

Chapter 1

The Rationales for the Principle of Legality

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I Introduction

Statutory construction, as the High Court tells us, expresses “the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws”.¹ The principle of legality, being a principle of statutory construction, therefore expresses certain aspects of the constitutional relationship between the arms of government. That constitutional relationship, like most long-term and intimate relationships, is one in which the parties are well capable of finishing each other’s sentences, but equally well capable of putting words in each other’s mouth. It is an important contemporary question whether a court, when it invokes the principle of legality to give meaning to a statute, does so to finish the Parliament’s sentence or to put words in the Parliament’s mouth. That question is one about the *rationale* for the principle of legality. It is about the *constitutional justification* for the judicial presumption that statutes do not abrogate certain rights unless expressed to do so with clear words. Is the rationale for the principle of legality to secure constructional fidelity to authentic legislative intentions? Or is it to vindicate normative commitments that are independent of legislative intention?

The traditional answers to this set of questions were clear. The rules of statutory construction, including what we now call the principle of legality, were justified on the basis that they were calculated to give effect to the intention of the legislature. Legitimate statutory construction was seen to require the courts to act as faithful agents of parliaments, and the rules of construction were guides which, if followed, would most likely cause the agent to carry out the true instructions of the principal. More recently, some rules of statutory construction, including the principle of legality, have become increasingly difficult to explain as incidents of the faithful-agent conception of interpretation. Some rules of statutory construction, including the principle of legality, might be seen to be more persuasively explained as incidents of an interpretive model in which judges enforce legal values or policies that are quite independent of the legislative policies pursued by the enactment being construed

* Sections II and III of this chapter draw on my earlier work, “The Normativity of the Principle of Legality” (2013) 37 *Melbourne University Law Review* 372.

1 *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28]; *Dickson v The Queen* (2010) 241 CLR 491 at 506-507 [32].

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