

# The criminal justice system and the rule of law



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By Donna Spears

In everyday use, the rule of law is often equated with law and order – the idea that people should obey the law. However, as Bottomley and Parker observe, while law and order might be an aspect of some conceptions of the rule of law, it is not really at the heart of it.<sup>1</sup> They suggest

that the rule of law is valued because it is thought to curb the power of government, protect the rights and liberties of citizens and promote personal autonomy, in that individuals can predict the circumstances in which government will interfere with their lives.

**P**roponents of the rule of law suggest that it constrains and legitimates the power of the state to punish by placing a premium on the clarity, rationality and coherence of the criminal law.<sup>2</sup> Neal has also stressed that the rule of law, at least in a developed form, requires a legal system for adjudicating disputes involving the general rules that is independent of the executive.<sup>3</sup> Two Latin maxims are often referred to: *nullum crimen sine lege* – no crime without law; and *nulla poena sine lege* – no punishment without law.

But what is the rule of law? At its most basic, the rule of law is the principle that every person should be subject to the same law. It abhors arbitrary governmental rule or action, and seeks to provide citizens with some basic protections by requiring the government to act according to the law.

Within the criminal law, the rule of law is generally associated with the right to a fair trial, the presumption of innocence, the rule against double jeopardy, the requirements of *habeas corpus* and the principle of legal equality. Beyond this, the content and effect of the rule of law in the criminal law is ill-defined, although most lawyers have an intuitive sense of when 'reforms' threaten the rule of law, even if the exact mischief is more difficult to identify. This article discusses recent developments within the NSW criminal justice system that raise significant rule of law issues.

#### THE RIGHT TO A FAIR TRIAL?

The framers of our Constitution made a conscious decision not to include an express guarantee of 'due process of law' in the Constitution on the basis that Australia's legal and political traditions already respected the right to a fair trial.<sup>4</sup> The High Court was not prepared to entertain the argument that unfairness to an accused arising from the operation of a validly enacted statute was, of itself, sufficient to justify a stay of proceedings.<sup>5</sup> The unsuccessful argument was that the so-called 'rape shield' provision operated to prejudice a fair trial by excluding otherwise relevant and probative evidence of prior sexual experience, and resulted in an unfair trial.

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#### THE RIGHT TO TRIAL BY JURY

Section 80 of the Constitution provides that '[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury.' Although the High Court has identified and upheld the essential features of trial by jury – where s80 guarantees a jury trial, that right cannot be waived<sup>6</sup> and any verdict must be unanimous<sup>7</sup> – in the main it has taken a fairly narrow view of the scope of such a right. Those cases also confirm that any such constitutional guarantees will apply only to Commonwealth offences. The existing state provisions for majority verdicts<sup>8</sup> and judge-alone trials<sup>9</sup> are not unlawful in relation to state offences.

In addition, the High Court has held that s80 guarantees trial by jury *only* when the trial is on indictment.<sup>10</sup> There is no constitutional constraint on federal or state legislatures from making even serious offences summary simply by designating them as such, or by creating new purely summary offences. In fact, as Findlay has recently pointed out,<sup>11</sup> the impact of the jury on criminal justice is being systematically and radically eroded by the expansion of summary jurisdiction.

Although the institution of the criminal trial still retains considerable symbolic, rhetorical and ideological power >>

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in the popular imagination, it is becoming increasingly irrelevant to much of what actually happens in the criminal justice system. The protections associated with trial by jury have little relevance to most accused persons. In NSW in 2006, 141,389 people had criminal matters finalised in either the Local Courts or Children's Court, where jury trial is not available, and only 556 out of 3,331 (16.7%) of those who had matters determined in the District and Supreme Courts exercised their right to trial.<sup>12</sup> This means that fewer than 1% of all people dealt with by the NSW criminal justice system in 2006 proceeded to a full criminal trial (either by jury or judge alone).

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Further, an increasing number of statutory offences do not require the prosecutor to prove that an accused person had the criminal intent, or *mens rea*, to commit the offence. The creation of such strict or absolute liability offences<sup>18</sup> is now so common that the NSW Legislative Review Committee has recently adopted a set of principles for considering whether Bills or Regulations that create such offences trespass unduly on personal rights and liberties.

#### HABEAS CORPUS

Bail is another area where statutory reform over the last 20 years has steadily eroded the presumption

of innocence and the right to be at liberty until convicted. An accused was generally entitled to bail to enable the preparation of his or her case to be as full, thorough and unfettered as possible.<sup>19</sup> Statutory schemes provide that accused people have a general right to bail, a presumption in favour of bail, no presumption or a presumption against bail, depending on the offence.

The steady trend of reform, however, has been to reduce the number of offences for which there is a right to bail, and to markedly increase the number of offences or circumstances in which there is either no presumption or a presumption against bail. Recent amendments to the *Bail Act 1900*,<sup>20</sup> which are about to commence, will see further presumptions against bail for serious firearms and weapons offences and limits placed on the number of bail applications that may unduly trespass on the right to be treated 'as though innocent'.

Aside from changes to the substantive bail law, since 1 September 2007, accused persons in custody are not physically present in court but rather appear by way of audio-visual link in all appearances except hearings and sentence proceedings. Concern has been expressed by the Bar Association, the Law Society and the Aboriginal Legal Aid services that the blanket use of this technology has the potential to alienate the accused from the court, undermine the relationship between legal practitioner and client, and reduce the quality of service to clients.

#### THE RULE AGAINST DOUBLE JEOPARDY

A longstanding principle of the common law is that a person should not be placed in peril of being convicted of the same crime for the same conduct on more than one occasion. This rule has now been eroded by Part 8 of the *Crimes (Appeal and Review) Act 2006*, which provides for the retrial of persons for serious offences in certain situations,<sup>21</sup> notwithstanding their acquittal by a judge or jury. One impetus for these reforms has been technological advances in evidence and proof such as DNA profiling. The problem for the rule of law is: if the innocent can be exonerated on

#### THE PRESUMPTION OF INNOCENCE

In *Woolmington v DPP*, Lord Sankey observed that 'no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained'.<sup>13</sup> However, as a number of commentators have observed,<sup>14</sup> this so-called 'golden thread' is becoming increasingly moth-eaten by statutory exceptions and judicial decisions that impose evidential burdens on the accused. Such modifications are generally justified on the basis that the presumption of innocence and the defendant's right to avoid mistaken conviction must be balanced against the community's interest in law enforcement and the practicalities of proof.

A reversal of the burden of proof occurs where an evidentiary burden is placed on the defendant to prove some fact in issue – often the basis of an excuse – to the balance of probabilities. An example of statutory reversal of proof can be found in provisions relating to state drug-supply charges – if an accused person has more than a specified amount of a prohibited drug in their possession, then they are presumed to have that drug for the purpose of supply, unless they can rebut the presumption.<sup>15</sup>

Such reversals are becoming more common. Not all reversals will offend the rule of law, but they may become problematic in the context of serious offences where pragmatic considerations of proof are seen to override the legitimate rights of the defendant. In addition, the golden thread is under assault from the courts themselves, which have imposed 'evidential' burdens of proof on accused people in areas as diverse as self-defence, duress, reasonable mistake of fact, and even the general issue of voluntariness.<sup>16</sup> These effectively require the accused to produce sufficient evidence before they can raise certain defences, which represents a departure from the principle that the onus of proving guilt rests with the prosecution. At the Commonwealth level, this trend has been endorsed in the Criminal Code itself.<sup>17</sup>

the basis of newly available cogent evidence, why should the guilty remain free on the 'technicality' that they have already been acquitted? The legislation commenced on 15 December 2006 and is retrospective.

**THE PRINCIPLE OF EQUALITY**

The principle of equality or equal treatment demands that the laws apply equally to all. The concept of equality is itself complex, and whether such requirements are formal or substantive is a moot point. Nevertheless, the recent introduction of a system giving police discretion to impose 'on-the-spot' fixed fines without conviction for certain minor criminal offences (such as minor fraud, shoplifting, possession of stolen goods, offensive conduct, offensive language, obstructing traffic and unauthorised entry of a vehicle or boat) raises obvious concerns about equality of treatment in terms of producing both excessive and inadequate punishments, and the need for individualised justice.

**CONCLUSION**

There is little room for complacency about the rule of law across the criminal justice system. The fear of crime and the need to protect the community have, in more recent times, been used to justify the significant erosion of what were once regarded as common law rights. A strength or weakness (depending on your point of view) of the criminal law is that its conception of fairness involves the balancing and weighing of competing consideration and interests. Justifications for reform of the criminal law are frequently cast in terms of the pressing need to protect the community and preserve law and order, even at the expense of the rights of the accused.


From the perspective of a common law criminal practitioner, the material difference between the traditional criminal law and the new federal and state anti-terror law is the explicit use of precaution as the justification for restricting a person's liberty – rather than conviction by a court. The spectre of terrorism has produced further impetus for the expansion of these laws, and derogation of civil liberties. Recourse to the ideology of the rule of law is not the panacea. As Cowdery and Lipscomb astutely observe, the rule of law 'cannot guarantee justice – but it is an essential precondition for it'.<sup>22</sup> The experience of the criminal justice system gives little support to the idea that the rule of law provides any absolute guarantees or protections. ■

**Notes:** **1** S Bottomley and S Parker, *Law in Context*, Federation Press, Sydney, 2nd ed, 1997, p46. **2** S Bronitt and B McSherry, *Principles of the Criminal Law*, Lawbook Co, Sydney, 2nd ed, 2005 p10. **3** D Neal, *The Rule of Law in A Penal Colony: Law and Power in Early New South Wales*, 1991, p67. **4** F Wheeler, 'Fair Trial and the Australian Constitution' (2005) 17 *Legaldate* 7. **5** *PJE* (unreported, NSWCCA, 9 October 1995). Special leave to the High Court was refused. **6** *Brown v R* (1986) 160 CLR 171. **7** *Cheatle v R* (1993) 177 CLR 541. **8** See s55F of the *Jury Act* 1977. **9** See s132 of the *Criminal Procedure Act* 1986. **10** *Cheng v The Queen* (2000) 203 CLR 248. **11** M Findlay, 'Juries Reborn' (2007) 90 *Reform*, 9. **12** Statistics taken from Statistical Services Unit, NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2006, 2007*. **13** [1935] AC 462.

**14** D Brown, D Farrier, S Egger, L McNamara and A Steel, *Criminal Laws*, Federation Press, Sydney, 4th ed, 2006, p414; and A Ashworth and M Blake, 'The Presumption of Innocence in English Criminal Law', [1996] *Crim LR* 306. **15** Section 29 of the *Drug, Misuse and Trafficking Act* 1995. **16** Brown et al (Note 14 above), p417. **17** Evidential burdens are imposed on the accused in relation to intoxication, mistake, claim of right, duress, self-defence and necessity: s13.3(2) and Pt 2.3. **18** An offence of strict liability is one in which a person may be punished for doing something whether or not they have guilty intent, unless they can show that they made an honest and reasonable mistake of fact. Classic examples of strict liability offences include polluting waters, owners of trucks failing to comply with load weights, some driver licensing offences and some food-handling expenses. Absolute liability can be contrasted with strict liability by the absence of the defence of mistake of fact. **19** *R v Wakefield* (1969) 89 WN (pt1) (NSW) 325 at 327. **20** *Bail Amendment Act* 2007 has received assent but will not commence until proclamation. **21** The Act applies to three situations: (1) retrials for a 'life sentence offence' (including murder, aggravated sexual assault in company and major drug offences) where there is 'fresh and compelling' evidence and it is in the interests of justice for a retrial to be ordered; (2) retrials for a '15 years or more sentence offence' where the acquittal was tainted – that is, where the outcome was likely to be affected by an 'administration of justice offence', such as interference with a juror; and (3) Crown appeals from acquittals on questions of law. **22** Nicholas Cowdery QC and Adrian Lipscomb, 'The Just Rule of Law', (2000) 4 *Southern Cross University Law Review*, 1.

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