correct, and, if it is, how far it goes'.[172] This potential development is, in some respects, defensible, but in other respects has its weaknesses.

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165 *H v Lord Advocate* [2013] 1 AC 413; *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (3 November 2016) (reported at [2018] AC 61, 61–99 with the subsequent UK Supreme Court decision); cf *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, 100–204 (on appeal). See also *R (HS2 Action Alliance) v Secretary of State for Transport* [2014] 1 WLR 324, 382 [207] (Lords Neuberger and Mance), where an issue arose as to how to deal with a potential conflict between a constitutional statute and another, subsequent constitutional statute.

166 [2013] 1 AC 413.

167 Ibid 435 [30].

168 Ibid.

169 Ibid.

170 Farrah Ahmed and Adam Perry, 'The Quasi-Entrenchment of Constitutional Statutes' (2014) 73(3) *Cambridge Law Journal* 514, 521.

171 Other statutes considered to be 'constitutional' include the *Magna Carta 1297*, 25 Edw 1, c 9, *Petition of Right 1628,* 3 Car 1, c 1, *Bill of Rights 1689*, 1 Wm & M Sess 2, c 2, *Claim of Right Act 1689*, c 28, *Act of Settlement 1701*, 12 & 13 Wm 3, c 2, *Act of Union 1707*, c 7, *Union with Scotland Act 1706*, 6 Ann, c 11, *Representation of the People Acts 1832*, 2 & 3 Wm 4, c 45, *1867*, 30 & 31 Vict, c 102, and *1884*, 48 & 49 Vict, c 3, *Human Rights Act 1998* (UK) c 42, *Government of Wales Act 1998* (UK) c 38, and *Constitutional Reform Act 2005* (UK) c 4: see *Thoburn* [2003] QB 151, 186 [62]; *R (HS2 Action Alliance) v Secretary of State for Transport* [2014] 1 WLR 324, 382 [207]. See further Bennion, above n 15, 189 n 11, 190 n 1 for other potential examples.

172 Neuberger, above n 152, [19].

B *Consistency with Parliamentary Sovereignty and Implied Repeal*

Concerns about consistency with parliamentary sovereignty for constitutional statutes in the UK bear some resemblance to concerns about a principle of legality that protects significant or valuable statutory rights in Australia. As outlined above, Dicey's view was that no bill is 'more sacred or immutable' than others.[173] Dicey further stated that '[t]here is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional'.[174] The *Thoburn* decision does run counter to these ideals. The High Court of England and Wales recognised the creation of 'a hierarchy of Acts of Parliament'[175] — ordinary statutes and constitutional statutes. Lord Justice Laws admitted as much in extra-curial commentary on his own judgment, when he said that while '[i]t is inherent in the doctrine [of parliamentary sovereignty] that there is no hierarchy of statutes; all have equal status',[176] 'we need the means to create a hierarchy of laws, so that our constitution may furnish constitutional guarantees'.[177]

Nevertheless, the Court in *Thoburn* maintained the view that its approach 'preserves the sovereignty of the legislature'[178] and Laws LJ stated extra-curially that the *Thoburn* approach was not a '*fatal* assault on the doctrine of sovereignty'.[179] This is presumably because constitutional statutes can still be repealed by express words or necessary implication.[180] The same could be said of a principle of legality in Australia that protects significant or valuable statutory rights.

Specifically in relation to implied repeal, the Court in *Thoburn* considered that the doctrine of implied repeal had been 'modified',[181] by creating an 'exception'[182] to the doctrine with respect to constitutional statutes. However, this description is apt to mislead. As discussed above, implied repeal is itself the exception to the presumption *against* implied repeal. The *Thoburn* approach provides an additional interpretive principle that reinforces the presumption against implied repeal. It does not truly involve a modification as has been suggested. Similarly, an extended principle of legality in the Australian context would not involve a modification of the doctrine of implied repeal.

C *The Position in Australia*

The purpose of this article is not to consider whether the concept of constitutional statutes should be applied in Australia. Nevertheless, for completeness this issue will

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173 See above n 123 and accompanying text.
174 Dicey, above n 121, 89.
175 *Thoburn* [2003] QB 151, 186 [62].
176 Laws, above n 124, 3.
177 Ibid 5.
178 *Thoburn* [2003] QB 151, 187 [64].
179 Laws, above n 124, 6 (emphasis added).
180 Ibid 6–7.
181 *Thoburn* [2003] QB 151, 185 [59]. See further Laws, above n 124, 7–8.
182 *Thoburn* [2003] QB 151, 185 [60].

be canvassed briefly here. Goldsworthy has suggested that *Thoburn* 'could be endorsed on relatively orthodox grounds'.[183] That is because '[w]e already accept that there are fundamental common law rights that Parliament is very unlikely to intend to override, and it is just as plausible to think that there are very important statutes that it is equally unlikely to intend to override'.[184]

To date in Australia, 'there is no precedent for a distinction between … "constitutional statutes" and other statutes'.[185] No Australian court has applied *Thoburn*, which can be traced to a movement to have identified 'rights' or 'guarantees' which should be accorded some higher status and protection,[186] in the absence of a 'written constitution' in the UK.[187] The drivers do not exist to the same extent in Australia. Although it is not to say that Australia has a federal constitutional bill of rights, the *Australian Constitution*, such as s 51, expressly denotes the limits of federal legislative power. Safeguards have also been implied from the *Australian Constitution* based on: the requirement that the Federal Parliament be directly chosen by the people;[188] the separation of powers at the federal level;[189] and in respect of state legislative power, the 'institutional integrity' of courts at the state level.[190] It remains true that the 'rights' that can be derived from the *Australian Constitution* are scant. But at least on the basis of views expressed by French CJ, it appears very unlikely that Australian courts will adopt the *Thoburn* approach.[191] More probable is the approach taken in *Buck* — the principle of legality being extended to protect significant (or valuable) statutory rights.

D *Analogous Criticisms*

In any event, the UK developments with respect to constitutional statutes illuminate similar concerns that would arise under an extended principle of legality. These have

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183 Goldsworthy, *Parliamentary Sovereignty*, above n 38, 312.

184 Ibid 313. See also Rebecca Prebble, 'Constitutional Statutes and Implied Repeal: The *Thoburn* Decision and the Consequences for New Zealand (2005) 36(2) *Victoria University of Wellington Law Review* 291, 300.

185 Williams and Reynolds, above n 56, 251. One commentator has provided a list of 'candidates for treatment as constitutional legislation' in the Australian context: Simon Evans, 'Why is the Constitution Binding? Authority, Obligation and the Role of the People' (2004) 25(1) *Adelaide Law Review* 103, 117, 120.

186 See *Thoburn* [2003] QB 151, 187 [64]; Laws, above n 124, 4–8; Elliott, above n 124, 40.

187 Cf Forsyth and Elliott, above n 159, 296–7. As to the position in New Zealand, see Prebble, above n 184.

188 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

189 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

190 *Kable v DPP (NSW)* (1996) 189 CLR 51.

191 In *Cadia Holdings*, French CJ said in obiter dicta, 'The application of the term "constitutional" to a statute which is not a written constitution must be approached with some care': (2010) 242 CLR 195, 217 [54]. His Honour went on to say, 'in a country with a written constitution the utility of such a designation, which is not amenable to precise definition, may be debatable': at 218 [56]. More recently, his Honour said (extra-curially) that the characterisation of certain statutes as constitutional 'is no doubt of greater importance in the United Kingdom than in Australia': French, above n 152, viii. See further Williams and Hume, above n 13, 18–9.

significant force. For instance, Marshall was of the view that *Thoburn* 'raises some difficult issues':[192]

> The proffered definitions are undeniably vague and it is hard to see any clear dividing line between ordinary statutes and statutes that deal with rights of a kind that we would now regard as fundamental. Are rights to education, medical services or pensions basic or fundamental, or are they mere run-of-the-mill entitlements? …
>
> What, in any event, is the rationale for supposing that some Acts of Parliament, whatever their subject matter, embody the intentions of the legislature in a more forceful way or in a more protected form than others, in the absence of any explicit Parliamentary expression of intention to create first and second class statutes? … In the absence of a consistent and workable definition … [t]his seems to inject an unwelcome element of uncertainty into our public law.[193]

The above criticisms relate to the lack of clarity around the definition of constitutional statutes and the dubious consistency with legislative intention in their recognition and protection. They pertain to the undeveloped criteria and undefined range of statutes that may be regarded as constitutional[194] and, as a result, the lack of certainty in statutory interpretation. If the courts are to apply the presumption 'in accordance with the wish of the Parliament enacting the constitutional statute',[195] being a reference to the notion of actual legislative intention, the courts must also be taking their cues from Parliament as to which statutes deserve special protection. Moreover, any attempt to list the constitutional statutes 'is not and could not be complete'[196] and 'from a practical perspective this is itself not encouraging'.[197]

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[192] Marshall, above n 153, 495. See also 'Editorial: Constitutional Statutes', above n 153; Feldman, above n 161, 345–8; Matthew S R Palmer, 'What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-Holders' (2006) 17(2) *Public Law Review* 133, 137 n 24; Prebble, above n 184, 297, 307; *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 419 [62] (Lord Rodger); Mark Elliott, 'Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution' (2014) 10(3) *European Constitutional Law Review* 379, 386.

[193] Marshall, above n 153, 495–6.

[194] Cf Lord Justice Sales who posits (extra-curially) that '[s]uch constitutional force may be inferred from the circumstances in which a particular piece of legislation was passed, or may be acquired over time from the prominence it is given in constitutional debate': 'Rights and Fundamental Rights in English Law', above n 26, 100 (citations omitted).

[195] Daniel Greenberg (ed), *Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation* (Sweet & Maxwell, 10th ed, 2012) 665. However, Elliott has observed that Laws LJ in *Thoburn* 'was at pains to emphasise that whether something is a constitutional statute is *not* a matter of parliamentary intention. Rather, it is a conclusion reached, and a status ascribed to legislation by, the *common law*' (emphasis in original): Mark Elliott, 'Critical Reflections on the High Court's Judgment in *R (Miller) v Secretary of State for Exiting the European Union*' on Mark Elliott, *Public Law for Everyone* (7 November 2016) <https://publiclawforeveryone.com/2016/11/07/critical-reflections-on-the-high-courts-judgment-in-r-miller-v-secretary-of-state-for-exiting-the-european-union/>. See further Goldsworthy, *Parliamentary Sovereignty*, above n 38, 313–4; Lindell, above n 124, 198 n 36, 199–200. Cf *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (3 November 2016) [88]: 'Since in enacting the [*European Communities Act 1972* (UK)] as a statute of major constitutional importance *Parliament has indicated* that it should be exempt from casual implied repeal by Parliament itself' (emphasis added).

[196] Greenberg, above n 195, 665.

[197] 'Editorial: Constitutional Statutes', above n 153, iv.

These criticisms mirror and are equally applicable to extending the principle of legality to significant or valuable statutory rights in Australia.

VII Human Rights Statutes

A *Overview*

A further comparison may be made between an extended principle of legality and the protection of human rights under statutory bills of rights. The *Victorian Charter* is a statutory bill of rights. It is one of only two enacted in Australia, the other being the *Human Rights Act 2004* (ACT) ('*ACT HRA*').[198] Taking the *Victorian Charter* as the example, s 32(1) provides that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights' under the Charter.[199]

The *Victorian Charter* makes clear that s 32(1) applies to both legislation 'passed before *or after*' commencement of the Charter.[200] Thus, statutes passed after commencement of the *Victorian Charter* that engage human rights, set out in the earlier enacted Charter, are to be interpreted pursuant to s 32(1) in a way that avoids incompatibility. Nevertheless, the *Victorian Charter* recognises that it may not always be 'possible' to interpret a statutory provision compatibly with human rights. Unlike a constitutional bill of rights, this does not affect the validity of primary legislation.[201] Rather, s 36(2) provides that the Victorian Supreme Court and Court of Appeal may make a 'declaration of inconsistent interpretation'.[202] This declaration does not affect 'the validity, operation or enforcement of the statutory provision'.[203]

In the jurisprudence, s 32(1) has predominantly been equated with the principle of legality. It 'applies … in the same way as the principle of legality but with a wider field of application';[204] although this proposition has been disputed.[205]

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198 There may soon be a third Australian jurisdiction with a statutory bill of rights: see Human Rights Bill 2018 (Qld).

199 See also *ACT HRA* s 30.

200 *Victorian Charter* s 49(1) (emphasis added). See also *ACT HRA* s 29.

201 *Victorian Charter* s 32(3)(a). See also s 31, which provides that Parliament 'may expressly declare' that an Act or a provision of an Act 'has effect despite being incompatible with one or more of the human rights' (override declaration).

202 See also *ACT HRA*, s 32 on 'declarations of incompatibility'.

203 *Victorian Charter* ss 36(5)(a). See also *ACT HRA*, s 32(3)(a).

204 *Momcilovic* (2011) 245 CLR 1, 50 [51] (French CJ). See further *Slaveski v Smith* (2012) 34 VR 206, 215 [23], 219 [45] (Warren CJ, Nettle and Redlich JJA); *Noone v Operation Smile (Aust) Inc* (2012) 38 VR 569, 608 [139] (Nettle JA); *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 12–13 [25] (Nettle JA); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383 [85] (Redlich, Osborn and Priest JJA); *Carolan v The Queen* (2015) 48 VR 87, 103–4 [46] (Ashley, Redlich and Priest JJA). Cf *R v DA* (2016) 263 A Crim R 429, 443 [44] n 46.

205 See *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 61–3 [188]–[191] (Tate JA, in obiter dicta); Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340; Justice Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the Charter — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online*

Therefore parallels might be drawn between the *Victorian Charter* and an extended principle of legality that protects significant or valuable statutory rights. Both would protect rights set out in statute. Both would require a restrictive interpretation of subsequent infringing statutes in the absence of clear and unambiguous language.

B *Consistency with Parliamentary Sovereignty and Implied Repeal*

The issue of consistency with parliamentary sovereignty and implied repeal also arises under the *Victorian Charter* and other statutory bills of rights. A common theme between the *Victorian Charter*, the *New Zealand Bill of Rights Act 1990* (NZ) ('*NZ BORA*'), and the UK *Human Rights Act 1998* (UK) ('*UK HRA*') is that they are designed to preserve parliamentary sovereignty. The *Victorian Charter* is based on what is commonly known as a 'dialogue' model for human rights.[206] It promotes a human rights dialogue between the three branches of the Victorian Government: the Executive, Parliament, and the courts.

Even under this dialogue model, there is a large body of commentary on whether the interpretive mechanisms of the *Victorian Charter*, *NZ BORA* and *UK HRA* are consistent with implied repeal,[207] which is considered integral to parliamentary sovereignty.[208] With respect to legislation enacted after a bill of rights,[209] do interpretive mechanisms undermine the so-called doctrine of implied repeal by requiring that subsequently enacted legislation that is incompatible with human rights must be drafted with clarity as to its intent? In the New Zealand case of *R v Pora*,[210] three justices of the Court of Appeal gave precedence, where fundamental human rights were concerned, to an earlier statute over a subsequent one, including by reference to s 6 of the *NZ BORA* — the equivalent of s 32(1) of

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Journal 43; Sir Anthony Mason, 'Statutory Interpretive Techniques under the *Charter* — Section 32' (2014) 2 *Judicial College of Victoria Online Journal* 69; Gledhill, above n 55.

206 However, usage of the term 'dialogue' was criticised by members of the High Court in *Momcilovic* (2011) 245 CLR 1: see 67–8 [95] (French CJ); 84 [146(iii)] (Gummow J, Hayne J agreeing), 207 [534] (Crennan and Kiefel JJ). Cf Debeljak in response to those remarks: Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 37, 61–2 n 104.

207 For the *Victorian Charter*, see James Allan, 'The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism' (2006) 30(3) *Melbourne University Law Review* 906, 911–2; Jim South, 'Potential Constitutional and Statutory Limitations on the Scope of the Interpretative Obligation Imposed by s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)' (2009) 28(1) *University of Queensland Law Journal* 143, 155–6; Sir Anthony Mason, 'Human Rights: Issues to be Resolved' (Speech delivered at the Law Institute of Victoria, Melbourne, 24 August 2009) [55]–[60].

208 See above n 127 and accompanying text.

209 The issue of implied repeal also arises with respect to legislation enacted before a bill of rights. For example, does s 32(1) of the *Victorian Charter*, being the subsequently enacted legislation, effect implied repeal of an earlier statute by requiring that the earlier statute must be interpreted where possible so as to be compatible with human rights? This issue was raised in the *Momcilovic v The Queen* proceeding, but not determined: see Transcript of Proceedings, *Momcilovic v The Queen* [2011] HCATrans 15 (8 February 2011) 2260–80, 3435, 4160–245. For present purposes, the application of s 32(1) to post-Charter legislation provides the better analogy with the principle of legality's extended application to protect significant or valuable statutory rights from subsequent infringing statutes.

210 [2001] 2 NZLR 37.

the *Victorian Charter*. Chief Justice Elias and Tipping J stated that '[i]t is not a correct approach to assume that pro tanto implied repeal … is to be preferred'[211] and this 'does not affect the orthodoxy that Parliament cannot bind its successors'.[212] Justice Thomas remarked that implied repeal 'need not be treated as if it were absolute'.[213] Thus, s 6 was deployed to operate against the doctrine of implied repeal.[214] However, three other justices, Gault, Keith and McGrath JJ, disagreed.[215] Even with the *NZ BORA*, their Honours said, if two enactments cannot be read together 'the provision enacted later in time will prevail'.[216]

There are other examples of rights-protective interpretive provisions that can operate prospectively. For example, s 17(2) of the *Supreme Court Act 1986* (Vic) provides that '[u]nless otherwise expressly provided by this or any other Act, an appeal lies to the Court of Appeal from any determination of the Trial Division constituted by a Judge'. Like Lord Hope's approach in *H v Lord Advocate*,[217] this goes further than the test under the principle of legality, by excluding the possibility of amendment or repeal by necessary implication. Section 17(2) was the subject of proceedings in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)*,[218] where the High Court of Australia took no issue with the provision's prospective operation,[219] finding that the subsequently enacted s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) did not 'expressly' provide otherwise.[220]

Based on the position taken earlier in this article, the application of s 32(1) of the *Victorian Charter*, and other rights-protective interpretive provisions, to subsequent statutes is broadly consistent with the presumption *against* implied repeal, with implied repeal better viewed as an exception to the rule. What the above further demonstrates is that there are already instances where the courts are empowered to interpret legislation in a way that protects certain statutory rights from subsequent statutes. There already are certain statutes that are 'more sacred or immutable' than others and that Parliament cannot 'as freely and in the same manner' legislate against.[221] On the one hand, this bodes well for extending the

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211 Ibid 50 [51]. See also 47–8 [36]–[40].

212 Ibid 50 [52]. Rather, said their Honours, the outcome 'implements Parliament's own requirement in s 6 of the [*NZ BORA*] that Parliament must speak clearly if it wishes to trench upon fundamental rights': at 50 [52]. See also 46–7 [29].

213 Ibid 69 [140]. Not unlike Laws LJ's view in *Thoburn* that constitutional statutes created an 'exception' to the doctrine of implied repeal, Thomas J thought that the doctrine can be subject to 'modification': at 70 [144].

214 This approach was controversial: see Andrew Butler, 'Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand' [2001] *Public Law* 586; Anita Killeen, Richard Ekins and John Ip, 'Undermining the Grundnorm?' [2001] *New Zealand Law Journal* 299; Kalderimis and Tripp, above n 127; Anthony Bradley, 'Conflicting Statutory Provisions — The Impact of Fundamental Rights' [2001] *New Law Journal* 311.

215 The seventh justice, Richardson P, did not consider this issue.

216 [2001] 2 NZLR 37, 63 [110].

217 See above Part VIA.

218 (2001) 207 CLR 72 ('*Roy Morgan*').

219 Cf *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603.

220 *Roy Morgan* (2001) 207 CLR 72, 78–9 [11]–[12] (Gaudron, Gummow, Hayne and Callinan JJ).

221 See above nn 122–3 and accompanying text.

principle of legality to protect significant or valuable statutory rights. An extended principle is not out of step with these rights-based developments.

On the other hand, there is a fundamental difference in that the interpretive function of s 32(1) is conferred by Parliament. It is a democratically sanctioned statutory command. Parliament, when enacting legislation, can be taken to know that the courts will, where possible, interpret legislation compatibly with a clearly identified set of human rights. Given this, s 32(1) bears a greater degree of legitimacy than the courts modifying a common law presumption from how it has long been understood and accepted to operate. There is greater flexibility for Parliament itself to make explicit and subscribe to new 'standing commitments'.[222] Moreover, if Parliament already has the capacity to lay down interpretive provisions that require that particular statutory rights not be lightly overridden, then there is little to be gained by extending the principle of legality to do the same. Rather, applying the principle to statutory rights in the absence of such interpretive provisions can be seen as contrary to legislative intention.[223]

C *Convergence between the Principle of Legality and the* Victorian Charter*?*

Furthermore, even if one accepts that the principle of legality extends to significant or valuable statutory rights, this logically leads to a further question — can the principle apply to the human rights in the *Victorian Charter* itself? In *Director of Public Prosecutions v Kaba*,[224] Bell J of the Victorian Supreme Court said in obiter dicta, 'there is reason to think that the statutory human rights specified in the Charter … are protected at common law under the principle of legality'.[225] That was because 'human rights specified in the Charter may be compared with the fundamental rights and liberties traditionally protected by the principle of legality. Following Finn J in *Buck*, it might be concluded that the principle encompasses these human rights'.[226] However, his Honour refrained from expressing a concluded view.

If the principle of legality protects significant or valuable statutory rights, then presumably it would include Charter rights. However, there is questionable utility in applying the principle of legality to Charter rights. The *Victorian Charter* already has its own interpretive mechanism in s 32(1). Furthermore, it is doubtful whether the principle of legality and Charter rights may properly be converged, as there are some aspects that potentially differ in operation. These are explored elsewhere. One example relates to whether justification and proportionality can have

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222 Goldsworthy, *Parliamentary Sovereignty*, above n 38, 305–6.

223 This could be broadly analogised with an *expressio unius est exclusio alterius* argument — the express inclusion of rights-protective interpretive provisions in some statutes indicates that such an approach is excluded under other statutes.

224 (2014) 44 VR 526.

225 Ibid 580 [188].

226 Ibid 581 [193].

any role to play in interpretation under the principle of legality[227] and s 32(1).[228] Another example is how the principle of legality and s 32(1) apply to broadly expressed statutory discretions and interpreting the scope of those discretions.[229]

VIII Related Presumptions

Finally, it should be noted that the principle of legality already protects certain statutory rights in Australia. The principle encompasses the well-established common law presumptions against interference with vested property rights without adequate compensation[230] and against the retrospective operation of statutes.[231] These may be dealt with briefly.

As to the former, the courts have sometimes approached the presumption against interference with 'vested'[232] property rights as including not only common law property rights, but also property rights sourced in statute.[233] For example, in *University of Western Australia v Gray (No 20)*,[234] French J (as his Honour then was) held that intellectual property rights derived from patents statutes could 'fall into the category of property rights which attract the presumption'.[235] An inventor's intellectual property rights could be vested property rights. Consistently with the above, the High Court of Australia appears to have accepted that the presumption can indeed apply to property rights in statute.[236]

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227 See Chen, 'The Principle of Legality: Issues of Rationale and Application', above n 53, 362–73; Goldsworthy, 'The Principle of Legality and Legislative Intention', above n 26, 69–70; Meagher, 'The Principle of Legality and Proportionality in Australian Law', above n 54; Hanna Wilberg, 'Common Law Rights Have Justified Limits: Refining the "Principle of Legality"' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 139.

228 See Bruce Chen, 'Making Sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the *Charter of Human Rights and Responsibilities Act 2006*' [2013] (74) *Australian Institute of Administrative Law Forum* 67; Victoria, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, Parl Paper No 77 (2015) 155.

229 See Bruce Chen, 'Section 32(1) of the Charter: Confining Discretions Compatibly with Charter Rights?' (2016) 42(3) *Monash University Law Review* 608; Bruce Chen, 'How Does the Charter Affect Discretions? The Limits of Section 38(1) and Beyond' (2018) 25(1) *Australian Journal of Administrative Law* 28.

230 *Clissold v Perry* (1904) 1 CLR 363, 373.

231 *Maxwell v Murphy* (1957) 96 CLR 261; *Rodway v The Queen* (1990) 169 CLR 515; *Esber v Commonwealth* (1992) 174 CLR 430.

232 The word 'vested', it is said, 'is primarily a technical legal term used to differentiate a presently existing interest from a contingent interest': Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws*, Report No 129 (2015) 466 [18.32]. Something is 'contingent' where it is 'conditioned upon the occurrence of a future event which is itself uncertain or questionable': *Temwood Holdings Pty Ltd v Western Australian Planning Commission* (2001) 115 LGERA 152, 169 [57].

233 See, eg, *Greville v Williams* (1906) 4 CLR 694, 703; *University of Western Australia v Gray (No 20)* (2008) 246 ALR 603, 634 [86], [88]–[89]; *Young v Owners — Strata Plan 3529* (2001) 54 NSWLR 60. Cf discussion in Pearce and Geddes, above n 5, 233–4; *New South Wales v Macquarie Bank Ltd* (1992) 30 NSWLR 307, 319–20 (Kirby P), where his Honour framed it in terms of procedural fairness before depriving a person of a valuable property right.

234 (2008) 246 ALR 603.

235 Ibid 634 [89].

236 *Tabcorp Holdings Ltd v Victoria* (2016) 328 ALR 375, 389 [68].

As to the presumption against retrospective operation of statutes, this common law presumption is widely reflected in interpretation Acts across the federal, state and territory jurisdictions, with respect to statutory rights.[237] The statutory presumption applies to 'acquired' or 'accrued' statutory rights.[238] It is presumed that, in the absence of express words or a necessary implication to the contrary, legislation will not operate retrospectively to affect existing statutory rights that have been acquired or accrued.

Since the presumption against interference with vested property rights and the presumption against retrospectivity fall within the scope of the principle of legality, the principle in its current state protects certain statutory rights. An extended principle of legality may overlap with these pre-existing presumptions, where relevant.[239] Moreover, as outlined earlier, there will be overlaps between the principle of legality and the presumption against implied repeal.

IX Conclusion

The principle of legality is a common law interpretive principle that protects fundamental common law protections from abrogation or curtailment, except by clear and unambiguous language. While it is uncontroversial that statute law can be a source for the development of fundamental common law protections, it would appear at first glance to be a radical thing for the principle to extend directly to protect statutory rights. However, this article has identified two scenarios in which steps have been taken to develop the principle of legality in this way. The first is where 'significant' or 'valuable' statutory rights are read generously within the context of the Act in which they are found. However, it is questionable whether this approach is appropriate. The second possibility is that subsequent infringing legislation is interpreted restrictively so as to protect earlier 'significant' or 'valuable' statutory rights.

There are several arguments in favour of extending the principle of legality to certain statutory rights. It is arguably consistent with the principle's 'original rationale', which already recognises the improbability of certain common law protections being abrogated or curtailed. It is not a great extension of logic to recognise the same with respect to statutory rights. That is all the more pertinent given we live in this modern 'age of statutes'.[240] Alternatively, if the concept of actual legislative intention is abandoned in statutory interpretation, as it was in *Lacey*, this removes the objection (at least, theoretically) that Parliament cannot be taken to know that certain statutory rights are to be protected by the principle of legality and cannot act accordingly. An extended principle is also consistent with the

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[237] See, eg, *Acts Interpretation Act 1901* (Cth) s 7(2)(c); *Interpretation Act 1987* (NSW) s 30(1)(c); *Interpretation of Legislation Act 1984* (Vic) s 14(2)(e).

[238] That is, a statutory right that is 'real' rather than 'abstract': *Abbott v Minister for Lands* [1895] AC 425; it is not 'a mere hope or expectation that a right will be created': *Director of Public Works v Ho Po Sang* [1961] AC 901.

[239] See, eg, *Tabcorp Holdings Ltd v Victoria* [2014] VSC 301 (26 June 2014) [93], [97]–[99] (vested property rights); *Oxenbould v The Solicitors' Trust* [2011] TASSC 57 (3 November 2011) [31], [36]–[37], [39] (presumption against retrospectivity).

[240] See above nn 4, 10 and accompanying text.

doctrine of parliamentary sovereignty in some respects. While it would create a hierarchy of statutes, contrary to Dicey's conception of parliamentary sovereignty, Parliament ultimately remains sovereign. Parliament is still free to amend or repeal statutory rights as it wishes, provided it does so with clear and unambiguous language. An extended principle of legality is also consistent with the so-called doctrine of implied repeal as an aspect of parliamentary sovereignty. 'So-called' because, as scholars have rightly identified, it is really a presumption *against* implied repeal. Thus, a principle of legality that protects statutory rights from subsequent infringing statutes adds to and fortifies, rather than deviates from, this presumption.

The protection of particular statutes through the strict interpretation of subsequent statutes is not as revolutionary as it might initially seem. This article provided four examples. First, movement towards the recognition of 'constitutional' statutes in the UK. Second, the enactment of rights-protective interpretive provisions, including under statutory bills of rights in Victoria and the Australian Capital Territory. Third, the common law presumption against interference with vested property rights without adequate compensation and the statutory presumption against retrospective operation, which already apply to protect statutory rights. Fourth, as already noted above, the operation of the presumption against implied repeal.

Nevertheless, there are stronger arguments that pull in the other direction. As to the principle of legality's origins, the principle is not conventionally understood to extend to statutory rights. It protects against legislative incursions into the common law. It would be rather ironic, then, if the principle were applied to the very thing from which it was intended to be shielded. Moreover, the principle of legality is based on actual legislative intention and grounded in the institutional relationship between Parliament and the courts. Arguably, Parliament cannot have 'directed its attention' to, and 'determined' or 'consciously decided' upon, abrogation or curtailment, or 'squarely confront what it is doing', in the absence of widespread agreement. Parliament and the courts are taken to be aware of the principle of legality. However, legitimacy of the principle risks being undermined if the courts strike out on their own to apply the principle to certain statutory rights, contrary to this shared understanding and acceptance.

There are already difficulties in ascertaining the scope of protection of the principle of legality with respect to fundamental common law protections. This has implications for both legislative intention and parliamentary sovereignty, and the democratic nature of lawmaking. Extending the principle of legality to statutes would significantly magnify that problem. There would be a high level of uncertainty and contestability about which statutory rights are 'significant' or 'valuable' and therefore protected. This is borne out in the commentary on the UK experience with respect to 'constitutional' statutes. The extension to certain statutory rights would also lead to a convergence between the principle of legality and s 32(1) of the *Victorian Charter*, which poses some problems given their potential differences in operation. Section 32(1) is also distinguishable from the principle of legality, in that the former is democratically sanctioned, whereas the latter would require modification and would be contrary to actual legislative intention and institutional understanding.

Finally, it appears there is little discernible benefit to be gained in return for such methodological challenges. Parliaments can and already do enact rights-protective interpretive provisions that allow for provisions to be protected against subsequent statutes. The presumption against implied repeal already protects statutes from repeal or amendment by subsequent statutes in the absence of express words or necessary implication. To adopt the words of Gageler J (albeit expressed in different contexts): '[o]utside its application to established categories of protected common law rights and immunities', the principle of legality 'must be approached with caution';[241] '[u]nfocused invocation' of the principle 'can only weaken its normative force, decrease the predictability of its application, and ultimately call into question its democratic legitimacy'.[242]

[241] *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 382 [67].

[242] *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 35–6 [88].