

THE WESTERN AUSTRALIAN JURIST

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ARTICLES

MARXISM, COMMUNISM AND LAW: HOW MARXISM LED TO LAWLESSNESS AND GENOCIDE IN THE FORMER SOVIET UNION

AUGUSTO ZIMMERMANN*

The writings of Marx and his collaborator Engels are in effect the New Testament of Communism. Lenin is the Pauline apostle to the gentiles who adopted the gospel to a new generation and a new people. Stalin is the Soviet Emperor Constantine, who make of the new religion a State Orthodoxy... It was on the foundation of Marxian analysis of the origin, growth, and decline of societies that the Russian Revolutionaries set out to construct a new social order. Led by Lenin, these men were thoroughly grounded in Marxism and were fanatical believers in its doctrines.

Harold J. Berman, *Justice in Russia* (1950) 8-9.

Abstract

This article discusses Marxism and how it has been interpreted and applied in communist countries that have claimed Marxism as their official state ideology, particularly the former Soviet Union. It looks into whether the undercurrent of violence and lawlessness so often exhibited by communist regimes may in actual fact represent a natural consequence of Marxist ideology itself. Marx, after all, basically viewed law in terms of guaranteeing and justifying class oppression. On this basis he defined the state and all its laws as mere instruments of class oppression that would have to disappear when the last stage of communism were at last accomplished. Meanwhile, Marx wrote, law in a truly socialist state must be no more than the mere imposition (by a socialist elite) of the ‘dictatorship of the proletariat’. The practical

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effects of such Marxist doctrines, once adopted by governments that have embraced Marxism as their official ideology, is the principal object of analysis in this article.

I INTRODUCTION

Marxism is primarily a social, political, and economic theory that interprets human history through a progressive prism. Marx claimed to have discovered a dialectical pattern controlling human development that would lead humanity to the advent of a communist society of classless individuals. On this basis Marx defined the state and all its laws as mere instruments of class oppression that would have to disappear when the final stage of societal progress was achieved. Marxism was the theory and faith of the founders of the Soviet Union. It functioned there as the ideological goal and self-justification for the entire Soviet experiment. This article discusses Marxist theory in general and how it was developed and applied during the seven decades of the Soviet Union (1917-1991), a country that claimed Marxism as its official ideology.

II MARXISM AND RELIGION

In order to more properly understand Marxism, it is necessary to explore its religious dimensions. Marxism is not only a project of social, economic and political transformation but also a form of secular theology. In many respects Marxism is no less religious or dogmatic than the traditional religions of Judaism, Christianity and Islam. Indeed, Marxism contains within itself a complete worldview that includes an explanation of the origin of the universe and an eschatological theory about the final destiny of humankind.

Theologically, Marxism declares that God does not, cannot, and must not exist. Marxism is based on the conviction (a genuine opiate of the people?) that history is progressing towards a certain end, and that the proletariat (to be guided by the ‘vanguard’ of the proletariat) is the redemptive force of humanity. Thus, Marx declared: ‘History is the judge, its executioner the proletariat’.¹ This provides the illusion that the proletariat is omnipotent, at least as method²; and that it is ‘destined to fulfil this mission in a manner as organic and ineluctable as a process of nature’.³ Marxism is therefore endowed with ‘prophetic dimensions and certainties [that are] central parts of its message and its appeal’.⁴ As Martin Krygier explains, ‘if we focus on its most obvious analogies to the world religions – its institutionalization and its emancipatory and eschatological themes, rather than its purely critical or theoretical ones – then clearly institutionalized Marxist has a lot in common with orthodox religions’. And yet, as Krygier also points out, the legacy of Marxism and the legacy of religions like Christianity and Judaism differ in at least two fundamental aspects:

The great world religions have endured for millennia and, if they have been involved in the infliction of pain, they have also been responsible for glorious achievements – achievements of the spirit; cultural, artistic, civilizational, architectural, monuments, both literal and metaphorical; and in certain case, if Weber is to be believed, significant economic achievements. Institu-

¹ Cited in Paul Johnson, *The Intellectuals* (New York/NY: Harper Perennial, 1988), 55.

² Milovan Djilas, *The New Class: An Analysis of the Communist System* (London: Thames and Hudson, 1957), 6.

³ Andrzej Flis, ‘From Marx to Real Socialism: The History of a Utopia’, in Krygier (ed.), *Marxism and Communism: Posthumous Reflections on Politics, Society, and Law* (Amsterdam: Rodopi, 1994), 25

⁴ Martin Krygier, ‘Marxism, Communism, and Narcissism’ (1990) 15(4) *Law & Social Inquiry* 707, 712.

tionalized Marxism lasted 70 years [in Russia]. In that short time it has cost millions of lives, enslaved millions of people and reduced once-civilized countries to dilapidated ruins. Its spiritual legacy is nil. Almost its only moral achievement (not small) has been the tempering of those characters that did not break or bend in hard times. The only great literature for which it was clearly responsible, and almost the only great literature produced under it, has been a literature of opposition and suffering. The less said about its monuments the better.⁵

Since Marx believed he had discovered the secret of perfecting the human condition, politics became for him a secular religion, whereby the ideal of human salvation must be accomplished by the belief in the proletariat's revolutionary actions in history.⁶ Marxist history was interpreted progressively by Marx, moving by means of ongoing social struggle. He believed that the final stage of human progress transcends class struggle, when the eschatological consummation of global communism is at last achieved.⁷ Comparing such Marxist eschatology with that contained in the Bible's *Book of Revelation*, David Koyzis comments:

Much as the scriptures teaches the ultimate victory of Jesus Christ over his enemies and the reign of the righteous over the new earth in the kingdom of God, so also does Marxism promise an eschatological consummation of human history. This does not, of course, mean that there is not a battle to be waged or work to be done. Indeed, there is much of both. But in fighting for

⁵ *Ibid*, 712.

⁶ According to Andrzej Flis, "*Marxism is more of a... socialist credo than the effect of investigations into the real dynamics of the workers' movement. Marx's conviction that the proletariat would evolve a revolutionary consciousness was not a scientific opinion but an ungrounded prophecy. Having arrived at his theory of the proletariat's historic mission on the basis of philosophical deduction, he later sought empirical evidence for it*". – Flis, above n 3, 24

⁷ David T. Koyzis, *Political Visions & Illusions* (Downers Grove/Ill: InterVarsity Press, 2003), 174.

the classless society, the proletariat does so fully confident that it is fighting not against history but with it.⁸

If the ‘god’ of Marxism is to be understood as a dialectical historical process toward communism, then its ‘devil’ constitutes the ‘reactionaries’ who either deny or hinder the eschatological consummation of communism. These ‘reactionaries’ are destined to receive their final destruction in the fires of global revolution.⁹ Hence, in the opinion of Leonardo Boff, a leading contributor to Marxist-oriented liberation theology in Latin America, one day the world will face a ‘final apocalyptic confrontation of the forces of good [communists] and evil [anti-communists], and then the blessed millennium’.¹⁰ The violent suppression of those ‘reactionaries’, he says, will represent the advent of ‘God’s Kingdom on Earth, and the advent of a new society of a socialistic type’.¹¹

In his 1987 book, *O Socialismo Como Desafio Teológico* (‘*Socialism as a Theological Challenge*’), Boff contended that the former communist regimes in Eastern Europe, especially the former Soviet Union and Romania, ‘offer[ed] the best objective possibility of living more easily in the spirit of the Gospels and of observing the Commandments’.¹² Returning from a visit to Romania and the former Soviet Union in 1987, just a few years before the collapse of communism in Eastern Europe, this former Catholic priest stated that these notorious regimes were ‘highly ethical and... morally

⁸ *Idem*, 172.

⁹ H.M. Morris and M.E. Clark, *The Bible has the Answer* (Green Forest/AR: Master Books, 2005), 340-1.

¹⁰ Leonardo Boff, *Salvation and Liberation* (Melbourne/Vic: Dove, 1984), 106.

¹¹ *Ibid*, 116.

¹² See Leonardo Boff, *O Socialismo Como Desafio Teológico* (Petrópolis/RJ: Vozes, 1987), 682.

clean', and that he had not noticed any restrictions in those countries on freedom of expression.¹³

Marxist theologians like Boff refuse to accept any possibility of peaceful coexistence between people of different classes. For individuals like him, every religious person has the moral obligation 'to rouse the working class to an awareness of class struggle and the need to take part in it'.¹⁴ He does not regard it as a 'sin' for anyone to physically attack someone from a supposedly 'oppressive' class, since this would be committed by a person who is socially 'oppressed' and thereby involved in the struggle to remove social inequalities.¹⁵ Addressing this kind of radical thinking, Cardinal Joseph Ratzinger, now Pope Benedict XVI, states:

The desire to love everyone here and now, despite his class, and to go out to meet him with the non-violent means of dialogue and persuasion, is denounced as counterproductive and opposed to love. If one holds that a person should not be the object of hate, it is claimed nevertheless that, if he belongs to the objective class of the rich, he is primarily an enemy to be fought. Thus the universality of love of neighbour and brotherhood become an eschatological principle, which will only have meaning for the 'new man', who arises out of the victorious revolution.¹⁶

¹³ Joseph A. Page, *The Brazilians* (Reading/MA: Addison-Wesley, 1995), 349.

¹⁴ 'Liberation Theology', *The Angelus*, Vol. VIII, No. 6, June 1985 (Reprinted from 'The Economist', October 13th, 1984), at:
<http://www.sspcx.ca/Angelus/1985_June/Liberation_Theology.htm>

¹⁵ Millard J. Erickson, *Christian Theology* (Grand Rapids/MI: Baker Book House, 1983), 592.

¹⁶ Joseph Ratzinger (Pope Benedict XVI), *Instruction on Certain Aspects of Theology of Liberation* (Rome: Congregation for the Doctrine of the Faith, August 6th, 1984), at
<http://www.newadvent.org/library/docs_df84lt.htm>

Radical Marxism, indeed, regards the advent of the communist utopia as an end in itself. Unlike a normal error of judgement, which can be discovered and corrected by the facts available, radical Marxism, according to François Furet, can more easily be discussed as a system of beliefs based on ‘psychological investment, somewhat like a religious faith even though its object [is] historical’.¹⁷ It is something that the believers must realise at any social cost. To realise Marxism, any means are justified, including violence and deceit.¹⁸ After all, under the communist paradise, there will be no more social injustice and everybody will be treated equally. The sum of violent actions is alleged to actually be a good thing, because this may potentially accelerate the advent of the great socialist utopia. In other words, anything that a person does to advance such a noble ideal is never to be regarded as objectively wrong or unethical. Likewise, all the failures of

¹⁷ François Furet, *The Passing of an Illusion: The Idea of Communism in the Twentieth Century* (Chicago: The University of Chicago Press, 1999), ix.

¹⁸ Believing, as Marx did, that violence was an essential element in the socialist revolution, people like Lenin, one of his most radical disciples, never quailed before the need to employ terror. He had inherited from Marx the tradition of justification for terror. Paul Johnson writes: “*Lenin always insisted that Marxism was identical to absolute truth... Believing this, and believing himself the designated interpreter ... Lenin was bound to regard heresy with even greater ferocity than he showed toward the infidel. Hence the astonishing virulence of the abuse which he constantly hurled at the heads of his opponents within the party, attributing to them the basest possible motives and seeking to destroy them as moral beings even when only minor points of doctrine were at stake. The kind of language Lenin employed, with its metaphors of the jungle and the farmyard and its brutal refusal to make the smallest effort of human understanding, reclass the odium theologicum which poisoned Christian disputes about the Trinity in the sixth and seventh centuries, or the Eucharist in the sixteenth. And of course once verbal hatred was screwed up to this pitch, blood was bound to flow eventually (55)... Just as the warring theologians felt they were dealing with issues which determine whether or not countless millions of souls burned in Hell for all eternity so Lenin knew that the great watershed of civilization was near, in which the future fate of mankind would be decided by History, with himself as its prophet. It would be worth a bit of blood: indeed a lot of blood*” – Paul Johnson, *Modern Times: The World from the Twenties to the Nineties* (New York/NY: HarperPerennial, 2001), 56.

communism are ignored by those whose faith persists amidst all the evidences provided, in the great hope that in some newly discovered land of innocence its feasibility will at last be proven. Thus Marxism becomes for them an object of faith and a spiritual ideal. As Michael Green points out,

Whatever the pogroms of Lenin, Trotsky, Stalin; whatever the revelations of the Gulag Archipelago and the terrifying brutality of the Soviet concentration camps; whatever the rapes of a Hungary, a Czechoslovakia, an Afghanistan, the faith of the committed [Marxist] persists. All personal judgement is obscured in the name of faith; faith is absolutely essential if everything is not to come tumbling round his ears ... Logically, of course, there is no reason why a modern Communist should bother to work for a utopia in which he will never share: this is one of the surds in Communism. But he is inspired by the vision, attracted by the prospect, stimulated by the struggle and warmed by the companionship. The millennial utopia held out by Communism ... is both a pale imitation of and unconsciously inspired by the Christian teaching of the Kingdom of God...¹⁹

There is, however, a remarkable difference between Christianity and Marxism. Christianity has always attracted particularly the poor and the outcast, whereas Marxism has always had a special appeal to the intellectual elite. Marxism applies a pseudo-scientific formula for the eschatological transformation of the imperfect man into an ideal communist man. The discipline most closely to this Marxist utopia is theology, since Marxism is an instrument of social engineering as well as a doctrine of redemption. As a doctrine of redemption, Marxism offers intellectuals the perfect consumma-

¹⁹ Michael Green, *I Believe in Satan's Downfall* (London: Hodder & Soutghton), 159-161.

tion of the Platonic fantasy of the philosopher king always surviving in the intellectual's subconscious mind.²⁰

As a religion properly suitable for the intellectual elite, Marxism seeks to provide intellectuals with a cause, a sense of mission, a conviction that their lives are worthwhile because history needs them to lead the working classes toward the advent of a new society and a new man. Marxism calls upon them self-sacrifice, in which freedom and historical determinism are combined in a perfect dialectical unit. Other religions have postponed happiness as a gift in another realm, as a reward for the individual in his or her afterlife. Marxism, however, promises reward still on this earth, claiming to speak for the foreseeable future of mankind. Glendon, Gordon and Osakwe thus provide this interesting explanation of Marxism's great appeal to the intellectual elite:

As a world secular religion, Marxism has its dialectic which is akin to Calvinist predestination. Like other creeds, Marxism has its sacred text, its saints, as well as its holy city. If Marx is its Messiah, Lenin is its St Paul. As is true of many other world religions, Marxism too has witnessed a luxuriant proliferation of sects and subsects – the deviationists, the revisionists, the fundamentalists, the modernizers, and so on ... But after all these analogies have been made, what remains to be emphasized is how different Marxism is from other religious. Unlike Christianity, for instance, its appeal has always been first to the intellectuals. Christianity was resisted by the ancient

²⁰ “Marxism offers the intellectual leadership in the new world somewhere in this earth. Feudal society has been ruled by military lords, capitalist society by money-minded businessmen, but in the socialist society the intellectuals would rule in the name of the proletariat... The Platonic fantasy of the “philosopher king”, always surviving in the intellectual's subconscious mind, would be finally realized in historical actuality”. – M.A. Glendon, M.W. Gordon and C. Osakwe, *Comparative Legal Traditions* (St Paul/MN: West Publishing, 1985), 676.

philosophers, who regarded it as an aberration of the lower classes; it spread upwards. Marxism, on the contrary, has been carried out by the intellectuals to the proletarians and peasants. To intellectuals it has appealed as no other doctrine has because it integrated for them most fully discordant psychological motives. In Marxism one finds for the first time a combination of the language of science and the language of myth – a union of logic and mysticism. Scientific criticism in the 19th century has deprived intellectuals of their God and left them uncertain as to the foundation of their ethics. Scientific agnosticism was an austere self-denial in a world inherently lifeless and undramatic, a world with neither purpose nor climax. Social movements had assumed the character of a superficial altruistic anodyne ungrounded in the nature of the universe. In Marxism, however, one's ideals could be taken as expressions of an underlying historical necessity in things.²¹

III MARXISM AND SOCIAL DARWINISM

There is a rather close relationship between Charles Darwin's biological evolution and Karl Marx's revolutionary socialism. Darwin's attempt to demonstrate how humans evolve from animals by a blind process of natural selection was deeply inspirational for Marx, who considered that the primacy of social classes paralleled the alleged inequality of the human races. As revealed in numerous of his articles and pamphlets, Marx believed that Darwinism amounted to 'a glorious corroboration and completion' of his own materialist philosophy.²² Marx thus argued in a letter to his close friend and co-writer Friedrich Engels that despite Darwin's 'crude English

²¹ *Idem*, 676.

²² Cited in Max Eastman, *Marx, Lenin and the Science of Revolution* (London; George Allen & Unwin, 1926), p.67.

style', his work 'contains the basis in natural history for our view'.²³ As Engels pointed out, 'just as Darwin discovered the law of evolution in organic nature, so Marx discovered the law of evolution in human history'.²⁴ He believed that Marxism was 'destined to do for history what Darwin's theory has done for biology'.²⁵ According to Eastman,

Darwin's achievement was to banish the ethico-deific out of biology, establish the fact of evolution upon a scientific basis, and point out a dominating principle of investigation and matter-of-fact explanation. And Marx made almost exactly the same contribution to the general science of history. He put in the place of moralistic and religious and poetic and patriotic eloquences, a matter-of-fact principle of explanation, ... and he established – or at least first adequately emphasized – the fact that there has been an evolution, not only in the political forms of society, but in its economic structure.²⁶

Marx therefore relied on Darwinian evolution to provide the revolutionary socialist movement with a more or less scientific basis. He needed such a 'scientific' element of evolution to justify the radical struggle for social change in an existing world that 'would change simply because it had to change, that it bore the seeds of its own opposition and destruction'.²⁷ Two concepts of socialism merges in Marx's writings: one castigated by him as 'Utopian Socialism', an ethical ideal to be achieved by political action; another 'Scientific Socialism', which he thought to be the 'most scientific'

²³ Paul Blackledge, 'Historical Materialism: From Social Evolution to Revolutionary Politics', in P. Blackledge and G. Kirkpatrick (eds.), *Historical Materialism and Social Evolution* (London: Palgrave Macmillan, 2002), 11.

²⁴ Frederick Engels, *Selected Works*, 3 vols (New York/NY: International Publishers, 1950), 153. See also Milovan Djilas, above n 2, 2.

²⁵ Eastman, above n 22, 67.

²⁶ *Ibid.*

²⁷ Djilas, above n 2, 6.

form of socialism and a natural result of human evolution. Marx claimed to have proven the inevitability of the latter.²⁸ As a philosopher of his time, he believed that God had been disproved by the ‘inexorable forces’ of science, reason and progress.²⁹ As a result, Darwinism became an important element of Marxist theory, receiving Darwin’s theory of evolution as a ‘support from natural science’.³⁰ In a personal letter to Engels, Marx writes that Darwin’s *Origin of Species* provided him ‘with the basis in natural science for the class struggle in history’.³¹ As a sign of gratitude, he sent Darwin the second edition of *Das Kapital*. On the title page he inscribed: ‘Mr Charles Darwin/On the part of his sincere admirer/(signed) Karl Marx/London 16 June 1873’.³²

In Darwin’s biological model, evolutionary change in the natural world is the product of the combination of variation between individuals, heredity, selection and the struggle for survival. In contrast to this model of evolutionary causation, Marxian social theory legitimises a mechanically deterministic reading of historical progress. As Blackledge points out, ‘Marxist social theory requires a sophisticated evolutionary component to underpin its revolutionary political theory. For such a politics will be strengthened if it is constructed within the parameters that are contextualised by the historical evolution of the forces of production. Moreover, through its incorpora-

²⁸ Flis, above n 3, 25,

²⁹ See H.J. Jaffa, ‘What Were the Original Intentions of the Framers of the Constitution of the United States?’, in H.V. Jaffa, B. Ledewitz, R.L. Stone, G. Anastaplo (eds.), *Original Intent and the Framers of the Constitution* (Washington/DC, Regnery Gateway, 1994), 49.

³⁰ Cited in Eastman, above n 22, 67.

³¹ Karl Marx and Friederich Engels, *Selected Correspondence* (New York/NY: International Publishers, 1942), 125.

³² S Kirschke, ‘Darwin Today, Geissler, E. and Scheler, W. (eds.) (Berlin: Akademie-Verlag, 1983), 55.

tion of an evolutionary component Marxism is better able to ensure that history is understood to be ‘more than just a series of particular and unique events, [but] reveals a certain directionality’.³³

Marx wholeheartedly endorsed English rule in India as a tool of history in bringing about social evolution, and embraced Darwinism to also justify racism and anti-Semitism, although he was ethnically Jewish himself. For instance, he constantly resorted to phrases like ‘dirty Jew’ and ‘Jewish Nigger’ to describe his political adversaries.³⁴ About the famous German socialist Ferdinand Lassalle, Marx commented: ‘It is not perfectly clear to me that, as the shape of his head and the growth of his hair indicates, he is descended from the Negroes who joined in Moses’ flight from Egypt (unless his mother or grandmother on the father’s side was crossed with a nigger). This union of Jew and German on a Negro base was bound to produce an extraordinary hybrid’.³⁵

In *On the Jewish Question*, Marx endorsed the anti-Semitism of Bruno Bauer, the anti-Semitic leader of the Hegelian left who published an essay demanding that the Jews abandon Judaism completely. In Marx’s opinion, the ‘money-Jew’ was ‘the universal anti-social element of the present time’. To ‘make the Jew impossible’, he argued, it is necessary to abolish the ‘preconditions’, the ‘very possibility’ of the kind of money activities which produced him.³⁶ Marx thus concluded that both the Jew and the Jewish religion should disappear if the world were to be able to finally abolish ‘the Jewish attitude to money’. As he put it, ‘in emancipating itself from

³³ Blackledge, above n 23, 11.

³⁴ Johnson, above n 1, 62.

³⁵ Mark-Engels, vol. xxx, 259. Cited in Johnson, above n 1, 62.

³⁶ *Ibid*, 57-58.

hucksterism and money, and thus from real and practical Judaism, our age would emancipate itself'.³⁷

Finally, Marx sincerely believed not only in the evolution of the races and society but also that history was invariably on his side. So it was easy for him to regard his political adversaries as 'reactionaries' who deserved not legal rights and protection, but severe punishment for retarding the march of humanity.³⁸ Marxist theory denies that anything can be properly called 'right' unless it advances socialism. In such a manner a radical ideology can be applied with the same catastrophic results that occur when radical ideas are applied to racial issues. From the standpoint of *Realpolitik* it is entirely reasonable to suggest that the class genocide carried out by Marxist-oriented regimes bears striking resemblance with the race genocide in Nazi Germany. According to Stephane Courtois,

In Communism there exists a socio-political eugenics, a form of social Darwinism. ... As master of the knowledge of the evolution of social species, Lenin decided who should disappear by virtue of having been condemned to the dustbin of history. From the moment that a decision had been made on a 'scientific' basis... that the bourgeoisie represented a stage of humanity that had been surpassed, its liquidation as a class and the liquidation of the individuals who actually or supposedly belonged to it could be justified.³⁹

³⁷ T.B. Bottomore (ed.) *Karl Marx: Early Writings* (New York/NY: McGraw-Hill, 1963), 34-37.

³⁸ Dinesh D'Souza, *What's so Great about Christianity* (Washington/DC: Regnery, 2007), 220.

³⁹ Stéphane Courtois, 'Conclusion: Why?' in S. Courtois et al (eds.), *The Black Book of Communism: Crimes, Terror, Repression* (Cambridge/MA: Harvard University Press, 1999), 752.

IV MARXISM AND HEGELIANISM

No one can deny the historical influence of G.W.F. Hegel (1770-1831) upon the formation of Karl Marx's methodology. Hegel was a German philosopher who described the state as a perfect organic unity. In such a scheme the individual owes his or her physical and spiritual existence to the state. The state is therefore transformed into the new absolute, the new god of being. Indeed, Hegelianism sees in the state a perfect 'organism' so that everything the state does and turns into law must acquire the status of absolute perfectibility and intrinsic goodness.⁴⁰ Hegel's insistence upon the absolute moral authority of the state is found in passages such as this:

The universal is to be found in the State. The State is the Divine Idea as it exists on earth... We must therefore worship the State as the manifestation of the Divine on earth, and consider that, if it is difficult to comprehend Nature, it is infinitely harder to grasp the Essence of the State... The State is the march of God through the world... The State must be comprehended as an organism... To the complete State belongs, essentially, consciousness and thought. The State knows what it wills... The State... exists for its own sake... The State is the actually existing, realized moral life'⁴¹.

The above excerpt reveals the close link between Hegelianism and totalitarianism. Evolutionary social theory, as it is conceived by Hegel, makes legality intrinsically relative, changing and arbitrary. The only thing that is never relative is the state itself as a mechanism of constant social change.

⁴⁰ Karl Popper, *The Open Society and its Enemies*, Vol.II (London: Routledge, 2003), 45.

⁴¹ Georg Hegel, *Philosophy of Law*, parags. 258, 269, 270, 272. Cited in Popper, above n 40, 35.

In absolutising the state, Hegelianism leads not only to positivism but also to totalitarianism. The followers of Hegel in absolutising the state are the Fascists and the Communists, i.e., the radical Marxists.

But perhaps the most significant connection between Hegelianism and Marxism lies not in their conceptions of the state, but in the dialectical method relied by Marx to establish his own political theories of dialectical and historical materialism.⁴² Hegel saw the world as an evolving organism. He argued that scientific (and political) progress is not smooth but moves dialectically, according to a conflicting philosophical dialogue. According to this theory, person A states something, person B argues the opposite, and then the combining elements of both ideas come about as a better or more evolved idea. In applying this dialectical premise to history, Hegel contended that truth is subjective and that it is impossible to judge cultural norms by any objective standard. Furthermore, Hegel's theory also maintains that the historical progress of humanity does not depend on the search for the truth, but that it is affected by an ongoing conflict of human ideas. As a result, Gabriël Moens writes, 'in the absence of a universal norm the morality of the state was defined by the state itself... Thus the morality of the individual came to be subordinated to the morality of the state: where the individual acted under the dictates of the state, the individual was subject to the moral standards of the state'.⁴³

⁴² J.M. Kelly, *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 2007), 309.

⁴³ Gabriël A. Moens, 'The German Borderguard Cases: Natural Law and the Duty to Disobey Immoral Laws', in S. Ratnapala and G.A. Moens (eds.), *Jurisprudence of Liberty* (Sydney/NSW: Butterworths, 1996), 161.

Marx agreed with Hegel about the inevitable progress of history. However, he rejected the belief that anything intellectual could be the driving force in human history. ‘Hegel’s dialectics’, Marx stated, ‘is the fundamental principle of all dialectic only after its mystical form has been sloughed off. And that is precisely what distinguishes my method.’⁴⁴ Believing that material forces are the real elements behind human progress,⁴⁵ Marx replaced Hegelianism with his own dialectical materialism, in which the forces in conflict are no longer ideas or principles, but the more tangible interests of social classes in their struggle over the ownership and control of material resources.⁴⁶ When history is understood according to this dialectical process, political and legal institutions are regarded as corresponding to the economic interests of the ruling economic class. The legal system is therefore perceived as a mere superstructure that suits the material needs of the dominating class.⁴⁷ Accordingly, the rule of law is no more than another ideological mechanism through which that class is able to eventually justify its grip on the means of production and the sources of wealth. As Marx put it,

⁴⁴ *Hegel’s Dialectic – Marx to Kugelmann*, cited in Sidney Hook, *From Hegel to Marx: Studies in the Intellectual Development of Karl Marx* (New York/NY: Columbia University Press, 1994), 16.

⁴⁵ M.D.A. Freeman writes: “For Hegel, the law of contradiction produced, in the form of thesis and antithesis, a solution by way of synthesis on a higher level. This he applied to opposing forces in nature or society. Marx seized on this approach towards history and society, particularly with reference to the ‘class-conflict’... Marx’s dialectic was different from Hegel’s. Marx rejected Hegel’s idealist philosophy and substituted materialism. A combination of Hegel’s dialectic and a materialist theory of knowledge produced dialectical materialism, and this, applied to human relations within society, particularly to their evolution and development, Marx called historical materialism.” – M.D.A. Freeman, *Lloyd’s Introduction to Jurisprudence* (London: Sweet & Maxwell, 2008), 1130.

⁴⁶ Kelly, above n 42, 310.

⁴⁷ *Idem*.

I was led by many studies to the conclusion that legal relations as well as forms of state could neither be understood by themselves, nor explained by the so-called general progress of the human mind, but that they are rooted in the material conditions of life, which are summed up by Hegel after the fashion of the English and French writers of the eighteenth century under the name ‘civil society’, and that the anatomy of civil society is to be sought in political economy [i.e. in economic forces]... In the social production which men carry on they enter into definite relations of production correspond to a definite stage of development of their material powers of production. The totality of these relations of production constitutes the economic structure of society – the real foundation, on which legal and political superstructure arise, and to which definite forms of social consciousness correspond.⁴⁸

V MARX’S THOUGHTS ON LAW

Born in Trier in the Rhineland in 1818, Karl Marx was the son of a Jewish lawyer, recently converted to Christianity. He received systematic university education, initially in Bonn and then in Berlin, over 1835-1841. Berlin had one of the best universities in the world at the time, particularly in law and philosophy. There Marx took his legal studies very seriously, intending to become a lawyer. As law student he attended the lectures of Karl von Savigny, the leading theorist of the German Historical School of Law. Savigny argued, from a historicist-relativist perspective, that law is only part of history and not a branch of applied ethics. It is evinced from a letter to his father that Marx had read and appreciated *Right of Possession*, a book in which Savigny argues that in place of property as a natural right of the individual, the great bulk of humanity had lived in societies whereby pos-

⁴⁸ Karl Marx, *A Contribution to the Critique of Political Economy*, tr. N.I. Stone, Chicago, 1904, preface, p. ii; cited in Kelly, above n 42, 310.

session of the land was communal and conditional. Such argument is said to have provided an indispensable basis for Marx's later work on the development of property relations.⁴⁹

Marx's ideas about law are expressed mainly in the *Communist Manifesto*, which he published in collaboration with his close revolutionary friend Friedrich Engels in 1848. There he contends that 'law, morality, religion, are so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests'. Marx then goes to criticise the whole Western constitutional tradition of individual rights to life, liberty and property as a mere expression of bourgeois' prejudices and aspirations. 'Your very ideas', he said,

are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all; a will, whose essential character and direction are determined by the economic conditions of existence of your class... The selfish misconception that induces you to transform into eternal laws of nature and of reason, the social forms springing from your present mode of production and form of property – this misconception you share with every ruling class that has preceded you.⁵⁰

⁴⁹ Gareth Stedman Jones, 'Marx's Contribution: Prologue', in Karl Marx and Friedrich Engels, *The Communist Manifesto* (London: Penguin, 2002), 73. Jones explains: "As a law student in 1836-7, Marx had attended Savigny's lectures on the Pandects, and it is clear from a letter to his father in 1837 that he had read Savigny's *Right of Possession*. It also seems certain that he would have been familiar with the controversy, which became public in 1839, between Savigny and the Hegelian law professor Eduard Gans precisely over the relationship between possession and right". – 157-8.

⁵⁰ Karl Marx and Friedrich Engels, *Manifesto of the Communist Party*, ch.2; cited in Kelly, above n 42, 329.

Marx perceived law primarily as an instrument of class domination that was constrained by certain economic relations.⁵¹ As a result, the legal phenomenon was considered essentially superstructural, dependent for their form and content upon determining forces emanating from the economic basis of society. For if the first premise presented by him was correct, David and Brierley commented,

Law is only a superstructure; in reality it only translates the interests of those who hold the reins of command in any given society; it is an instrument in the service of those who exercise their 'dictatorship' in this society because they have the instruments of production within their control. Law is a means of expressing the exploited class; it is, of necessity, unjust – or, in other words, it is only just from the subjective point of view of the ruling class. To speak of a 'just' law is to appeal to an ideology – that is to say, a false representation of reality; justice is no more than an historical idea conditioned by circumstances of class.⁵²

Marx considered that there can be nothing intrinsically good in the existence of law. Arising from the conflict between social classes as the need to control such a conflict, positive laws would cease to exist with the final advent of communism. In *The Communist Theory of Law* (1955) Hans Kelsen argued that the 'anti-normative approach to social phenomena is an essential element of the Marxian theory in general and of the Marxian theory of

⁵¹ Naturally, Marx did not invent the idea of law as a mere expression of socio-economic oppression. It appears, for example, in Plato's *Republic*, where Thrasymachus advances the thesis that "each form of government enacts the laws with a view to its own advantage". Thus, legislation is presented as being one 'that which is for their – the rulers – advantage, and the man who deviates from this law they chastise as a law-breaker and a wrongdoer' (Plato, *Republic* 338d,e). Socrates contested the argument that justice is no more than the interest of the stronger, although he did not say this may not happen in practice.

⁵² René David and John Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (London: Stevens & Sons, 1985), 171.

law in particular'.⁵³ He curiously labelled such a Marxian promise that lawlessness would lead to 'perfect justice' a 'utopian prophecy'.⁵⁴

In the *Gotha Critique*, lawlessness is elevated by Marx to constitute the final stage of communism, which, according to him, 'must predate a period in which the state can be nothing but the revolutionary dictatorship of the proletariat'.⁵⁵ And since in this period the proletariat would impose its own arbitrary will upon all the other classes as the dominating social class, law in communist societies is largely identified with the interests of the ruling party within the communist state. It does not function as a vehicle to protect against oppressive action on behalf of the state. 'Law is in a sense merely an application of ruling party policy'.⁵⁶

In conclusion, Marx held a rather cynical idea of law that regarded it as a mere instrument of oppression that illustrated 'the course of political struggles and the evolution of social formations'.⁵⁷ According to him, the long-term trend of legality is not towards the common good, but towards the selfish interests of the economically dominant class. Of course in pluralistic societies comprised by different social classes law may sometimes favour the economically most powerful. But if one believes like Marx did that law is always an instrument of oppression, writes Mark C. Murphy, 'it is hard to see how legislative deliberation for the common good would be possible... On Marx's view, there can be no hope for law that is for the common

⁵³ Hans Kelsen, *The Communist Theory of Law* (London: Stevens & Sons, 1955), 36.

⁵⁴ *Idem*, viii.

⁵⁵ Karl Marx, *Critique of the Gotha Programme*, cited in Maureen Cain and Alan Hunt, *Marx and Engels on Law*. (London: Academic Press, 1979), 163.

⁵⁶ R.A. Hughes, G.W.G. Leane, A. Clarke, *Australian Legal Institutions – Principles, Structures, Organisation*. (Sydney/NSW: Lawbook, 2003), 33.

⁵⁷ Hugh Collins, *Marxism and Law* (Oxford: Oxford University Press, 1988), 9.

good... until revolution abolishes economic class distinctions, law will inevitably fail to be for the common good, and thus the task of the legislator is doomed to failure'.⁵⁸

VI MARXISM, HUMAN RIGHTS AND CLASS GENOCIDE

The main objective of classical Marxist jurisprudence is not to advance basic human rights or to support the rule of law, nor even equality before the law, but to criticise these very ideals and to reveal the putative structures of socio-economic domination. In *Principles of Communism* Engels describes such values as individual rights and equality before the law as 'fraudulent masks' worn by the bourgeoisie to legitimise their socio-economic exploitation. Indeed, all the most cherished values of liberal-democratic societies were denounced as merely being ideological tools for legitimising an exploitive economic system that would serve only the dominant economic group.⁵⁹

With this idea in mind Marx contended that basic human rights are variable and class-conditioned. They would not be fixed but constantly evolving according to the progressive stages of class warfare. In *On the Jewish Question* Marx states that 'the so-called *rights of man* are simply the rights of egoistic man, of man separated from other men and from the community'. Marx saw liberty as not founded upon the relations between free and responsible individual citizens but rather upon 'the separation of men from

⁵⁸ Mark C. Murphy, *Philosophy of Law: The Fundamentals* (Malden/MA: Blackwell, 2007), p.196

⁵⁹ Kelly, above n 42, 330.

men'. 'It is the right of such separation', he declared.⁶⁰ For him, its practical application was the right to property. 'If power is taken on the basis of rights', wrote Marx and Engels in *The German Ideology*,

then right, law, etc., are merely the symptoms of other relations upon which state power rests. The material life of individuals... their mode of production and form of interest which eventually determine each other... this is the real basis of the State... The individuals who rule in these conditions, besides having to constitute their power in the form of the State, have to give their will... a universal expression as the will of the State, as law.⁶¹

Can orthodox Marxists then support the universality of human rights while still remaining faithful to their ideological beliefs? After all, Marx argued that the 'narrow horizon of bourgeois right' should be entirely eliminated. He openly denied that any human right could possess any practical meaning apart from its own historical context. For Marx himself, human rights exist insofar as the existing dominant class creates them, accepts them, and then allows them to exist.⁶² According to Furet, 'what... Marx criticized about the bourgeois was the very idea of the rights of man as a... foundation of society'. Marx considered it 'a mere cover for the individualism governing capitalist economy. The problem was that capitalism and modern liberty were both subject to the same rule, that of the freedom or plurality – ... and he impugned it in the name of 'humanity's lost unity'.⁶³

⁶⁰ Bottomore, above n 37, 24-26.

⁶¹ Karl Marx and Frederick Engels, 'German Ideology', *Collected Works*, v.90, 329; cited in Kelly, above n 42, 329

⁶² E.A. Harriman, 'Enemy Property in America' (1924) 1 *The American Journal of International Law*, 202, cited in Eugeny B Pashukanis, *Law and Marxism: A General Theory* (London: Pluto Press, 1989), 130.

⁶³ Furet, above n 17, 10-11.

Rather than supporting the universality of human rights Marx advocated the abolition of all legal and moral rules.⁶⁴ He despised the idea of any objective standard of morality.⁶⁵ In *The German Ideology*, Marx mocks objective morality as ‘unscientific’ and an obstacle to the advance of socialism. Instead, the struggle for socialism, which Marx treats as the only fundamental good, would have ‘to eliminate the conditions of morality and circumstances of justice’.⁶⁶ Such a view of morality in practice ‘amounts to a self-consistent attack on non-relativist ethics’. As a matter of fact, Freeman writes, ‘Marx, and subsequent Marxists have singled out [morality] as ideological and relative to class interests and particular modes of production’.⁶⁷ To Marx and Engels, he adds,

‘... all that “basic laws” would do is furnish principles for the regulation of conflicting claims and thus serve to promote class compromise and delay revolutionary change. Upon the attainment of communism the concept of human rights would be redundant because the conditions of social life would no longer have need of such principles of constraint. It is also clear (particularly in the writings of Trotsky) that in the struggle to attain communism concepts like human rights could be easily pushed aside – and where’.⁶⁸

The force of Marx’s critique of human rights, according to Geoffrey Robertson, ‘led Marxist thinkers in the next century to characterize human rights as a device to universalize capitalist values, notably freedom of enterprise... Hence socialist governments were silent or suspicious of the

⁶⁴ Freeman, above n 45, 1151

⁶⁵ *Idem*, 1151.

⁶⁶ *Idem*, 1152.

⁶⁷ *Idem*, 1150.

⁶⁸ *Idem*, 1153.

concept until it proved useful to rally support for leftist causes in the later states of the Cold War'.⁶⁹ This being the case, the undercurrent of violence that is so often manifested by Marxist-oriented regimes seems to represent no more than a mere projection of the foundations of lawlessness laid down by Marx himself. As Krygier points out, the very notion that law can be used as a way of restraining power is entirely 'alien to Marx's thought about what law did or could do, alien to his ideals, and alien to the activities of communists in power'.⁷⁰ The notorious disdain for the rule of law so often manifested by communist regimes 'is no mere accident but is theoretically driven'. The writings of Marx, writes Krygier, 'had nothing good to say about the rule of law; it generated no confidence that law might be part of a good society; it was imbued with values which made no space for those that the rule of law is designed to protect'.⁷¹

In countries that have been governed by principles of Marxism the morally normative context for legality has resulted in the absolutisation of power. Indeed, communist regimes do not answer for their violent actions to any higher law or principle apart from that of advancing socialism. As a result, these regimes are extremely oppressive entities that might easily decide to eliminate certain people for no other reason than their 'belonging to an enemy class' or simply being declared 'socially undesirable'. These massacres are fully justified by the Marxist belief that a new world is coming into

⁶⁹ Geoffrey Robertson, *Crimes Against Humanity* (London: Penguin, 2008), 17.

⁷⁰ Martin Krygier, 'Introduction', in Martin Krygier (ed.), *Marxism and Communism: Posthumous Reflections on Politics, Society, and Law* (Amsterdam: Rodopi, 1994), 14.

⁷¹ Martin Krygier, 'Marxism, Communism, and Rule of Law', in Krygier (ed.), above n 70, 117

being, and that everything is permitted in order to assist its difficult birth.⁷² Thus declared the editorial of a Soviet newspaper in 1918:

We reject the old system of morality and ‘humanity’ invented by the bourgeoisie... Our morality has no precedent, and our humanity is absolute because it rests on a new ideal... To us, everything is permitted, for we are the first to raise the sword not to oppress races and reduce them to slavery, but to liberate humanity from its shacklers... Blood? Let blood flow like water! Let blood stain forever the black pirate’s flag flown by the bourgeoisie, and let our flag be blood-red forever! For only through the death of the old world can we liberate ourselves from the return of those jackals!

In the former Soviet Union, Marxism was filtered through Lenin’s interpretation of Marxism and ‘formed an integral part of the body of ideas that produced it’.⁷³ Lenin was the founder and first leader of the Soviet Union. His main desire, as Miolvan Djlas pointed out, ‘was to construct a system out of Marx’s ideas’.⁷⁴ Indeed, Lenin regarded himself as ‘responsible for the continuation of all Marx’s work’.⁷⁵ As an orthodox Marxist he strongly believed that ‘in Marxism, there is not a single grain of ethics from beginning to end. Theoretically, it subordinates the ethical standpoint to the principle of causality, in the practice it reduces to the class struggle’.⁷⁶ According to Tismaneanu,

⁷² Nicholas Werth, ‘A State against its People: Violence, Repression and Terror in the Soviet Union’, in S Courtois et al, above n 39, 102.

⁷³ Furet, above n 17, 99.

⁷⁴ Djlas, above n 2, 4.

⁷⁵ *Idem.*

⁷⁶ *Collected Works*, vol. I, 421; cited in Freeman, above n 45, 1150.

Communism in its Leninist version (and, one must recognize, this has been the only successful application of the original dogma) was from the very outset inimical to the values of individual rights and human freedom. In spite of its overblown rhetoric about emancipation from oppression and necessity, the leap into the kingdom of freedom announced by the founding fathers turned out to be actually an experiment in ideologically driven unbound social engineering. The very idea of an independent judiciary was rejected as “rotten liberalism”. The party defined what was legal and what was not: as in Hitler’s Germany, where the heinous 1936 Nuremberg trials were a legal fiction dictated by Nazi racial obsessions, Bolshevism from the very outset subordinated justice to party interests. For Lenin, dictatorship of the proletariat was rule by force and unrestricted by any law. The class enemy had to be weeded out, destroyed, smashed without any sign of mercy.⁷⁷

In a lecture delivered at Moscow University in 1919, Lenin advocated that ‘the revolutionary dictatorship of the proletariat shall be ruled, won, and maintained by the use of violence by the proletariat against the bourgeoisie, rule that is unrestricted by any laws’.⁷⁸ Such a brutal approach to politics was fully endorsed by Soviet leaders such as Grigory Zinoviev, who once declared: ‘To dispose of our enemies, we will have to create our own socialist terror. For this we will have to train 90 million of the 100 million Russians and have them all on one side. We have nothing to say to the other 10 million; we’ll have to get rid of them’.⁷⁹ Thus the Soviet decree of January 1918 called on the agencies of the

⁷⁷ Vladimir Tismaneanu, ‘Communism and the Human Condition: Reflections on the Black Book of Communism’, *Human Rights Review*, Jan-Mar 2001, 126.

⁷⁸ ‘The Proletarian Revolution and the Renegade Kautsky, Selected Works,’ Volume II, Part 2 (Progress Publishers, Moscow, 1951), 41, *cited in* Martin Krygier, ‘The Rule of Law’, in N.J. Smelser and P.B. Baltes (eds.), *International Encyclopedia of the Social & Behavioral Sciences* (2001), 13404.

⁷⁹ *Severnaya Kommuna*, n.109 (19 September 1918), 2, *cited in* Werth, above n 72, 76.

state to ‘purge the Russian land of all kinds of harmful insects’. This was not a mere piece of legislation but an invitation to mass murder. Entire groups thus found themselves condemned to extermination as ‘insects’, including homeowners, high-school teachers, parish choirs, priests, Tolstoyan pacifists, officials of trade unions – soon all to be classified as ‘former people’.⁸⁰

In 1891, a young lawyer called Vladimir Ilych Ulianov refused to participate in the aid efforts to assist the hungry during that great famine in Russia. As recalled by a friend, ‘he had the courage to come out and say openly that famine would have numerous positive results, particularly in the appearance of a new industrial proletariat, which would take over from the bourgeoisie... Famine, he explained, in destroying the outdated peasant economy, would bring about the next state more rapidly, and usher in socialism, the state that necessarily followed capitalism. Famine would also destroy faith not only in the tsar, but in God too’.⁸¹ Thirty years later, that very law student, now a revolutionary leader called Lenin, the head and founder of the newly established Soviet Union, deeply rejoiced in the fact that the great famine of 1922 that cost the lives of 5 million people would ‘strike a mortal blow against the enemy’. The enemy in question was the Russian Orthodox Church. In a 19 March 1922 letter to the Politburo, Lenin stated:

With the help of all those starving people who are starting to eat each other, who are dying by the millions, and whose bodies litter the roadside all over the country, it is now and only now that we can – and therefore must – con-

⁸⁰ Johnson, above n 18, 70.

⁸¹ A. Beliakov, *Yunost vozhdya* (The adolescence of the leader) (Moscow: Molodaya gvardiya, 1958), 80-82, cited in Werth, above n 72, 123-24.

fiscate all church property with all the ruthless energy that we can still muster ... We must therefore amass a treasure of hundreds of millions of gold rubles (think how rich some of these monasteries are! ... No matter what the cost, we must have those hundreds of millions of rubles. This can be carried out only at the present moment, because our only hope is the despair engendered in the masses by the famine, which will cause them to look at us in a favourable light or, at the very least, with indifference. I thus can affirm categorically that this is the moment to crush the ... clergy in the most decisive manner possible, and to act without any mercy at all, with the sort of brutality that they will remember for decades ... The more representatives from the reactionary clergy and the recalcitrant bourgeoisie we shoot, the better it will be for us. We must teach these people a lesson as quickly as possible, so that the thought of protesting again doesn't occur to them for decades to come.⁸²

According to the irrefutable evidence that is now readily available, the great famine of 1932-34 was not another in a series of famines that has inflicted Russia throughout the centuries. Unlike the famine of 1921-1922, the famine of 1932-33 was the sole result of a genocidal assault inflicted by the Soviet authorities upon the people of the countryside. As a result, nearly 40 million people were affected and more than 6 million died as the direct result of an utterly artificial, systematically perpetuated famine. 'While millions of people were starving to death, the Soviet government 'continued to export grain, shipping 18 million hundredweight of grain abroad'.⁸³ As Nicolas Werth points out,

⁸² RTsKhIDNI, 2/1/22947/1-4, *cited in* Werth, above n 72, 125.

⁸³ Werth, *idem*, 164.

This famine alone, with its 6 million deaths, exacted by far the heaviest toll of Stalinist repression and constitutes an extreme and previously unknown form of violence. After having been collectivized, the kolkhoz peasants of a number of the richest agricultural regions of the country (Ukraine, North Caucasus, and Black Lands) were robbed of their entire harvests, then “punished” for having tried to resist – passively – this plundering. This punishment managed to transform the situation from one of scarcity to one of famine.⁸⁴

Forced to hand over everything they had, and lacking the means for buying food, these millions of peasants had no option but escape to the cities for their lives. On October 27th, 1932, however, Soviet authorities instructed the local authorities to ban ‘by all means necessary the large-scale departure of peasants from Ukraine and the Northern Caucasus for the towns’.⁸⁵ Desperately struggling to survive, those peasants were criminalised with a vast range of laws, such as the law from August 7th, 1932, that condemned anyone who took any potato of a collective plantation (*kolkhoz*) to either outright execution or concentration camp for ‘theft or damage of socialist property’. These laws help explain why the peasants formed the vast majority of prisoners in the Soviet camps in the 1930s.⁸⁶

The law of August 7th, 1932, opened the way to criminalisation of a significant number of minor offences, a tendency that would develop throughout the 1930s and 1940s, feeding the Soviet concentration camps called Gulags

⁸⁴ Nicholas Werth, ‘Strategies of Violence in Stalinist URSS’, in Henry Rousso (ed.), *Stalinism and Nazism: History and Memory Compared* (Lincoln/NE: University of Nebraska Press, 1999), 74.

⁸⁵ Werth, above n 72, 164.

⁸⁶ Anne Applebaum, *Gulag: A History* (London: Anchor, 2004), 47.

with millions of prisoners. Gulag is an acronym for Main Camp Administration and it has been described as the ‘quintessential expression of the Soviet system’.⁸⁷ Over time the term came to mean not only the Soviet administration of concentration camps, but also the Soviet repressive system in all its varieties of labour camps, punishment camps, women’s camps, and children’s camps.

In his seminal *Democracy and Totalitarianism*, Raymond Aron discussed ideas that have inspired both Marxist-oriented regimes and Hitler’s National Socialism. In one case, Aron said, the final result is the labour camp, in another it is the gas chamber. As Aron pointed out, the destruction of the kulaks during the collectivisation campaigns in the former Soviet Union was unquestionably analogous to the Nazi genocidal politics against ethnic groups deemed to be racially inferior.⁸⁸ Similar to Hitler’s Nazi Germany, Lenin’s Soviet Union also legitimated itself by establishing categories of ‘enemies’ or ‘sub-humans’ against whom they conveniently dehumanised and then mercilessly destroyed on a massive scale. In Nazi Germany the first targets were the crippled and the retarded, and then the Jews. In the Soviet Union, the victims were at first ‘the enemies of the people’, a category of people that could include not only alleged opponents of the regime but also national groups and ethnicities ‘if they seemed (for equally ill-defined reasons) to threaten the Soviet state’.⁸⁹ These people were arrested and brutally assassinated not for what they had done but for who they

⁸⁷ *Idem*, xxix.

⁸⁸ Raymond Aron, *Democracy and Totalitarianism* (London: Weidenfeld and Nicolson, 1968), 168.

⁸⁹ Applebaum, above n 86. ‘At different times Stalin conducted mass arrests of Poles, Chechens, Tartars, and – on the eve of his death – Jews’, xxxvi.

were.⁹⁰ The Soviet propaganda described these poor people as ‘half-animals’ and ‘as something even lower than two-legged cattle’. They referred to them in Social Darwinian terms as ‘vermin’, as ‘pollution’, as ‘poisonous weeds needing to be uprooted’⁹¹, just as Nazi propaganda had associated Jews with images of vermin, of parasites, of infectious disease.⁹² Therefore, as Tismaneanu explains,

The most important point that needs to be made is that both regimes [Nazism and Communism] are genocidal. Analytical distinctions between them are certainly important,... but the commonality in terms of complete contempt for the ‘bourgeois’ rule of law, human rights, and the universality of humankind regardless of spurious race and class distinctions is in my view beyond doubt...

The persecution and extermination of the Jews was as much a consequence of ideological tenets, held sacred by the Nazi zealots, as the destruction of the ‘kulaks’ during the Stalinist collectivization campaigns. Millions of human lives were destroyed as a result of the conviction that the sorry state of mankind could be corrected if only the ideologically designated “vermin” were eliminated. This ideological drive to purify humanity was rooted in the scientistic cult of technology and the firm belief that History (always capitalized) had endowed the revolutionary elites... with the mission to get rid of the “superfluous” populations...⁹³

As early as October 1923, there were 315 concentration camps spread all over the Soviet Union. From 1929 to 1951 alone, one adult male in five had passed through them. Over that period no less than 15 million people were

⁹⁰ *Idem.*

⁹¹ *Idem*, 102.

⁹² *Idem*, xxxvi.

⁹³ Tismaneanu, above n 77, 130.

condemned to forced labour, with more than 1.5 million dying in prison. Six million more were collectively deported by family and indeed by ethnic group.⁹⁴ So it was precisely in the Soviet Union, and not Nazi Germany, that the first concentration camps in Europe were created.⁹⁵ Hitler knew very well of those Soviet camps and learned a lot from them in order to create his own concentration camps for Nazi Germany. As Kaminski pointed out,

The leaders of Soviet communism were the inventors and creators of ... the establishments called "concentration camps"... [They] also created a specific method of legal reasoning, a network of concepts that implicitly incorporated a gigantic system of concentration camps, which Stalin merely organized technically and developed. Compared with the concentration camps of Trotsky and Lenin, the Stalinist ones represented merely a gigantic form of implementation... And, of course, the Nazis found in the former as well as the latter ready-made models, which they merely had to develop. The German counterparts promptly seized upon these models'.⁹⁶

To complete this brief inventory of communist brutality in the former Soviet Union, it is important to remind that from 1929 to 1936, around 3.6 million people were condemned by a special court dependent on the Soviet political police. Of these, 770,000 received the death penalty, most of them (88%) during the Great Terror of 1937-39, according to 'execution quotas' that were planned and approved by the Political Bureau.⁹⁷ There is no doubt whatsoever that all this terror was caused and motivated by Marxist ideology. Marx himself had never rejected violence and terrorism when it

⁹⁴ Werth, above n 84, 73.

⁹⁵ *Idem.*

⁹⁶ Andrzej Jozef Kaminski, *Konzentrationslager*, 82-83, cited in Richard Pipes, *The Russian Revolution* (New York/NY: Vintage Books, 1997), 836.

⁹⁷ Werth, above n 84, 74.

suited his ideological objectives: ‘We are ruthless and ask no quarter from you. When our turn comes we shall not disguise our terrorism’, he wrote in a letter addressed to the Prussian government, in 1849.⁹⁸ Moreover, when Marx heard about a failed terrorist attempt to murder the German Emperor Wilhelm I in 1878, a fellow communist recorded his great anger and indignation, ‘heaping curses on this terrorist who had failed to carry out his act of terror’.⁹⁹ According to Paul Johnson,

That Marx, once established in power, would have been capable of great violence and cruelty seems certain. But of course he was never in a position to carry large-scale revolution, violent or otherwise, and his pent-up rage therefore passed into his books, which always have a tone of intransigence and extremism. Many passages give the impression that they have actually been written in a state of fury. In due course Lenin, Stalin, and Mao Tse-tung practiced, on an enormous scale, the violence which Marx felt in his heart and which his works exude.¹⁰⁰

History shows beyond any doubt that class genocide in Marxist regimes have been aided and abetted by a political philosophy that encourages, inadvertently if not explicitly, governmental policies that turned out to be profoundly genocidal. The problem is not so much that such a philosophy does not pay enough attention to policies that turn genocidal, but rather that this philosophy (and those who support it) may actually bear some responsibility for what happened. Such philosophy prepared the mindset and provided the whole rationale for the implementation of state-directed mass murder and violence. Arguably, the most disturbing characteristic of every

⁹⁸ Marx-Engels, Gesamt-Ausgabe, vol.vi, pp.503-5. *Cited in* Paul Johnson, above n 1, 71.

⁹⁹ Johnson, above n 1, 71.

¹⁰⁰ *Idem*, 72 .

communist terror is not only the quantity of the victims but also the very principle on which genocide can be justified. Once in power Marxist regimes tend to abandon the notion of personal responsibility, to use the state's repressive apparatus to hunt down people, and destroy them, not on the basis of what they have done but on the basis of their social condition or 'category'. In the Soviet Union, decree-laws extended to whole classes the notion of killing people collectively rather than individually. As Paul Johnson points out,

Once Lenin had abolished the idea of personal guilty, and had started to 'exterminate' (a word he frequently employed) whole classes, merely on account of occupation or parentage, there was no limit to which this deadly principle might be carried. Might not entire categories of people be classified as 'enemies' and condemned to imprisonment or slaughter merely on account of the colour of their skin, or their racial origins or, indeed, their nationality? There is no essential moral difference between class-warfare and race-warfare, between destroying a class and destroying a race. Thus the modern practice of genocide was born.¹⁰¹

VII MARXIST JURISPRUDENCE IN THE FORMER SOVIET UNION

In a normative sense, all the most prominent jurists in the former Soviet Union considered the existence of law 'a theoretically inconvenient fact'.¹⁰² They maintained that the rule of law was an objectionable bourgeois notion that served to mask economic inequalities and to cripple the power of the

¹⁰¹ Johnson, above n 18, 71.

¹⁰² Igor Grazin, 'The Role of Ideas in Political Change', in S. Ratnapala and G.A. Moens (eds), *Jurisprudence of Liberty* (Sydney/NSW: Butterworths, 1996), 249.

socialist state.¹⁰³ Hence the leading Soviet jurist Evgeny Pashukanis (1891-1937), in his seminal *The General Theory of Law and Marxism* (1924), contended that the ‘excessive’ neutrality and formality of the rule of law served only as a mask to the ‘hegemonic’ underpinnings of the ‘bourgeois legality’.¹⁰⁴ For Pashukanis, the rule of law is no more than ‘a mirage, but one which suits the bourgeois very well, for it replaces withered religious ideology and conceals the fact of the bourgeoisie’s hegemony from the eyes of the masses’.¹⁰⁵

¹⁰³ R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge: Cambridge University Press, 1995), 260.

¹⁰⁴ Pashukanis is described by Harold Berman as “a profound legal philosopher, who dominated Soviet jurisprudence (and in some respects Soviet legal development) for some 20 years”. – Harold J. Berman, ‘Book Review: Soviet Legal Philosophy, by H.W. Babb and J.N. Hazard’, *The Annals of the American Academy of Political and Social Science* n.281 (1952), 249.

¹⁰⁵ The entire passage reads as follows: “*The constitutional state (Rechtsstaat) is a mirage, but one which suits the bourgeois very well, for it replaces withered religious ideology and conceals the fact of the bourgeoisie’s hegemony from the eyes of the masses... The free and equal owners of commodities who meet in the market are free and equal only in the abstract relations of appropriation and alienation. In real life, they are bound by various ties of mutual dependence. Examples of this are the retailer and the wholesaler, the peasant and the landowner, the ruined debtor and his creditor, the proletarian and the capitalist. All these innumerable relationships of actual dependence form the real basis of state structure, whereas for the juridical [i.e. the conventional Rechtsstaat-related] theory of the state it is as if they did not exist... One must, therefore, bear in mind that morality, law, and the state are forms of bourgeois society. The proletariat may well have to utilise these forms, but that in no way implies that they could be developed further or be permeated by a socialist content. These forms are incapable of absorbing this content and must wither away in an inverse ratio with the extent to which this content becomes reality. Nevertheless, in the present transition period the proletariat will of necessity exploit this form inherited from bourgeois society in its own interest. To do this, however, the proletariat must above all have an absolutely clear idea – freed of all ideological haziness – of the historical origin of these forms. The proletariat must take a soberly critical attitude, not only towards the bourgeois state and bourgeois morality, but also towards their own state and their own morality. Phrased differently they must be aware that both the existence and the disappearance of these forms are historically necessary*”. Evgeny Pashukanis, *Law and Marxism* (1978), 143-60, cited in Kelly, above n 42, 358.

Through his political writings, Marx often commented on the importance of law for the formation, organisation and maintenance of the capitalist modes of production and social relations. Pashukanis built his entire jurisprudence on the basis of such ideological assumptions. His 'Commodity Exchange Theory of Law' asserts that in the organization of human societies, the economic factor is paramount and that as a result, legal and moral rules are nothing more than a mere reflection of the economic forces operating at each social context. When communism achieved its final stage of development, Pashukanis concluded, not only the state and its laws would disappear, but all moral principles should also cease to perform any practical function.

Curiously, Vladimir Lenin (1870-1924), the main leader of the 1917 October Revolution and first Head of State of the Soviet Union, once was a lawyer who practiced law in the Volga River port of Samara. This happened before Lenin moved to St Petersburg to pursue his career as a political agitator in 1893. Although being trained as a lawyer, he despised the rule of law and believed, as Lenin himself put it, that 'the revolutionary dictatorship of the proletariat must be ruled, won, and maintained by the use of violence by the proletariat against the bourgeoisie, rule that is unrestrained by any laws'.¹⁰⁶ The final victory of communism, Lenin believed, required the creation of the 'dictatorship of the proletariat'.¹⁰⁷

Lenin nonetheless agreed with Pashukanis that once the revolutionary period of 'proletarian dictatorship' was accomplished, the state with all its laws and institutions would simply wither away. After all, there would be no fur-

¹⁰⁶ V.I. Lenin, *Collected Works*, Vol.28 (Moscow: Progress Publishers, 1981), 236.

¹⁰⁷ *Ibid*, 16: 33.

ther conflict among the social classes to activate the engine of dialectical historicism.¹⁰⁸ Meanwhile, in order to continue on the road to the communist utopia, the Soviet state would have to become increasingly more arbitrary and violent. Caenegem provides an insightful explanation of how these seemingly self-contradictory ideas could co-exist and be justified by the Soviet leadership:

In order to continue on the road to communism a strong state was indispensable. At the end of the road, after socialism had given way to the ultimate achievement of communism, the state would be meaningless and doomed to disappear. In the meantime, however, its power was needed to keep the forces of reaction in check. When exactly this disappearance would take place was a moot point that used to pop up in theoretical journals. The date was, like that of the coming of the Lord for the early Christians, constantly pushed into a more distant future. It was precisely because a strong state was necessary... that the constitutional freedoms had to be limited, as they could not be invoked against the workers and their state... Freedom in the Soviet Union was a guided, teleological freedom, not to do what one liked, but to co-operate in the construction of socialism. It was comparable to the Christian doctrine that true liberty consists in doing God's will. Consequently Article 50 [of the 1977 Soviet Constitution], which guaranteed freedom of the press and the expression of opinion, stated that Soviet citizens enjoyed those liberties 'in accordance with the interests of the people and in order to strengthen and develop the socialist regime'.¹⁰⁹

The death of Lenin in 1924 unleashed a deadly struggle for power within the Soviet elite. The struggle was ultimately won by the Party's General Secretary, Joseph Stalin (1878-1953), who after eliminating his principal

¹⁰⁸ Kelly, above n 42, 310-311.

¹⁰⁹ Caenegem, above n 103, 266.

political adversary, L.D. Trotsky (1879-1940), launched a deadly ‘reign of terror’ in which millions were killed with or without mock trials by outright execution or by mass deportation to Siberia. It was during this time that Pashukanis was executed. Stalin’s new ‘socialist legality’ was incompatible with Pashukanis’ legal nihilism. Ironically, it has been argued that Pashukanis’s own legal approach may have contributed to the rise of Stalinism. According to Berman, ‘[h]is theories were ... disastrous for ... the Soviet law, since he believed that law was based essentially on the marked and on the principle of reciprocity or exchange, and that hence in a socialist planned economy law represented a bourgeois survival which should be used, if all, simply for political purposes’.¹¹⁰ This so being, Krygier explains,

There was no place... for legal rights [in Pashukanis’ legal theory]. In the 1920s Pashukanis, whose commodity-exchange school dominated Soviet law and set the agenda for Soviet law schools, argued for “direct action” rather than “action by means of a general statute” in criminal law. This “legal nihilism” was an important ingredient in early Stalinist lawlessness. Pashukanis attacked, and his school sought to root out, “the bourgeois juridical worldview”. In doing so, they contributed directly to what has been called “jurisprudence of terror”. In the “campaign against the kulaks”, for example, which Robert Conquest estimates to have cost some 6.5 million lives, terror operated directly without legal restraint, as well as through legal provisions empowering local authorities “to take all necessary measures... to fight Kulaks.”¹¹¹

¹¹⁰ Berman, above n 105.

¹¹¹ Martin Krygier, ‘Marxism, Communism and the Rule of Law’, in Krygier (ed.), above n 71, 163.

VIII CONSTITUTIONALISM IN THE SOVIET UNION

The Soviet legal system created institutional safeguards for the individual citizen that were only nominal, whereas others were merely a façade. Indeed, the Soviet regime had no interest whatsoever in complying with the rule of law. Established by violence, such regimes never became a government under the law. On the contrary, the Soviet legal system played an insignificant role in the actions of the communist government, since the real power lay in the small leadership of the Bolshevik Party. Aron commented: ‘The proletariat is expressed in the Party and the latter being possessed of absolute power, is the realization of dictatorship of the proletariat. Ideologically the solution is satisfactory and justifies the monopoly of the party. The party possesses and should possess supreme power, because it is the expression of the proletariat and the dictatorship of the proletariat’.¹¹²

The public authorities who promulgated the Soviet Constitutions never intended to respect their legal provisions. The first Soviet Constitution is dated from 1918, the second is from 1924, the third was enacted in 1936, and the fourth and final Soviet Constitution was promulgated in 1977, remaining in operation until the regime’s final collapse in 1991. The first constitution explicitly stated that the Soviet Union was a ‘dictatorship of the proletariat’ and that human rights were guaranteed only to the ‘workers’. In all subsequent constitutions, the people were declared to enjoy fundamental rights to free speech, free press, free assembly, etc. And yet nobody really expected to enjoy any of these rights. There were limitations derived from

¹¹² Aron, above n 88, 168.

the constitution itself, which determined that these rights could only be enjoyed if they were exercised in absolute conformity with the general interests of the socialist state. A further check lay in the fact that the special police was immune from respecting the law. So it is argued that all these constitutional rights were merely a façade to deceive naïve foreigners and to advance the cause of communism worldwide. As explained by Aron in relation to the Soviet Constitution enacted by Stalin in 1936:

Because Westerners consider constitutional regulations important, [the Soviet rulers] must be shown that they have no reason to feel superior even in this respect... One of the reasons for the 1936 constitution was possibly to convince world public opinion that the Soviet regime was close in spirit to western constitutional practice and opposed to fascist tyranny or Nazism. The regime wanted foreigners to see the distinction between the party and the state. Without this juridical distinction, relations between the Soviet Union and other states would be compromised.¹¹³

IX THE JUDICIAL FUNCTION IN THE FORMER SOVIET UNION

During the former Soviet Union the power of the state was indivisible. The principles of judicial independence and neutrality were discarded as no more than mere ‘bourgeois myths’. Instead, the Soviet courts had two basic functions: to advance socialism and to destroy all the real or imagined enemies of the state. I.M. Reisner (d.1958), an influential member of the People’s Commissariat of Justice from 1917 to 1919, commented:

The Separation of powers in legislative, executive and judicial branches corresponds to the structure of the state of the bourgeoisie.... The Russian So-

¹¹³ Ibid, 166.

viet Republic... has only one aim, the establishment of a socialist regime, and this heroic struggle needs unity and concentration of power rather than separation.¹¹⁴

Lenin believed that the Soviet judiciary needed to be ‘an organ of state power’, and nothing else.¹¹⁵ ‘The court is an organ of power of the proletariat. The court is an instrument for inculcating discipline’, he wrote.¹¹⁶ According to Lenin, ‘the only task of the judiciary is to provide a principled and politically correct (and not merely narrowly juridical)... essence and justification of terror... The court is not to eliminate terror... but to substitute it and legitimize it in principle’.¹¹⁷ True to this conviction, Lenin established in 1918 the notorious ‘People’s Courts’ whereby judges were under no obligation to rely on any rules of evidence. Their final verdicts were basically guided by executive decrees, and their own sense of ‘socialist justice’.¹¹⁸ Figes reports on their functioning:

The Bolsheviks gave institutional form to the mob trials through the new People’s Courts, where ‘revolutionary justice’ was summarily administered in all criminal cases. The old criminal justice system, with its formal rules of law, was abolished as a relic of the ‘bourgeois order’... The sessions of the People’s Courts were little more than formalised mob trials. There were no set of legal procedures or rules of evidence, which in any case hardly featured. Convictions were usually secured on the basis of denunciations, often arising from private vendettas, and sentences tailored to fit the mood of the crowd, which freely voiced its opinions from the public gallery...

¹¹⁴ Cited in Caenegem, above n 104, 261.

¹¹⁵ Lenin, above n 107, 25:155.

¹¹⁶ Ibid, 2:478-9.

¹¹⁷ V.I. Lenin, *PSS*, XLV, 190, cited in Richard Pipes, *Russia under the Bolshevik Regime 1919-1924* (London: Harvill Press, 1997) 401.

¹¹⁸ Pipes, above n 96, 798.

The People's Courts judgements were reached according to the social status of the accused and their victims. In one People's Court the jurors made it a practice to inspect the hands of the defendant and, if they were clean and soft, to find him guilty. Speculative traders were heavily punished and sometimes even sentenced to death, whereas robbers – and sometimes even murderers – of the rich were often given only a very light sentence, or even acquitted altogether, if they pleaded poverty as the cause of their crime. The looting of the 'looters' had been legalized and, in the process, law as such abolished: there was only lawlessness.¹¹⁹

To further intensify repression Lenin introduced a second court called the 'Revolutionary Tribunals', in February 1919. Modelled on a similar institution of the French Revolution, the first Soviet Commissar of Justice, Dmitry Kursky, defined such tribunals as not really intended to be 'real courts' in the 'normal,' bourgeois sense of the term, but instead 'courts of the dictatorship of the proletariat, and weapons in the struggle against the counterrevolution, whose main concern was eradication rather than judgments'.¹²⁰ So Nicolai Krylenko, who succeeded Kursky as the Soviet Commissar of Justice, commented that 'in the jurisdiction of revolutionary tribunals complete freedom of repression was advocated while sentencing to death by shooting was a matter of everyday practice'.¹²¹

Although Lenin deemed 'mass terror' an indispensable instrument of oppression for every socialist government, to his great disappointment the

¹¹⁹ Orlando Figes, *A People's Tragedy* (London: Pimlico, 1996), 534.

¹²⁰ D.I. Kurskii, *Izbrannye stat'i rechi* (*Selected articles and speeches*) (Moscow: Gos. izd-vo iurid. lit-ry, 1958), 67, cited in Werth, above n 72, 55.

¹²¹ N. Krylenko, *Sudoustroistvo RSFSR* (*The Judiciary of the RSFSR*) (Moscow, 1923), 205, cited in Vladimir Gsovski, 'Preventive and Administrative Detention in the U.S.S.R.' (1961) 3(1) *Journal of the International Commission of Jurists* 135, 138.

revolutionary tribunals turned out not to be as entirely efficient. Too many of these ‘revolutionary’ magistrates could easily be bribed, and they also appeared reluctant to impose sentences of death on the ‘enemies’ of the ‘proletariat’. This was not what Lenin had in mind, so a new instrument of terror had to be conceived. The power conferred on those revolutionary tribunals was gradually transferred to a new and far more deadly entity: the Cheka. Since the decree establishing Cheka has never been published, the exact date of its creation cannot be ascertained. Although its date of creation is uncertain, it is absolutely clear that Cheka became a ‘state within the state’, assigned as it was with unlimited power to eradicate anyone perceived ‘to undermine the foundations of the socialist order’.¹²² Krylenko characterised its activities as follows:

The Cheka established a de facto of deciding cases without judicial procedure... In a number of places the Cheka assumed not only the right of rendering final decisions but also the right of control over the courts. Its activities had the character of tremendously merciless repression and complete secrecy as to what occurred within its walls... Final decisions over life and death with no appeal from them... were passed... with no rules establishing the procedure or jurisdiction.¹²³

Cheka is a name derived from the first letters of the Russian word *Chrezvyshainaia Kommissiia*, meaning ‘Extraordinary Commission’. Cheka agents had full licence to kill without having to follow the most perfunctory procedures. Martin Latsis, the head of the Ukranian Cheka, explicitly instructed his agents: ‘Do not to look for evidence as proof that the accused has

¹²² NZh, No.112/327 (June 9, 1918), p. 4, *cited in* Gsovski, above n 121, 137.

¹²³ Krylenko, *Sudoustroistvo RSFSR (The Judiciary of the RSFSR)* (Moskva, 1923) 97, 322-323, *cited in* Govski, above n 20, 137.

acted or spoken against the Soviets. First you must ask him to what class he belongs, what his social origin is, his education and profession. These are the questions that must determine the fate of the accused. That is the meaning of the Red Terror'.¹²⁴ Such 'enemies of the regime', often their entire families, were systematically arrested and thrown into concentration camps, which Latsis himself once reported as being no more than death camps: 'Gathered together in a camp near Maikop, the hostages, women, children, and old men survive in the most appalling conditions... They are dying like flies. The women will do anything to escape from death. The soldiers guarding the camp take advantage of this and treat them as prostitutes'.¹²⁵

Latsis also produced two revealing books that provide a general account of Cheka activities: *Two Years Fighting* (1920) and *The Extraordinary Commission for Combating Counterrevolution* (1921). These books reveal Cheka not simply as a mere tribunal or commission, but as 'a fighting organ on the internal front of the civil war... It does not judge, it strikes. It does not pardon, it destroys all who are caught on the other side of the barricade'.¹²⁶ In fact, Latsis presented its activities in a way that leaves absolutely no doubt about their extra-legal nature as well as incredible brutality:

Not being a judicial body the Cheka's acts are of an administrative character... It does not judge the enemy it strikes... The most extreme measure is shooting... The second is isolation in concentration camps. The third measure is confiscation of property... The counterrevolutionaries are active in all spheres of life... Consequently, there is no sphere of life in which the Cheka

¹²⁴ Izvestiia, 23 Aug 1918, cited in Figes, above n 119, 535.

¹²⁵ RTsKhIDNI, 17/84/75/28, cited in Werth, above n 72, 100.

¹²⁶ Nazhivin, *Zapiski*, 14, cited in Figes, above n 119, 632.

does not work. It looks after military matters, food supplies... etc. In its activities the Cheka has endeavoured to make such an impression on the people that the mere mention of the name Cheka will destroy the desire to sabotage, to extort, to plot.¹²⁷

On February 6th, 1922, Cheka was abolished by executive decree but Cheka's successors (GPU, OGPU, NKVD, MVD, MGB, and KGB) continued operating outside the legal boundaries, remaining technically free to condemn anyone by means of summary procedure, including the death penalty.¹²⁸ These were nominal changes laid down by such organisations that, if anything, only amounted to the institutionalisation of terror in Soviet Russia. So it happens that between 1937 and 1938 alone, no less than 1,575,000 people were arbitrarily arrested by the NKVD. Out of that number, 1,345,000 received some form of punishment, with 681,692, or 51 per cent, being executed.¹²⁹ As Werth points out,

Although the name had changed, the staff and administrative structure remained the same, ensuring a high degree of continuity within the institution. The change in title emphasized that whereas the Cheka had been an extraordinary agency, which in principle was only transitory, the GPU was permanent. The state thus gained a ubiquitous mechanism for political repression and control. Lying behind the name change were the legalization and the institutionalization of terror as a means of resolving all conflict between the people and the state.¹³⁰

¹²⁷ Latsis, *Chrzvychainaia Komissiiia*, 8, 15, 23, 24, *cited I*, Gsovski, above n 121, 137.

¹²⁸ The Cheka was abolished on February 1922, and immediately replaced by an organization named 'State Political Administration', or GPU. In 1924, following the creation of the Soviet Union, it was renamed 'United State Political Administration', or OGPU.

¹²⁹ Werth, above n 71, 128, 190.

¹³⁰ *Idem*, 128.

Curiously, during the first five years of the communist experiment, from 1917 and 1923, there was no proper judicial system in the Soviet Union. One of the earliest decrees of Soviet regime was to abolish all the courts, dismiss all the public prosecutors, and even the Bar Association was dissolved.¹³¹ The newly established activities of the revolutionary tribunals and the Cheka overshadowed any possible legal action. Pipes provides a rather dramatic description of the daily life of the Russian people in April 1918:

Those living under Bolshevik rule found themselves in a situation for which there was no historic precedent. There were courts for ordinary crimes and for crimes against the state, but no laws to guide them; citizens were sentenced by judges lacking in professional qualifications for crimes which were nowhere defined. The principles *nullum crimen sine lege* and *nulla poena sine lege*... were thrown overboard as so much useless ballast... One observer noted in April 1918 that in the preceding five months no one had been sentenced for looting, robbery, or murder, except by execution squads and lynching mobs. He wondered where all the criminals had disappeared to... The answer, of course, was that Russia had been turned into a lawless society.¹³²

Ultimately a Judiciary Act was enacted by the Soviet authorities in 1923, which created a uniform judicial system that, in the main, survived until the final collapse of the communist regime. The new courts conceived by this legislation were constituted as ‘obedient instruments of the policy of the government and the Communist Party.’¹³³ Soviet judges were not expected to be neutral adjudicators of the law. In fact, they had no independence

¹³¹ Gsovski, above n 120, 135.

¹³² Pipes, above n 96, 799.

¹³³ Gsovski, above n 121, 139.

from the government. Instead, they were instructed to carry out the general line of the Party as well as the general policies of the Soviet Executive, and the same was true until the Soviet experiment ended in 1991. As mentioned by Krylenko in a lecture delivered at the University of Moscow in 1923:

No court has even been above class interest and if there were such a court we would not care for it... We look upon the court as a class institution, as an agency of government power, and we erect it as agency completely under the control of the vanguard of the working class... Our court is not an agency independent of governmental power... therefore it cannot be organized in any other way than dependent upon and removable by the Soviet power.¹³⁴

It is somehow ironic, therefore, that such a staunch supporter of the ‘Red Terror’ ended up being arrested and executed in the 1930s during Stalin’s ‘Great Purge’. In 1938, Krylenko was forced by Stalin to step down as Prosecutor General only to be sentenced to death in a trial that lasted no more than twenty minutes. He was then replaced by Andrei Vyshinsky (1883-1954), a legal academic who acquired a reputation for his lectures on legal philosophy at the University of Moscow.¹³⁵ Vyshinsky’s approach to legal matters was remarkably similar to Krylenko’s. Inspired by the teachings of Marx, Vyshinsky argued:

Law is the aggregate of the rules of conduct expressing the will of the dominant class and established by legislation, as well as of customs and rules of community life confirmed by state authority, the application whereof is guaranteed by the coercive force of state to the end of safeguarding, making

¹³⁴ Krylenko, above n 121, 177.

¹³⁵ Vyshinsky served also as Soviet Foreign Minister from 1949 to 1953.

secure and developing social relationships and arrangements advantageous and agreeable to the dominant class.¹³⁶

According to Vishinsky, ‘the main function of the Soviet courts is to destroy without pity all the foes of the people in whatsoever form they manifest their criminal encroachments upon socialism’.¹³⁷ He argued that the ‘formal law’ should be entirely subordinated to ‘the law of the revolution’: ‘If there might be conflict and discrepancies between the formal commands of law and those of the proletarian revolution this conflict must be solved... by the subordination of the formal commands of law to those of Party policy’, Vishinsky wrote.¹³⁸ In *Judiciary in the URSS* (1936) he stated:

The court of the Soviet State is an inseparable part of the whole of the government machinery... This determines the place of the court in the system of administration. The general Party line forms the basis of the entire government machinery of proletarian dictatorship, and also forms the basis of the work of the court... The court has no specific duties, making it different from other agencies of government power, or constituting its ‘particular nature’.¹³⁹

¹³⁶ Cited in Francis Nigel Lee, *Communist Eschatology* (Nutley/NJ: Craig Press, 1974), 383.

¹³⁷ A. Vyshinsky, *Judiciary of the USSR* (Moscow: Progress Publishers, 1935), 32.

¹³⁸ A. Vyshinsky, *Sudoustroistvo v SSR* (2nd ed. Moscow, 1935), 32, cited in Krygier, above n 70, 141.

¹³⁹ A. Vyshinsky, *The Judiciary*, Vol.1 (Criminal Procedure) (1936), cited in Gsovski, above n 121, 139.

X SOVIET CRIMINAL LAW

Among the peculiarities of the Soviet legal system there was the existence of parallel jurisdictions for prosecuting criminal matters, one judicial and the other administrative. When questions about the abolition of the Cheka were raised, the Soviet authorities promised that the ‘the fight against violations of the laws’ would be entrusted exclusively to judicial bodies. Hence, a decree from 6 February 1922 that abolished Cheka promised that all crimes henceforth would be subject to trial in ordinary courts. This promise was never truly accomplished. Alongside these ordinary courts there remained a variety of Cheka successors that kept its broad, largely undefined arbitrary powers: GPU; OGPU; NKVD; MVD; and from 1954, the KGB.¹⁴⁰ These agencies were endowed with extraordinary powers to arrest, investigate, try, sentence and execute any person whom they suspected of political opposition. They worked in secret and without any need to consult a court or legal rule.¹⁴¹

The first Soviet Criminal Code came into force only on June 1st, 1922. And even after this code was enacted the widespread practice of arbitrary imprisonment continued to be one of the most notorious characteristics of Soviet public life. According to Stuchka, the then Soviet Commissar of Justice, the criminal code was only a ‘codification of revolutionary practices consolidated on a theoretical basis’.¹⁴² Indeed, ‘one of the code’s functions was to permit the use of all necessary violence against political enemies

¹⁴⁰ KGB is the abbreviation for *Komitet gosudarstvennoy bezopasnosti* or ‘State Security Committee’ Committee for State Security. KGB operated from 1954 to 2002.

¹⁴¹ *Prisoners of Conscience in the USSR: Their Treatment and Conditions* (Amnesty International, London, 1975), 18-9.

¹⁴² Stuchka, *Kurs sovetskogo grazhdanskogo prava tom 1. Vvedenie* (‘Course on Soviet Civil Law, vol.1, Introduction’), 1931. Cited in Gsovski, above n 120, 140.

even though the civil war was over and expeditious elimination could no longer be justified'.¹⁴³ In other words, the code was enacted not to prevent violence on political grounds, but to reveal the 'motivation' and the 'essence' of the Soviet terror. This, after all, was exactly what Lenin intended when he demanded the following from the drafter of the Criminal Code:

Comrade Kursky, I want you to add this draft a complementary paragraph to the penal code... It is quite clear for most part. We must openly – and not simply in narrow juridical terms – espouse a politically just principle that is the essence and motivation for terror, showing its necessity and its limits.

The courts must not end terror or suppress it but give it a solid basis.¹⁴⁴

In Lenin's view, the main cause of crime was 'the exploitation of the masses'. The removal of such a cause (i.e., capitalism), Lenin argued, would lead to the withering away of ordinary crime.¹⁴⁵ In time, the socialist revolution would do away with such crimes. The code therefore stated that there is 'no such thing as individual guilt', and that criminal punishment 'should not be seen as retribution'.¹⁴⁶ On the other hand, unlike ordinary criminals all those 'political criminals' classified under the category of 'class enemies' were forced to endure 'harsher punishment than would an ordinary murdered or thief'.¹⁴⁷ This being the case, N.V. Krylenko, the People's Commissar of Justice and Prosecutor-General of Soviet Russia in the 1920s and the early 1930s, wrote entire books and articles advocating that matters

¹⁴³ Werth, above n 72, 127.

¹⁴⁴ I.V. Lenin, *Sochineniia* (Works), 3rd ed, vol.27, p.296, cited in Gsovski, above n 120, 140.

¹⁴⁵ See Kelsen, above n 53, 45 & 102.

¹⁴⁶ Some aspects of the language in the Soviet criminal code would have 'warmed the hearts of the most radical, progressive criminal reformers in the West'. Applebaum, above n 85, 160.

¹⁴⁷ *Ibid*, 161.

of ‘political consideration’, not criminal ones, should play far more decisive a role on issues of guilt, innocence and punishment. Krylenko even went to the point of stating: ‘We must execute not only the guilty. Execution of the innocent will impress the masses even more’.¹⁴⁸ Serving as Commissar of Justice in 1918, he declared:

It is one of the most widespread sophistries of bourgeois science to maintain that the court... is an institution whose task it is to realize some sort of special “justice” that stand above classes, that is independent in its essence of society’s class structure, the class interests of the struggling groups, and the class ideology of the ruling classes... “let justice prevail in courts” – one can hardly conceive more bitter mockery of reality than this... Alongside, one can quote many such sophistries: that the court is a guardian of “law”, which, like “governmental authority”, pursues the higher task of assuring the harmonious development of “personality”... Bourgeois “law”, bourgeois “justice”, the interesting of the “harmonious development” of bourgeois “personality”... Translated into the simple language of living reality this meant, above all, the preservation of private property.¹⁴⁹

The criminal codes legislated during the Soviet Union provided for the arrest, conviction and imprisonment on ideological grounds. Article 58 of the first Criminal Code was especially obnoxious in that it classified as ‘counterrevolutionary’ any form of participation in the so-called ‘international bourgeoisie’. This was treated as a serious crime punishable by either three years of incarceration or lifelong banishment. Such punishment was applied with considerable liberality, in such a manner that facilitated the arrest of countless innocent people, often on no logical basis other than polit-

¹⁴⁸ N.V. Krylenko ‘*Revoliutsionnye Tribunaly*’ VZh, No.1, (1918), *cited in* Pipes, above n 96, 796.

¹⁴⁹ *Ibid.*

ical expediency.¹⁵⁰ The lifelong-banishment provision in practice meant that anyone who dared return to the country would be greeted with immediate execution. Among those exiled were the compassionate people who “had committed the ‘political crime’ of establishing a committee for the fight against the severe famine of 1921-1922, which was dissolved on 27 July 1921 by Lenin.”¹⁵¹

Article 58 indeed provided blanket charges against anyone who was even remotely suspected of representing a threat to the socialist regime. Thus, anyone who fell within the elastic categories of ‘socially dangerous’ and/or ‘counter-revolutionary’ could be rapidly sentenced to prison even if there was a complete absence of guilt.¹⁵² Arguably the dramatic situation sprang from the primacy assigned to the interests of the socialist state, together with the Marxist understanding of law as a mere instrument of class oppression. Writing in 1947, the Soviet jurist A.A. Piontkowsky made it crystal clear that for political reasons any individual could be sentenced even if no crime had actually been committed:

Of course, sometimes for these or those considerations of a political nature... it is necessary to apply compulsory measures to persons who have

¹⁵⁰ Werth, above n 72, 128.

¹⁵¹ According to Werth, “*In place of the committee the government set up a Central Commission for Help for the Hungry, a slow-moving and bureaucratic organization made up of civil servants from various People’s Commissariats, which was characterized by inefficiency and corruption. When the famine was at its worst in the summer of 1922 and nearly 30 million people were starving, the Central Commission was assuring an irregular supply to about 3 million people... Despite the massive international relief effort, at least 5 million people of the 29 million Russians affected died of hunger in 1921 and 1922*”. – Werth, above n 72, 123.

¹⁵² *Ibid*, 136.

not committed any crime but who on some basis or another are socially dangerous.¹⁵³

Alongside the criminal code there was also the Soviet Code of Criminal Procedure (1926), which broadened the definitions of ‘counter-revolutionary crime’ and ‘socially dangerous person’. Among the crimes deemed to be ‘counter-revolutionary’ was any criticism or negative comment about ‘the political and economic achievements of the revolutionary proletariat’.¹⁵⁴ Another striking feature of this procedural code was the instruction of provincial courts to refuse ‘to admit as a counsel for defense any formally authorized person if the court consider such person not appropriate for appearance in the court in a given case depending upon the substance or the special character of the case’.¹⁵⁵ Furthermore, Article 281 allowed these courts to hear a case in the absence of both the prosecution and the defence.¹⁵⁶ As a result, millions of prisoners who received criminal sentences were not really criminals in any normal sense of the word.¹⁵⁷

From the mid 1920s until the death of Stalin the crimes for which people were arrested, tried and sentenced were often ‘nonsensical’ and the procedures in which they were investigated and convicted were arbitrary and violent if not absurd and surreal. For instance, the vast majority of inmates in the notorious Soviet concentration camps (‘Gulags’) had been interrogated only cursorily, tried farcically, and found guilty in a trial that often

¹⁵³ A.A. Piontkowsky, *Stalinskaya Konstitutsia i Proyeckt Ugolovnogo Kodeksa SSSR* (1947,) 15-16, cited in Amnesty International, above n 140, 15.

¹⁵⁴ Werth, above n 72, 135-6.

¹⁵⁵ RSFSR Code of Criminal Procedure, Section 382, cited in Gsovski, above n 121, 140.

¹⁵⁶ *Ibid*, 140.

¹⁵⁷ Applebaum, above n 86, 582.

would take less than a minute.¹⁵⁸ The investigations conducted by the Soviet secret police routinely included gruesome methods of torture, including hitting their victims in the stomach with sandbags, breaking their hands or feet, or tying their arms and legs behind their backs and hoisting them in the air.¹⁵⁹

Undoubtedly one of the most appalling aspects of the Soviet penal system was the treatment of children.¹⁶⁰ Small children were frequently ‘arrested’ alongside their parents. Both pregnant and nursing women were arrested. In 1940, an executive order allowed female inmates to stay with their babies for no longer than a year and a half. But once breast-feeding ended, the mother was immediately separated from her child and denied any further contact. The consequences of separating children from their mothers were so horrifying that, in these Soviet prisons, infant death rates were extremely high.¹⁶¹ Usually children at the age of two and sometimes even less were transferred into regular orphanages that ‘were vastly overcrowded, understaffed, and often lethal’.¹⁶² Upon arrival at the state orphanages these infants, even little babies, had their fingerprints taken like criminals, and ‘caretakers were all afraid to show them too much affection, not wanting to be accused of having sympathy with “enemies”’.¹⁶³ These children were brainwashed in such establishments to despise and hate their own parents as ‘enemies of the people’. Applebaum provides the following account:

¹⁵⁸ *Ibid*, 122.

¹⁵⁹ *Ibid*, 141.

¹⁶⁰ *Ibid*, 318.

¹⁶¹ *Ibid*, 323.

¹⁶² *Ibid*, 325.

¹⁶³ *Ibid*, 326.

Some children... were permanently damaged by their orphanage experiences. One mother returned from exile, and was reunited with her young daughter. The child, at the age of eight, could still barely talk, grabbed at food, and behaved like the wild animal that the orphanage had taught her to be. Another mother released after an eight-year sentence went to get her children from the orphanage, only to find that they refused to go with her. They had been taught that their parents were “enemies of the people” who deserved no love and no affection. They had been specifically instructed to refuse to leave, “if your mother ever comes to get you”, and they never wanted to live with their parents again.¹⁶⁴

The adoption of a new Penal Code on December 25th, 1958, seemed to represent some change of direction. After all, this code did away with key terms such as ‘enemy of the people’ and ‘counterrevolutionary crimes’. The use of violence and torture was also outlawed, and from now on the accused should be entitled to always have a lawyer. Regrettably, all these changes were more apparent than real, because the new code retained some provisions of the previous legislation, including the one authorising for the punishment of ‘political deviancy’. Under Article 70, any person caught spreading ‘anti-Soviet propaganda’ was susceptible of being sentenced to a maximum seven-year imprisonment in a concentration camp followed by exile for two to five years. In addition, Article 190 determined a sentence of no less than three-year jail for any failure to denounce ‘anti-Soviet behaviour’. During the 1960s and 1970s these two articles combined were widely used to punish any act of ‘political deviancy’.¹⁶⁵

¹⁶⁴ *Ibid*, 327.

¹⁶⁵ Werth, above n 72, 258.

A further problem for the many victims of ‘political crime’ was that the vast majority of defence lawyers in the former Soviet Union were members or candidate members of the Communist Party (CPSU). These lawyers were utterly subordinated to the party, which required its members an ‘uncompromising obedience to its rules and policies’. Under Article 2 of the Statute of the CPSU, ‘a member of the Party is obliged to observe Party and State discipline and one law for all Communists, irrespective of their work and of the positions held by them’.¹⁶⁶ So it was not surprising that a 1975 report released by Amnesty International commented:

There has never in Amnesty International’s experience been an acquittal of a political defendant in the USSR. No Soviet court trying a person charged from his political activity has rejected the prosecution’s case on grounds of procedural violations committed during the investigation period or on grounds of insufficient evidence.¹⁶⁷

That such cases invariably ended in criminal conviction indicates that some criteria other than criminal culpability played a more decisive role. Lawyers who were too up-front in defending their clients accused of dissent activity risked losing the right to defend in political cases, and perhaps even the license to exercise the legal profession. The best known such case was that of B.A. Zolotukhin, a Moscow lawyer who defended Alexander Ginzburg in 1968. As a ‘reward’ for his professional legal defence, Zolotukhin lost his licence to practice law and was thus deprived of the right to work as a defence lawyer. He was expelled from the Communist Party, from the presidium of the Collegium of Lawyers, and from a post as the head of a

¹⁶⁶ *Ustav Kommunisticheskogo Partii Sovetskogo Soyuza*, Article 2, cited in Amnesty International, above n 140, 30.

¹⁶⁷ *Ibid*, 32.

prestigious legal consultative office. The reason for all these expulsions was Zolotukhin's 'adopting a non-party, non-Soviet line in his defence of Ginzburg'.¹⁶⁸

XI CONCLUSION

Marx believed that laws are the product of class oppression, and that laws would have to disappear with the advent of communism. Marxist ideas are closely associated with communist regimes, since these regimes have claimed Marxism as their official ideology. Unfortunately, the Marxist dream of a classless (and lawless) society has led only to gross inequality and class-oriented genocidal policies. In fact, Marxist regimes have been far more efficient in the art of killing people than in art of producing any concrete or perceived form of social justice. In the twentieth century alone, Marxist-inspired governments killed at least 100 million people. In the former Soviet Union, a country founded on basic Marxist goals and principles, the victims of assassination by the socialist state approached at least 20 million people.¹⁶⁹

As demonstrated in this article, there was absolutely no respect for human rights and the rule of law in the former Soviet Union. Marxism operated in that country as a rigid dogma 'used for the purpose of cementing power, justifying tyranny, and violating human conscience'.¹⁷⁰ It was clear to everyone who lived in the Soviet Union that laws could be easily ignored or manipulated by the Marxist ruling elite. There was no judicial guarantee

¹⁶⁸ *Ibid*, 31.

¹⁶⁹ See Courtois et al, above n 39.

¹⁷⁰ Djilas, above n 2, 9.

against the encroachment on basic human rights and, as a result, a nihilistic attitude towards legality was developed that affected the entire social perception about law, not only among the bureaucratic elite but also among the ordinary people. Instead of trust in the fairness and neutrality of the law, citizens were forced to subject their most basic rights to life, liberty, and property to the arbitrary will of the state. Under such a social context, any possible right derived from state law was perceived as possessing little or no practical importance at all.

**FAUSTIAN BARGAINS:
ENTANGLEMENTS BETWEEN CHURCH AND STATE IN
AMERICA**

STEVEN ALAN SAMSON*

Abstract

As the state extends its operations into all areas of social life, it breaches the protective 'wall of separation' that has traditionally kept the church free from overt regulation by the civil authorities. This is manifested in several ways: first, a statutory extension of state police powers through social legislation; second, a restriction or pre-emption of certain activities that were once held to be outside the purview of the state; third, a vitiation of the principle of religious non-interference through judicial interpretations of the First Amendment; and fourth, an adversary posture toward churches taken by many agencies of the state while pursuing their regulatory objectives. As a consequence, churches are facing novel restraints on their ecclesiastical or corporate rights, immunities, and privileges. Originally written in 1984, this piece is updated by a brief review of subsequent developments that addressed many of these concerns.

I INTRODUCTION

Two subjects most apt to be avoided in polite conversation are religion and politics. The reasons are not hard to fathom. We express our values and views in mixed company at the risk of exposing our identity: perhaps also our ignorance. Explanations are most easily avoided by a circumspect silence. As citizens of an increasingly pluralistic America, we put a

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premium on anonymity and privacy with regard to personal convictions.¹

Consequently, these most public of commitments – religion and politics – are kept most private and guarded as Rumpelstiltskin guarded his name. Matters of faith tend to be consigned to a tacit dimension of being: a Homeric netherworld of the sort once inhabited by shades of the Greek dead. Religion in particular is becoming more mystic or ineffable, confirming psychologically a dualism in our thinking that has been embraced by modern philosophy. Ludwig Wittgenstein concluded his *Tractatus* on this rather diffident note: ‘What we cannot speak about we must pass over in silence.’² J. Glenn Gray has characterized the abstraction of modern social life as a consequence of its godlessness.³

¹This contrasts with the earlier emphasis on cultural life in which politics and religion were the great issues. See Guillaume Groen van Prinsterer, *Unbelief in Religion and Politics*, ed. and trans. Henry Van Dyke (Amsterdam: The Groen van Prinsterer Fund, 1975), 16: ‘Lamennais writes correctly: “There are truths and errors which are at once religious and political, since religion and society have the same origin, namely God, and the same end, namely man. Thus a fundamental error in religion is also a fundamental error in politics, and vice versa.” See also Richard E. Morgan, *The Politics of Religious Conflict: Church and State in America* (New York: Pegasus, 1968), 21-23, on the close affinity between mainline Protestant and secularist perceptions with regard to church and state.

²Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, 2nd ed., trans. D. F. Pears and B. F. McGuinness (London: Routledge and Kegan Paul, 1961), 151. Working within the tradition of Kantian philosophy, Wittgenstein made an absolute distinction between facts and values that led to a kind of ‘ethical mysticism.’ Allan Janik and Stephen Toulmin, *Wittgenstein's Vienna* (New York: Simon and Schuster, 1973), 150-61, 232-35. This resolution of the dualism of fact and value is comparable to the ‘semantic mysticism’ that, according to some critics, characterizes so much of modern theology. See Hazel E. Barnes, *An Existentialist Ethics* (New York: Vintage Books, 1967), 379-99.

³J. Glenn Gray, *The Warriors: Reflections on Men in Battle* (New York: Harper & Row, 1959; Perennial Library, 1973), xxii. Gray, an American existentialist philosopher, regarded this change as an increasingly negative development.

II RELIGION AND POLITICS

We are confronted by a twin paradox in America today: the private Christian and the private citizen. In a bygone generation, the Christian gospel was openly proclaimed abroad in the land. Christianity was recognized as part of the common law. Today, the proclamation is muted and the recognition of our Christian legal tradition is indistinct, even in the churches. The public religiosity of an earlier era has retreated from community life. A malaise has settled over the civil pageantry of the boisterous young republic that once marked time with seven league boots. Even the obligatory lip service paid to civic virtue by dubious politicians and doubtful citizens has grown cold.⁴ Shakespeare's Brutus suggested a diagnosis for times like ours:

When love begins to sicken and decay,
It useth an enforced ceremony.
There are no tricks in plain and simple faith:
But hollow men, like horses hot at hand,
Make gallant show and promise of their mettle;

⁴ Borrowing a page from George Santayana, Leo Marx characterized the switch from a religious to a pragmatic emphasis in American letters as a change of language from the civil religion of the genteel tradition to the vernacular of the 'cruder, more colloquial, closer to the raw, often profane particularities of everyday life in the West.' Marx quoted Ralph Waldo Emerson to the effect that 'the corruption of man is followed by a corruption of language' and reiterated George Orwell's maxim that 'the great enemy of clear language is insincerity.' Leo Marx, 'The Uncivil Response of American Writers to Civil Religion in America,' in *American Civil Religion*, ed. Russell E. Richey and Donald G. Jones (New York: Harper & Row, 1974), 226-27. These observations may be compared with Eugen Rosenstock-Huussy, *Speech and Reality* (Norwich, Vt.: Argo Books, 1970), 10. While Gilbert Keith Chesterton once complimented America as the only nation founded upon a creed, he similarly warned against an insincere solemnity that is so often associated with church life. He regretted the weakness and weariness he saw in American politics and regarded them as evidence of decadence. See Sidney E. Mead, 'The 'Nation with the Soul of a Church,' in Richey and Jones, *op. cit.*, 45; Gilbert K. Chesterton, *Heretics*, 3rd ed. (New York: John Lane Company, 1906), 216-31, 263-66.

But when they should endure the bloody spur,
They fall their crests, and, like deceitful jades,
Sink in the trial.⁵

We live in an age of transition. Sporadic church attendance and low voter turnouts each express a growing disdain for any sort of confessionism or civic obligation. Where once a confident public philosophy held court,⁶ a strident skepticism has displaced the fairly broad moral consensus that, according to James Hitchcock, prevailed ‘until sometime after 1960.’

While there were inevitable disagreements over values, in retrospect these seem to have been relatively minor in scope, occurring within an accepted framework of belief. To cite one particularly sensitive example, the nation was overwhelmingly family-oriented. Hence there was general agreement about the undesirability of divorce, unmarried cohabitation, homosexuality, and other practices. However common they may have been in actuality, there was little inclination to defend them in theory. Agencies of public expression, like the schools and the mass media, tended overwhelmingly to honor this moral consensus.⁷

⁵ *Julius Caesar*, act 4, sc. 2, lines 20-27.

⁶ Walter Lippmann, *Essays in the Public Philosophy* (Boston: Little, Brown & Company, 1955; New York: New American Library), 136-37, attempted to reformulate the earlier theistic public philosophy in terms that would be acceptable to an agnostic generation since, as he acknowledged, ‘public philosophy is in large measure discredited among contemporary men.’

⁷ James Hitchcock, ‘Competing Ethical Systems,’ *Imprimis*, April 1981, 1. Harold Berman, who argues for a religious and against an instrumental conception of law, believes that a profound shift toward an exclusively secular theory of law has taken place during the last two generations. As a result, law is becoming unenforceable to the extent that it is seen merely as something expedient or arbitrary. ‘If law is to be measured only by standards of experience, or workability, and not by standards of truth or rightness, then it will be difficult to enforce it against those who think it does not serve their interests . . . One who rules by law is not compelled to be everywhere with his police force. I think this point is proved today in a negative way by the fact that in our cities that branch of the law in which the sanctions are most severe, namely

Indeed, this consensus was securely established within our legal system, despite some signs of fraying at the edges even before the 1960s. A radical shattering of this outwardly Christian set of expectations scarcely could have been anticipated. The current fragmentation of values is being viewed positively within what Hitchcock calls the ‘new pluralism’ as a means to effect the transition from one orthodoxy to another.

While the call for “pluralism” is ostensibly merely a call for tolerance – a request that the reigning orthodoxy make room for newer “points of view” – in practice an orthodoxy which loses its authority has trouble even retaining the right of toleration. Although it is still extended bare legal toleration, in practice it finds itself more and more on the defensive, its very right to exist challenged in numerous ways.⁸

the criminal law, has been powerless to create fear when it has failed to create respect by other means.’ Harold Berman, ‘The Interaction of Law and Religion,’ *Mercer Law Review*, 31 (1980): 409.

⁸ Ibid., 2. See also Gary North, ‘The Intellectual Schizophrenia of the New Christian Right,’ *Christianity and Civilization*, 1 (Spring 1982): 23: ‘Education is deeply religious. So is any system of legislation. We cannot escape religion. There is no neutrality. *Everyone uses the neutrality doctrine in order to create his own version of theocracy*: humanist theocracy (man is God), Marxist theocracy (the proletariat is God), anarchist theocracy (the free market is God), or whatever. They use the doctrine of religious liberty to enthrone an anti-Christian social order -- an order which does not allow Christians to establish their God-ordained theocracy. (I am using theocracy here as ‘the rule of God,’ not the rule of ordained priests or the institutional church.) In short, those using the religious liberty argument say that they are maintaining a society open to all religions, when in fact it will be *a society closed to the God of the Bible and His law-order*.’ The experience of churches in the Soviet Union may serve as an illustration. Religious liberty was constitutionally guaranteed but the teaching of religion to children is prohibited to all except their parents. Vladimir Gsovski pointed out in the 1930s that Soviet policy was to dismember the old Orthodox establishment into isolated local units and deprive churches of their property holdings. Although the use of church buildings was granted by local soviets free of charge, members of the church were required to assume all financial responsibilities: taxes, fees, and obligatory insurance payments. Congregations were not allowed to incorporate and, for a time, members of the clergy were disfranchised. Vladimir Gsovski, ‘Legal Status of the Church in Soviet Russia,’ *Fordham Law Review*, 8 (1939): 1-28. The 1977 Soviet Constitution contained the following provision in Article 52: ‘In the USSR the church is separate from the state, and the

The bedrock of this older orthodoxy was an accommodation between church and state designed to maintain standards of law and morality based on Christianity. The disestablishment of the state churches appears to have been originally intended to strengthen rather than impair the cooperation between church and state as institutions. This is attested by numerous court rulings, including the decision of the Supreme Court of New York in the case of *People v. Ruggles*, 8 Johnson 296, 297 (1811):

Though the constitution has discarded religious establishments, it does not forbid judicial cognisance of those offences against religion and morality which have no reference to any such establishment, or to any particular form of government, but are punishable because they strike at the root of moral obligation and weaken the security of the social ties The legislative exposition of the constitution is conformable to this view of it.

Here the Court noted at 296-97 that ‘the people of this state, in common with the people of this country, profess the general doctrines of christianity as the rule of their faith and practice’ Although the political system is not derived from any particular statement of religious doctrine, it was predominantly Christian in its legal assumptions, moral values, and religious sympathies.⁹

Today, however, there is strong evidence of a growing separation of the

school is separate from the church.’ Robert Sharlet, *The New Soviet Constitution of 1977: Analysis and Text* (Brunswick, OH: King's Court Communications, 1978), 93.

⁹ See H. B. Clark, *Biblical Law: Being a Text of the Statutes, Ordinances, and Judgments Established in the Holy Bible -- With Many Allusions to Secular Laws: Ancient, Medieval and Modern -- Documented to the Scriptures, Judicial Decisions and Legal Literature* (Portland, OR: Binfords & Mort, 1943), 36-41.

American legal and political system as a whole from its original, basically Christian, presuppositions. This trend raises questions of both a theoretical and practical nature concerning the nature and direction of the change.¹⁰ The object of this study is to analyse and evaluate the implications of current public policy concerning the relationship of church and state and to do so in the context of a Christian philosophy of history, law, and government.

III CHURCH, STATE, AND SOVEREIGNTY

The central questions of philosophy often lie at the frontiers of several disciplines. The problem of delineating the proper spheres of church and state, for instance, raises issues of great consequence in the fields of law, theology, political theory, and economics. The institutional conflicts between church and state nevertheless point to an even more fundamental question about the proper source of authority to which each may appeal: Who or what wields ultimate power in society? This is the question of sovereignty. It asks: What is the court of last resort? Where does the buck stop? The answers of philosophers and statesmen throughout history have been varied and often irreconcilable: the *polis*, the people, the king, the constitution, the church, humanity, destiny, and God. For our purposes here, the options ultimately boil down to two: God or Caesar.

¹⁰ In commenting on a book by Herman Wouk, Robert Ulich remarks: 'The author rightly believes that the Jewish people would not have survived the long years of persecution without faithful adherence to their rituals, festivals, and prayers. May then not the loss of the Christian past not jeopardize the future of this nation, just as the desertion from the covenant would have jeopardized the survival of the Jews? Nations, as well as men, though living by bread, do not live by bread alone.' Paul A. Freund and Robert Ulich, *Religion and the Public Schools* (Cambridge: Harvard University Press, 1965), 40. See Berman, 'Interaction,' *Mercer Law Review*, 405-13.

Our American forebears were faced with the delicate task of founding and properly outfitting a new system of government that would distribute authority, protect liberty, and simultaneously guard against the abuses of both. By the time of the Declaration of Independence, the concept of legal sovereignty that had for so long been claimed by kings and parliaments was thoroughly discredited.¹¹ It is noteworthy that the Constitution does not even use the word sovereignty and, instead, reserves for itself the more modest status of ‘supreme law of the land,’ a concept that may be traced back to the Bible through the Magna Charta.¹² The founders recognized

¹¹ See, for example, Harold J. Laski, *Studies in the Problem of Sovereignty* (New Haven: Yale University Press, 1917), 267-75; and Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (New York: Harcourt Brace Jovanovich, 1955), 44-45. On the term ‘political sovereignty,’ see John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed and Ward, 1960), 70-71: ‘Nowhere in the American structure is there accumulated the plenitude of legal sovereignty possessed in England by the Queen in Parliament. In fact, the term ‘legal sovereignty’ makes no sense in America, where sovereignty (if the alien term must be used) is purely political. The United States has a government, or better, a structure of governments operating on different levels. The American state has no sovereignty in the classic continental sense. Within society, as distinct from the state, there is room for the independent exercise of an authority which is not of the state. This principle has more than once been affirmed by American courts, most recently by the Supreme Court in the *Kedroff* case. The validity of this principle strengthens the stability of the Church’s condition at law.’ See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). But an unfortunate consequence of the inability or unwillingness by the courts to take faithfulness to doctrinal standards into consideration – as in *Kedroff* – is that they are often unable to provide relief to an orthodox faction seeking to prevent a congregational or denominational takeover. Corporation and property laws place the burden of responsibility on churches and denominations to anticipate and protect themselves against any such eventuality. Many churches are wary of the implications of incorporating, submitting to regulation, or turning to the secular courts.

¹² See Helen Silving, ‘The Origins of the Magnae Cartae,’ *Harvard Journal of Legislation*, 3 (1965): 117-31. Reprinted in Helen Silving, *Sources of Law* (Buffalo, NY: William S. Hein and Co., 1968), 237-49. Thomas J. Higgins, *Judicial Review Unmasked* (West Hanover, MA: Christopher Publishing House, 1981), 51-52, deals with the difficulty of trying to reconcile a separation of powers with the concept of political sovereignty.

that ultimate authority must be located at a point beyond human intervention and, hence, beyond politics. Noah Webster expressed a Christian understanding of sovereignty when he illustrated the word in his definition: ‘Absolute *sovereignty* belongs to God only.’¹³ Without this common understanding, the question of who wields ultimate power necessarily becomes the supreme object of political contention.

The constitutional protection of the church from intervention by the state is a revolutionary idea. From the earliest days of the church, monarchs had often claimed authoritative powers in matters of church doctrine and government. The authority of the Roman emperor as the supreme pontiff over the state religion was maintained to some degree even as the empire became nominally Christian, though it was expressly repudiated by the Christian emperor, Gratian.

During the centuries that followed, emperors, popes, and kings fought to possess the keys to the kingdom of God. The American historian, Sanford H. Cobb, could thus remark with some justification that, in light of the long history of political absolutism, ‘this pure religious liberty may be justly rated as the great gift of America to civilization and the world. . . .’¹⁴ Although Americans tend to take this gift for granted today, the proper juxtaposition of church and state is still an unsettled question.

Some degree of political divisiveness is to be expected when the place of

¹³ Noah Webster, *An American Dictionary of the English Language*, vol. 2 (New York: S. Converse, 1828; San Francisco: Foundation for American Christian Education, 1967), 76.

¹⁴ Sanford H. Cobb, *The Rise of Religious Liberty: A History* (New York: Macmillan, 1902; Burt Franklin, 1970), 2.

the church in society is discussed because it involves the issue of ultimate allegiance. With the secularization of our cultural institutions, people's expectations about the interaction of church and state have changed.¹⁵ Many Americans now regard the church as an unrepresentative special interest group and thus expect it to play a subordinate, even invisible, role in public affairs. This attitude is probably nearly as prevalent among church members as among non-members.

Pluralism is frequently prescribed as an antidote to the divisiveness of religious orthodoxies and enjoys a favourable image as a common denominator or neutral value.¹⁶ According to Sidney Mead, it was the pluralist vision of a 'cosmopolitan, inclusive, universal theology' that guided the founders.¹⁷ Similarly, it was an avowedly non-sectarian Christian moralism rather than religious skepticism that motivated Horace Mann and other supporters of the public education movement early in the nineteenth century.¹⁸ But now that religion is generally considered to be a private affair, the church as an institution is today being relegated to the fringes of an avowedly pluralistic secular society. In his study of the phenomenon of revolution during the last thousand years of western history, Eugen Rosenstock-Huessy detected a gradual reversal in the identity of the public and private realms:

¹⁵ David Martin, *A General Theory of Secularization* (New York: Harper and Row, 1978), 278-80.

¹⁶ See Mead, 'Nation,' in *American Civil Religion*, ed. Richey and Jones, 54-55, which distinguishes nonconformity from secularism.

¹⁷ *Ibid*, 55.

¹⁸ See Rousas John Rushdoony, *The Messianic Character of American Education: Studies in the History of the Philosophy of Education* (Nutley, NJ: The Craig Press, 1963).

Church and economy have changed their places during the last thousand years The universal church becomes more and more particular in her operations; economy becomes more and more universally organized. We still pray for One Catholic Church. The real trouble of the future will be, whether we can pray for it sincerely or not. It is true that for ten centuries the nations carried both visions, the vision of local rights and private property, and the vision of a universal realm of peace. Private property is being attacked today on the same ground as the unity of faith. Both ideals are imperilled. Bolshevism is radical enough to make the church a private affair for the individual, and property the public affair of the community. But the question is not dependent on any subjective theory about Marxism. It is an issue for any government which subsidizes industry, taxes private educational institutions, propagates political ideas, or repopulates its deserted villages with self-subsisting homesteads.¹⁹

Indeed, some secularists nurture a hope that the church will eventually die of sheer irrelevance if it is left isolated and unacknowledged.²⁰

Ironically, the problem of reconciling the claims of church and state may be a more urgent one for a nominally secular society than for one in which religion officially plays a leading civic role. In the days when sovereignty was regarded as a transcendent concept, church and state at least had a common religious reference and a common source of appeal in Scripture, even though they may have competed for control of the civil sword from time to time.²¹ Now that sovereignty has been brought down to earth in the

¹⁹ Eugen Rosenstock-Huussy, *Out of Revolution: Autobiography of Western Man* (New York: William Morrow and Company, 1938), 496.

²⁰ See, for example, John D. Dunphy, 'A Religion for a New Age,' *The Humanist*, January/February, 1983, 23-26. See also James Hitchcock, *What is Secular Humanism?: Why Humanism Is Becoming Secular and How It Is Changing Our World* (Ann Arbor, MI: Servant Books, 1982), 105.

²¹ See Sidney E. Mead, *The Lively Experiment: The Shaping of Christianity in America*

name of the people, there is good reason to doubt that any institution remains sufficiently independent of the state to guarantee freedom of religion, or any other freedom, beyond the merest 'considerations of what is expedient for the community itself.'²²

The business of determining 'community standards' is inherently moral or religious in nature. Indeed, morality is just as readily legislated as it is preached or taught. If, in fact, religiosity and morality are basic human traits, secularity and amorality are not their opposites. The rejection of one system of values and beliefs only indicates that it has been replaced by another system considered more acceptable, believable, or valuable. If the really salient issue were the establishment of religion, what would be gained by a community if, in disestablishing the church, it simply established the state in its place?²³ When the state itself is sovereign, what

(New York: Harper & Row, 1963), 59. For illustrations of this common religious reference, see B. F. Morris, *Christian Life and Character of the Civil Institutions of the United States, Developed in the Official and Historical Annals of the Republic* (Philadelphia: George W. Childs, 1864).

²² Oliver Wendell Holmes, Jr., *The Common Law*, ed. Mark DeWolfe Howe (Boston: Little, Brown, and Company, 1963), 32. Similarly, Woodrow Wilson 'believed that laws must be adjusted to fit facts 'because the law . . . is the expression of the facts in legal relationships. Laws have never altered the facts; laws have always necessarily expressed the facts.' Quoted in Herbert Schlossberg, *Idols for Destruction: Christian Faith and Its Confrontation with American Society* (Nashville, TN: Thomas Nelson Publishers, 1983), 14. American legal philosophy tends toward a pragmatism that appears to be descended from scholastic nominalism. In its historicism, it recalls what G. E. Moore called 'the naturalistic fallacy.' See William K. Frankena, *Ethics* (Englewood Cliffs, NJ: Prentice-Hall, 1963), 81-82.

²³ Abraham Kuyper, *Lectures on Calvinism* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Company, 1931), 96-99, expresses concern about a tendency for the modern state to take the place of the church. Richard John Neuhaus, 'Law and the Rightness of Things,' *Valparaiso Law Review*, 14 (1979): 12, raises a similar concern: 'This is precisely the cultural crisis of our society: the popularly accessible and vibrant belief systems and worldviews of our society are largely excluded from the public arena in which the decisions are made about how the society should be ordered

institution is sufficiently independent to stand apart from the state as a court of last resort fully equipped to assure civil and religious liberty? This is the dilemma posed by any establishment of religion by the state.

This is not to deny that disestablishment has created its share of difficulties. Even though Christianity still outwardly prevails as the majority religion, our accustomed religious liberty has furnished a rich soil for doctrinal innovations. Otto Scott's analysis suggests some of the perplexities that confront historians as they interpret the nature of American religion:

The United States was a government whose constitution claimed no higher authority than its own laws. That was essentially a lawyer's concept of civilization, and could be traced not to the church, but to Roman tradition. The novelty of a nation without an official religion was not fully appreciated in 1830 -- for no land was as crowded with churches and no people more prone to use religious terminology and Christian references in everyday speech, in their writings, and in their thinking, than the Americans. There was no question of the piety of millions. There was equally little doubt that they did not fully realize that a land with no religious center is a land where religion is what anyone chooses to claim.²⁴

With apologies to Spinoza, transcendence abhors a vacuum. Today there is such a vacuum in the public space of American law and politics. Unless it is democratically filled by the living moral tradition of the American people, it will surely be filled, as has so tragically happened elsewhere, by the pretensions of the modern state. As the crisis of legitimacy deepens, it will lead – not next year, maybe not in twenty years, but all too soon – to totalitarianism or to insurrection, or to both.’

²⁴ Otto J. Scott, *The Secret Six: John Brown and the Abolitionist Movement* (New York: Times Books, 1979), 97. But other commentators, like Philip Schaff in the late nineteenth century, strongly disagreed with critics who charged the constitutional system with ‘political atheism.’ It is important to realize, however, that this was largely a controversy among professing Christians. See Philip Schaff, *Church and State in the United States: or The American Idea of Religious Liberty and Its Practical Effects*, Papers of the American Historical Association, vol. 2, no. 4 (New York: G.

The varieties of religious expression are paralleled by the seemingly endless permutations to public law that attempt to accommodate them. No cultural vacuum remains unfilled for very long. The retreat of the church from many of its earlier social welfare and education commitments has been matched by the advance of the state in these same areas. The one has catalysed the other. But the state has also come to be regarded as a vehicle for promoting civil and religious unity and universality.²⁵ World history is the story of successive empires that have aspired to universal dominion in one form or another, among them Assyria, Babylon, Persia, Greece, Rome, Islam, Germany, Mongolia, Spain, England, France, the Axis, America, and Russia.

IV THE MYTH OF NEUTRALITY

America has long been a prolific breeding ground for new cults. In the absence of a healthy civil religion, almost anything goes. The Harvard sociologist, Pitirim Sorokin, characterized this phenomenon as “chaotic syncretism,” which he attributed to the decomposition of an ‘overripe sensate culture.’²⁶ Indeed, religious pluralism is just as problematic in its own way as the old church establishments once were for the American colonists. This is most strikingly reflected in the high level of litigation over church-state issues. The guarantee of religious free exercise upsets the status quo, especially once it is accepted as a distinct value apart from

Putnam's Sons, 1888), 38-43.

²⁵ Rosenstock-Huessy, *Revolution*, 493-95.

²⁶ Pitirim A. Sorokin, *The Crisis of Our Age: The Social and Cultural Outlook* (New York: E. Dutton and Co., 1941), 241-52.

its original purpose of protecting dissenters – mainly Christian – from existing church establishments.

Regarding matters of religious belief and practice, the state today affects an attitude of disinterested neutrality. In a series of decisions, the Supreme Court has held that every government activity must be guided by a secular purpose and have a neutral ‘primary effect that neither advances nor inhibits religion.’²⁷ But these tests are not as straight-forward as they might appear to be for the simple reason that the effective spheres of political and religious activity cannot be neatly compartmentalized. Both politics and religion are comprehensive in their reach. Above all, they are inclusive; they are first of all inclusive even where they appear exclusive. Both are unavoidably value-laden. Neither is neutral in its effects, whether these are primary or subsidiary. Indeed, all perception, thought, and action begins with biases, presuppositions, or predilections.²⁸ Whether in theory or in practice, neither the state nor the church is apt to always agree which are the things of God and which are the things of Caesar (Matt. 22:21), assuming they even attempt to draw a meaningful distinction between the secular and the sacred. If Christian believers are to ‘Render . . . to all their dues’ (Rom. 13:7), then some yardstick is required to determine what is due to each. It is a problem of jurisdiction.

This problem of jurisdiction has been compounded by the divided state of the church. Public policy unavoidably differentiates among and differently affects the perceptions and practices of different churches and church

²⁷ *Abington School District v Schempp* (1963) 274 U.S. 222.

²⁸ See Cornelius Van Til, *In Defense of Biblical Christianity*, vol.2: *A Survey of Christian Epistemology* (Nutley, NJ: Presbyterian and Reformed Publishing Company, 1977), 4-6.

communicants. What may be regarded as welcome assistance by some may be regarded as an unwelcome intrusion by others. Some religious traditions, like Puritanism, are militantly reformational. Others, like the Social Gospel and liberation theology, concentrate on the transformation of social institutions. Anabaptists, such as the Mennonites, generally tend toward strict separationism and political quietism.²⁹ Others, among them Roman Catholics, seek close cooperation between church and state.³⁰ Religious liberty means something very different in each case.

Particular laws and policies burden the members of some sects more than others. When class legislation was still the exception rather than the rule, relief was usually sought in the form of exemptions or favourable court rulings. But exemptions have come to be treated as privileges rather than immunities; and court rulings have become highly unpredictable and subjective in the absence of a clear interpretative tradition.³¹ General policy legislation invariably imposes hardships on those who, for legitimate religious reasons, cannot or will not comply. These hardships may be further aggravated by overly stringent and sometimes quite logical renderings of the vagaries of legislative language into administrative practice. A simple turn of phrase or an undefined term may inspire novel

²⁹ See John Howard Yoder, *The Christian Witness to the State*. Institute of Mennonite Studies, Number 3 (Newton, KS: Faith and Life Press, 1964); Willem Balke, *Calvin and the Anabaptist Radicals*, trans. William Heynen (Grand Rapids, MI: William B. Eerdmans Publishing Company, 1981), 59-65, 260-65.

³⁰ See Robert E. Webber, *The Secular Saint: A Case for Evangelical Social Responsibility* (Grand Rapids, MI: Zondervan Publishing House, 1979), 75-165.

³¹ Walfred H. Peterson, *Thy Liberty in Law* (Nashville, TN: Broadman Press, 1977), 151, 156-59, notes the importance of personality factors in judicial interpretation. See also Rousas John Rushdoony, 'The War Against Christ's Kingdom,' *A Special Chalcedon Alert*, no. 1, January 1982.

bureaucratic initiatives. The courts are then placed in the position of having to referee the competing claims of government officials, private citizens, and churches.

The earlier cooperation that characterized the relationship of church and state was followed in this century by an era of relatively benign indulgence or accommodation. But by the late 1970s prominent religious leaders were expressing their concern that the relationship was becoming increasingly confrontational. Numerous books and articles appeared that criticized what the authors regarded as gratuitous regulatory interference in areas formerly left to church control.³² Significant numbers of church members had become persuaded that incidents involving licensure and certification requirements for church-operated schools and day care facilities, demands for church records by revenue agencies, restrictions on property use by zoning authorities, and bureaucratic stipulations concerning the proportion of time devoted to “religious” as opposed to “secular” activities were not simply unforeseen by-products of more general policy changes, or unfortunate misunderstandings, but deliberate provocations by officials in pursuit of hostile purposes.³³

Has the era of benign neglect of churches by the state come to an end? Considerable evidence suggests that the state is claiming such a wide scope of regulatory authority that its operations impinge upon routine church

³² Two examples are Kent Kelly, *The Separation of Church and Freedom* (Southern Pines, NC: Calvary Press, 1980); and Clayton L. Nuttall, *The Conflict: The Separation of Church and State* (Schaumburg, IL: Regular Baptist Press, 1980).

³³ See Franky Schaeffer, *A Time for Anger: The Myth of Neutrality* (Westchester, IL: Crossway Books, 1982).

activities.³⁴ If this is true, it may be due in no small part to the high premium many churches place on an entangling partnership with the state in furthering either their own programs or those of the state.³⁵ It does not necessarily or in all cases indicate a malicious intent. If, in fact, the religious institutions of our society are being brought under the effective supervision and control of the state, their independence is perhaps being most threatened by the logical consequences of an avowedly beneficent purpose: that is, the equalization of economic and social opportunities for all groups in our society.

It serves little purpose, however, to speculate about the motives or intentions of legislators, bureaucrats, and judges. Although intent – where it may be determined – does help confirm the direction of the changes, what matters in this context is the impact of the policy changes. Despite all the talk about secular purposes and neutral effects, what is the object of a policy of religious pluralism – or syncretism – if not the formation of “a more perfect union” on the basis of some variety of universalism? It is precisely here – in the realm of ideology – that the concern of churches with their doctrinal integrity and their customary immunity from state intervention in the form of regulation or taxation may come into conflict with the state's interest in ideological and administrative consistency. Exceptions admitted by either side tend to dilute the impact of its claims to authority in its proper sphere.³⁶

³⁴ Some degree of relief has been provided by Congress through the subsequent passage of the Religious Freedom Restoration Act in 1993 and the Religious Land Use and Institutionalized Persons Act of 2000. See Appendix.

³⁵ See Morgan, *Politics*, 37-38.

³⁶ William A. Stanmeyer, *Clear and Present Danger: Church and State in Post-Christian America* (Ann Arbor, MI: Servant Books, 1983), 58, warns that if the

How then may the current state of affairs best be understood? Have the most important conflicts between church and state already been resolved through a series of imperfect but generally agreeable compromises, or are the complexities of the issues only just now coming to the surface?

The issue may be stated in terms of a conflict of jurisdiction between church and state. As the state extends its operations into all areas of social life, it breaches the protective “wall of separation” that has traditionally kept the church free of obtrusive regulation by the civil authorities. The widening scope of official state activity is manifested in several ways: first, a statutory extension of state police powers through social legislation over what are still widely regarded as ecclesiastical and domestic spheres of authority; second, a restriction or pre-emption of certain activities involving commerce, employment, and social relations -- whether conducted in public or in private -- that were once held to be outside the jurisdiction of the state; third, a vitiation of the principle of religious non-interference through judicial interpretations that divorce the “establishment” and “free exercise” clauses of the First Amendment, and fourth, an adversary posture toward churches being taken by many agencies of the state while pursuing their regulatory objectives.³⁷ As a consequence,

Christian does not assert a particular constitutional right ‘then he abdicates the protections that the laws have provided for him. Worse, he abandons these protections for others.’ On the other hand, weak cases often set bad precedents.

³⁷ Stanmeyer notes, by way of illustrating the problem, the 1978 ‘proposed Revenue Procedure on Private Tax-Exempt Schools,’ which was delayed in its implementation as a result of intense lobbying: ‘This ‘procedure’ was actually a substantive rule; it proposed automatic loss of tax exemption for all private schools if found ‘discriminatory’ by a court or *agency*, or if they lacked a ‘minority’ student enrollment of twenty percent of the ‘minority school population’ of the *public* school district in which the private school was located. Further, the proposal set up a *presumption* that

churches are facing new restraints on their ecclesiastical or corporate rights, immunities, and privileges.

Several presuppositions that underlie this thesis have influenced the manner of its investigation and elaboration.

First, religion is a comprehensive human activity that embraces all of life, particularly the rules and values of society. The Christian theologian, R. J. Rushdoony, maintains that 'all law is enacted morality . . . and all morality presupposes a religion as its foundation.'³⁸ Paul Tillich's very broad definition of religion as an "ultimate concern," which has been cited by the Supreme Court, includes theistic, pantheistic, and atheistic religion within its compass.³⁹

Second, the comprehensiveness of religion means that religious neutrality is a myth. Francis J. Powers has written that 'an attitude of indifference or neutrality toward religion, on the part of the state, is theologically and philosophically untenable.'⁴⁰

the private school is discriminatory if it fails to have, among other things, 'an increasing percentage of minority student enrollment' and 'employment of minority teachers.' The only way the school could rebut this presumption would be to carry 'the burden of clearly and convincingly' demonstrating that it did not discriminate on racial grounds. It would be only 'rare and unusual' to find a school not enrolling some minority students to be non-discriminatory.' Ibid., 113.

³⁸ Rousas John Rushdoony, *Law and Liberty* (Fairfax, VA: Thoburn Press, 1977), 2.

³⁹ *United States v. Seeger* (1965) 380 U.S. 187.

⁴⁰ Francis J. Powers, *Religious Liberty and the Police Power of the State: A Study of the Jurisprudential Concepts Underlying the Problem of Religious Freedom and Its Relationship to the Police Power in the United States With Special Reference to Recent Decisions of the United States Supreme Court on the Subject* (Washington, DC: The Catholic University of America Press, 1948), 46.

Third, the American constitutional system is essentially Christian in its foundational character and assumptions. Justice William O. Douglas acknowledged this when he wrote that ‘a “religious” rite which violates standards of Christian ethics and morality is not in the true sense, in the constitutional sense, included within ‘religion,’ the ‘free exercise’ of which is guaranteed by the Bill of Rights.’⁴¹ From the bench, he reiterated an assumption in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) that has frequently been stated by the Court: ‘We are a religious people whose institutions presuppose a Supreme Being.’

Fourth, the legal heritage of our country is Christian at its roots. Sir Matthew Hale's maxim that Christianity is part of the common law was often cited by early members of the American judiciary, both in their written opinions and their scholarly commentaries. For example, in his treatise on constitutional limitations, Chief Justice Thomas M. Cooley of Michigan wrote:

The Christian religion was always recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly.⁴²

What may be concluded from these observations, finally, is that perhaps too much attention has been paid to the alleged secularization of our political institutions and not enough to the religious and political

⁴¹ William O. Douglas, *An Almanac of Liberty* (Garden City, NY: Doubleday and Company, 1954), 304.

⁴² Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, vol. 2, 8th ed. (Boston: Little, Brown, and Company, 1958), 91.

presuppositions that have favoured such an interpretation. In recent years, it appears that the state has been assuming – whether intentionally or not – the essential attributes of a church.⁴³ Far from pursuing a separationist course, the state has consistently attempted to convert churches and other institutions into instruments of its own social programs and has enlisted their cooperation or acquiescence by the granting and withholding of favours.⁴⁴ This is by no means an exclusively American problem. Writing in the 1930s, Eugen Rosenstock-Huessy depicted it as part of a universal modern trend:

The world owes it to the British Commonwealth that during the last centuries, donations, endowments, voluntary gifts, have been the mainspring of progress in many fields. Were it not for the right of man to do what he liked with his property little would exist in religion, art, science, social and medical work today. No king's arbitrary power was allowed to interfere with a man's last will as expressed in his testament. On the independence of 10,000 fortunes a civilization was based that allowed for a rich variety of special activities introduced by imaginative donors and founders. The ways of life explored under the protection of an independent judiciary form a social galaxy. Our modern dictators, however, are cutting deeply into this tradition. This is achieved through progressive taxation of inheritance or limitation of a man's right over his property, by subsidizing institutions, like Oxford, which were independent formerly. . . . The famous Dartmouth case

⁴³ This is nothing new. The state was usually the central religious authority in ancient times. Other institutions serve much the same purpose, as suggested by Hazel Barnes, *The University as the New Church* (London: C. A. Watts & Co., 1970). The separation of religious and civil is unique to the biblical tradition, but it has been a source of contention ever since church and state first joined in partnership during the latter years of the Roman Empire. For the early modern period, see Otto Gierke, *Political Theories of the Middle Ages*, trans. Frederic William Maitland (Cambridge: Cambridge University Press, 1900; Boston: Beacon Press, 1958), 91.

⁴⁴ See, for example, Lyle E. Schaller, *The Churches' War on Poverty* (Nashville, TN: Abington Press, 1967), 77-79.

which Daniel Webster won against the State (a striking example of the progressive significance of the Whiggish principle) was tried only a century ago; yet the conditions which made it possible for Webster to win are rapidly vanishing, at least in Europe.⁴⁵

Exemptions that were designed to protect religious liberties are now perceived in some political circles either as customary privileges which are not binding on the state or else as bargaining chips with which to advance its policies. The wall of separation, as it now stands, appears to be a permeable one that simultaneously consigns churches – often with their cheerful cooperation – to a position of irrelevance within the contemporary American culture and enables the state to absorb their traditional functions and prerogatives. Indeed, a retrospective look at the record suggests that the courts, legislatures, and bureaucracies of the land have become involved in an experiment to gradually disengage our political system from its dominant religious and legal heritage.⁴⁶ Secular equivalents to religious institutions now promote human relations, education, health, and welfare in a manner reminiscent of William James's proposal for 'a moral equivalent of war.'⁴⁷

Although education has been at the centre of much of the conflict in recent years, school issues are only the most visible part of a more fundamental clash of religious values. Richard E. Morgan regards the "governmentalization of welfare services" and the "educational revolution" as the two major trigger issues that have led to a growing conflict between

⁴⁵ Rosenstock-Huessy, *Revolution*, 29-30.

⁴⁶ Hitchcock, *Secular Humanism*, 99-113.

⁴⁷ William James, *Pragmatism and Other Essays* (New York: Washington Square Press, 1963), 289-301. 'A Moral Equivalent of War' is the title of one of the essays.

church and state due to the rise of a reaction in the 1960's against "the traditional ideology of privatism." Morgan adds:

These radical secularists tend to regard private charitable activity as illusory and psychologically corrupting, and the notion of religious institutions administering public funds is anathema. Religious schools are seen as especially regressive. . . . There is, it should be noted, a direct conflict between the radical secularist demand for governmentalization of social welfare and education, and the principle of "subsidiarity" which looms large in Catholic social thought. As formulated by Pius XI, this holds that it is "unjust" and "gravely harmful to turn over to a greater society . . . functions and services which can be performed by lesser bodies. . . ." Thus families and private associations should handle all possible functions, and nothing which they are capable of doing should be displaced "upward" to government.⁴⁸

At stake is who or what will define the political and social agenda of the future? It is a question of whose vision of the future, whose values, whose religion will prevail. Since church and state are so influential in shaping public opinion, both have long been utilized as ideological proving grounds by various social movements seeking to mould society according to the desire of their hearts. Possibly as a consequence, church and state now claim overlapping spheres of authority. If they continue to find themselves

⁴⁸ Morgan, *Politics*, 131-32. It would be a mistake, however, to regard this radical secularism as something fundamentally outside and antithetical to the Judeo-Christian religious tradition. Comparable views are expressed by many professing Christians. See W. Stanley Mooneyham, *What Do You Say to a Hungry World?* (Waco, TX: Word Books, 1975), 25-32; Ronald J. Sider, *Rich Christians in an Age of Hunger: A Biblical Study* (Downers Grove, IL: Intervarsity Press, 1917), 214-17. For a critique of these views, see David Chilton, *Productive Christians in an Age of Guilt Manipulators: A Biblical Response to Ronald Sider*, 2nd ed. (Tyler, TX: Institute for Christian Economics, 1982), 184-86; Schlossberg, *Idols*, 243-50.

at cross-purposes, each may be expected to assert an independent claim – perhaps even a monopoly of competence – over areas of that are of mutual concern.

More than any other social institution today, excepting the family, the church derives its original identity and authority from a source that is independent of the state.⁴⁹ The church steadfastly maintains that it answers to a higher authority regarding its sacraments, ceremonies, disciplines, and doctrines. Otherwise it risks becoming a creature or appendage of the state. The state is equally steadfast in upholding its immediate responsibility regarding the protection of public health, safety, welfare, morals, and peace. But the sphere of its interests has grown so large that the state is again coming into direct competition with the church and has begun asserting regulatory control over many church activities as a sovereign right. The concept of the church as a “charitable public trust,” which is a holdover from the days of established churches, has opened the door to inroads by the state into church affairs as, for instance, in California, where the Worldwide Church of God was temporarily placed into receivership by the Attorney General and more than sixty churches were recently threatened with sale for back taxes over a dispute concerning filing requirements.⁵⁰

Several consequences appear to follow from the expansion of jurisdiction and the tightening of regulations by the state: first, a decline of civil and

⁴⁹ Abraham Kuyper, *Lectures on Calvinism* (Grand Rapids: Wm. B. Eerdmans Publishing Company, 1931), 99-109.

⁵⁰ See Ted Witt, ‘Church Tax Veto Hits Home,’ *The Times-Advocate* (Escondido, Cal.), 2 October 1980, C-1; Ted Witt, ‘Poway Church Nears Line in Filing Marathon,’ *Times-Advocate*, 29 January 1982, A-5; Ted Witt, ‘Risking Jail for Freedom,’ *Times-Advocate*, 17 September 1982, A-2, A-8.

religious liberty in those areas of public life where explicitly religious expression is either excluded, as in the public school classroom and auditorium, or where it is otherwise made unwelcome, as in the use of some public facilities for religious gatherings and displays;⁵¹ second, a withering away of independent public institutions – sometimes called ‘mediating structures’⁵² – in favour of agencies dominated, subsidized, or otherwise regulated by the state; and third, an attitude among some public officials that may be described as missionary, messianic, or authoritarian.⁵³

The relationship between church and state tends to fall into one of several categories: first, a union of church and state in which dissenters are persecuted; second, a union of church and state in which dissenters are tolerated; third, a separation of church and state in which believers are persecuted; and fourth, a separation of church and state in which religious liberty prevails.⁵⁴ But these categories are not necessarily exclusive. In ancient Rome, licensed religions were tolerated and unlicensed ones were

⁵¹ See Peter J. Ferrara, *Religion and the Constitution: A Reinterpretation* (Washington, DC: Free Congress Research & Education Foundation, 1983), 1-13.

⁵² See Theodore M. Kerrine and Richard John Neuhaus, ‘Mediating Structures: A Paradigm for Democratic Pluralism,’ *The Annals of the American Academy of Political and Social Science*, 446 (November 1979): 10-18, hereafter cited as *Annals*; Rockne McCarthy. Donald Oppewal, Walfred Peterson, and Gordon Spykman, *Society, State, and Schools: A Case for Structural and Confessional Pluralism* (Grand Rapids: William B. Eerdmans Publishing Company, 1981), 1-3. Lawrence Rosen notes that the Supreme Court has given some recognition to the rights of what the calls an ‘interstitial entity’ – in this case, an Amish family and community – *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and wishes to see the principle extended further. Berman, ‘Interaction,’ *Mercer Law Review*, 420-21.

⁵³ For example, John McDermott, ‘Campus Missionaries: The Laying on of Culture,’ *The Nation*, 208 (March 10, 1969), reprinted in Herbert G. Reid, ed., *Up the Mainstream: A Critique of Ideology in American Politics and Everyday Life* (New York: David McKay Company, 1974), 303-15.

⁵⁴ See Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* (New York: The Macmillan Company, 1902; Burt Franklin, 1970), 7-18 passim.

persecuted. Historical circumstances have also depended on whether the state dominates the church or the church dominates the state. The prevalent pattern since the rise of nation-states has been a union of church and state in which the state dominates the church.

Historical experience – if not logic – shows religion and politics to be inseparable. Each is an arena for the interplay of basic beliefs about human nature, power, and society. Each is an expression of faith guided by presuppositions that are never finally definitive or indisputable.⁵⁵

V THE DYNAMICS OF THE PROBLEM

The dichotomy of church and state confronts us, initially and finally, as a political problem. It is a problem that began at a specific place at a specific time in a specific political context: the imperial reign of the Roman Caesars. As one writer notes: ‘In ancient times, as in primitive society today, there existed no problem of Church and State, for the very good reason that no church, in the modern sense of the word, existed.’⁵⁶ While the issue between them has not troubled all climes and all seasons equally, it looms large in the history of the West. Religion at one time served mainly as an accessory of statecraft. The advent of Judaism and

⁵⁵ Addressing himself to the writing of history, Eugen Rosenstock-Huessy remarked: ‘Man is a name-giving animal. Conscious experience is the presupposition for a new name. . . . Gettysburg, Saratoga, Yorktown, Marathon, are not facts, but creations of a nation’s memory. This creative process precedes historiography by as great an interval as that by which it follows the confusion of the thousands of soldiers or civilians who, among countless facts, did not know what it all meant. The Peloponnesian War was in the hearts and bowels of the Greeks long before Thucydides clarified its memory in the first scientific book on history.’ Rosenstock-Huessy, *Revolution*, 693, 694.

⁵⁶ T. M. Parker, *Christianity and the State in the Light of History*, Bampton Lectures (London: Adam and Charles Black, 1955), 1.

Christianity set new forces into motion that freed religious energies from a preoccupation with parochial loyalties. How the church – specifically the Christian Church – emerged independent of the state and how the two have interacted since that time are foremost among the institutional forces that have moded western civilization.

The problem may be explored in any of several dimensions. The political dimension may be brought into focus with a question: How can two distinct institutions, similar or overlapping in composition, make authoritative yet independent claims to the obedience and loyalty of their members? The durability of the coexistence of church and state may be regarded as a major catalyst in the development of western political traditions. Their rivalry in matters of jurisdiction often prompted accommodations which have served as prototypes for subsequent political innovations. American federalism, for example, owes many of its essential features to Puritan political experiments in colonial New England. Various constitutional liberties and concepts of limited government derived much of their original impetus from struggles for religious freedom.

This suggests another question: What circumstances permitted such a conflict of authority to be resolved by limiting the jurisdiction of the state? The ingredients for an understanding are stored in the laboratory of history. Issues raised during earlier religious controversies provide a basis for analysing current disputes. Early Christians and Jews challenged the state cult of imperial Rome by refusing obeisance to Caesar as their lord or master. Both groups sought immunity from the religious laws and had to endure periods of official persecution while defending their distinct identity

and way of life.

A third dimension, the ideological, is arguably the most important to a recognition of what is at stake on both sides. It involves a different question: How is it possible to establish and maintain a political consensus without bringing all authority under one sovereign head? Differing perceptions of sovereignty, law, and citizenship may, after all, indicate seriously divided loyalties. Where social institutions fall out of step with each other and unifying traditions are weakened, even ordinary stresses may threaten political disruption and demoralization. The ability of a society to face change and conflict with unity and equanimity is a measure of its moral health. Common values and a common political agenda are generally preferred as a society's first line of defence. Normally this means an assimilation of all groups and traditions to some existing or purposely devised set of norms. This function is usually filled by a civil religion.

It is sometimes objected that the relationship between church and state is not characteristically political and, compared with earlier eras, is no longer a matter of particular concern in a modern secular society. The contemporary American church – if it may be described in the singular – does not press a distinctly political claim. Its ordinances are not comparable in nature or force to those of the state. Moreover, people expect that questions of faith today be left to the private dictates of individual consciences. The church that addresses political issues or otherwise imposes its separate will overreaches these customary limits at its own peril.

While this point may be conceded in part, it fails to consider the dynamic nature of religion, particularly Christianity. Changes in political circumstances or religious priorities may redefine, even shatter, any existing accommodation between church and state. American political institutions have long operated on the basis of shared moral values and assumptions that derive in large part from the Bible and Christianity.⁵⁷ It is worth considering whether and how well such institutions can work under a deliberately secular, pluralistic regime. In the absence of a common moral ground that can help channel conflict, secular or religious militancy may stir up fear and reaction. The volume of current legislation and litigation concerning religious issues is a sign of growing dissension over the proper role of the state in religion and the church in public life.

As to whether this is a political question, then, the objection may be met very simply: any association between church and state is unavoidably political. On the one hand, the state values religion – at least in the generic sense – as a means of upholding an ideological consensus and encouraging civil peace. On the other hand, the Christian Church is historically called to acknowledge ‘one Lord, one faith, one baptism’ (Eph. 4:5): which is to say, one citizenship in which all final authority is vested in a sovereign God. Such a claim is treasonable if the state – if Caesar – is rightfully sovereign. Here, as always, the issue is joined. It is a suitable point of

⁵⁷ By connecting the declining influence of Christianity with a growing indifference ‘to the hullabaloo of all verbiage,’ Rosenstock-Huessy distinguished between the creation of compelling names – an expression of a vigorous faith – and a mere ‘consumption of words’ that signals spiritual languish. Attempts to reformulate the country’s Christian heritage in terms of ‘a complete system of agnostic ethics and morality’ are still based on a ‘fundus of Christian standards implicitly lived.’ See Eugen Rosenstock-Huessy, *The Christian Future: Or the Modern Mind Outrun* (New York: Charles Scribner’s Sons, 1946; Harper Torchbooks, 1966), 6-11, 43-53.

departure for a historical study of the problem.

APPENDIX: SUBSEQUENT CONTROVERSIES

This article is drawn from the first chapter, “The Imprint of Culture,” of the author’s doctoral dissertation.⁵⁸

Many of the issues discussed above subsequently came to a head in *Employment Division v. Smith*, 494 U.S. 872 (1990). The Supreme Court held that the Free Exercise Clause permitted the State of Oregon to prohibit the sacramental use of peyote through a neutral law of general applicability and, thus, also to deny unemployment benefits to employees who were discharged on these grounds.

This ruling met with strong opposition. Congress responded by passing the Religious Freedom Restoration Act of 1993, which, among other things, used section 5 of the Fourteenth Amendment to protect religious rights against action taken by the states. The Supreme Court struck down this provision of the law in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court upheld the City’s use of a historical preservation ordinance that prevented a church from expanding its facility.

Congress subsequently passed the Religious Land Use and Institutionalized Persons Act of 2000 in response. The new law bypassed the Court’s Fourteenth Amendment objection to the Religious Freedom Restoration Act by using the Constitution’s Spending Clause to require recipients of

⁵⁸ Steven Alan Samson, *Crossed Swords: Entanglements Between Church and State in America*. Ph.D. dissertation, University of Oregon, 1984.

federal funding to accommodate the earlier law's provisions regarding religious freedom. Given that all localities rely on federal subsidies, the resulting irony is almost whimsical. What more appropriate illustration could there be of the much larger problem Congress itself has created: that is, a regime of fiscal, educational, and social regulation which has spawned so much First Amendment litigation in recent decades?

POWER AND INTERNATIONAL LAW: HOHFELD TO THE RESCUE?

JOHN R. MORSS*

Abstract

There can be little doubt that power and international law are deeply interconnected. The nature of the connection is however somewhat elusive. Hohfeld's account represents a tool with which to 'open up' our understanding of power in legal relationships at the global level. If the interconnections between powers, rights, privileges and immunities can be unpacked, and international legal norms 'unbundled' into their Hohfeldian components, then not just a vocabulary but also perhaps a grammar of public international law may emerge.

I INTRODUCTION

There can be little doubt that power and international law are deeply interconnected. The nature of the connection is however somewhat elusive. To a significant extent international law has in the past hundred years defined itself by *bracketing* power relations – by establishing its jurisdiction in what one might call a 'territory of norms.'¹ Emphasising the

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¹ Those varieties of international legal theory that do discuss power indeed tend to be those most closely aligned with or convergent with international relations theory, namely varieties of international law that would be classed as 'realist' or 'policy oriented.' In international law this is often referred to as the 'New Haven' School.

diplomatic origins of international law would be consistent with such a view: reciprocal expectations of conduct, and the whole panoply of ‘recognition’ as an element of international statehood,² represent ways of setting power dynamics at a distance. The same might generally be said of any kind of legal system; it is not necessary to adopt a triumphalist or evolutionary narrative of ‘law as progress’ to recognise that litigation represents a departure from blood-feuds and ordeal by combat.³ Law as culture, or law as rhetoric,⁴ one might say. In any event geopolitics and other varieties of global inequalities of ‘muscle’ are the province of other members of the academy. International relations and political studies are, it might be said, among the contemporary disciplines properly focused on power relationships at the international level; international law has other fish to fry.

To the extent that law in general, or international law in particular, is thought of as a norm-focused or a values-focused discipline, power is therefore at arm’s length. Yet considerations of power, perhaps poorly articulated, are rarely far from the conceptual surface. It takes a theorist of the extreme rigour of a Kelsen⁵ to analyse international norms without ‘backsliding’ into *realpolitik*. A values focus in contemporary theorisation

² James Crawford, *The Creation of States in International Law* (2nd ed, 2006) 19.

³ John R. Morss, ‘Shadow of a Gunman? Legal Obligations, Wizards and the Persistence of Evil Systems,’ (2010) 23/2 *Ratio Juris* 274; John R. Morss, ‘Evil Regimes of Law: Challenges for Legal Theory and for International Law,’ (2009) 13 *University of Western Sydney Law Review* 137.

⁴ Connections between rhetoric and law go back at least to Cicero; Richard Tuck, *Natural Rights Theories: Their origin and development* (1979) 33.

⁵ Jochen Von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010).

in international law, such as in the work of Allen Buchanan⁶ or in the ‘fiduciary’ approach to peremptory norms in international law,⁷ adopts implicit understandings of power relationships in the international domain without subjecting those understandings to detailed scrutiny. It is probably the case that in all eras, relationships between power and international law are important and are worthy of investigation. In different eras the relationships may well be different, reflecting historical change in disciplinary development as well as many other factors. In our time the context includes globalisation, the hegemony of the USA, the environmental crisis and the United Nations system as we currently know it. Some comments on historical matters can be offered before an attempt is made to demonstrate the value of Hohfeld’s account of legal interrelationships to the analysis of these questions in our own times. The history of rights theories provides an illuminating insight into these issues.

II RIGHTS, POWER AND INTERNATIONAL LAW

The history of rights theories crosses the boundaries of political theory, of legal theory and of philosophy (and indeed of theology) among other disciplines. Early developments in modern international law – from the times of Grotius, to take a familiar chronological benchmark – took place within the context of debates over the relative legitimacy of various forms of government, from monarchical to republican. Key to these debates was the question of the limits or conditionality (if any) of sovereignty: when

⁶ Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (2004); Allen Buchanan, ‘Human Rights and the Legitimacy of the International Legal Order’, (2008) 14 *Legal Theory* 39, 45.

⁷ Evan Criddle and Evan Fox Decent, ‘A Fiduciary Theory of *Jus Cogens*,’ (2009) 34 *Yale Journal of International Law* 331.

may a population resist or overthrow a ruler, or defy the commands of a representative sovereign institution such as a parliament? Executive power came under scrutiny; some very radical voices were raised, for example those of the Levellers of England in the mid-seventeenth century.⁸ Grotius himself was deeply interested in these questions. He treated the dispute between the Dutch East India Company (supported by the state) and Portugal over alleged piracy, as a matter of access to the high seas, and approached it through an analysis of property rights. What kind of property, with what kinds of communality of use or of exclusivity, could be held in the seas by seafaring princes? What norms therefore govern the conduct of competing nations?

Grotius' argument was published in 1609 as *Mare Liberum*, proposing what might now be thought of as a 'free trade' approach.⁹ The most significant 'protectionist' English response to *Mare Liberum*, John Selden's *Mare Clausum* of 1636, was originally drafted in 1618 in the context of a fishing dispute between England and Holland:¹⁰ an early 'cod war' so to speak. The 1636 publication of Selden's *Mare Clausum* was stimulated by a further outbreak of the fishing dispute. Selden's monarch in 1618, King James VI/I, was active in relation to international maritime law, being much concerned with the delicate matter of the control of piracy and on receiving complaints of unfair foreign competition in fishing and in the selling of fish, proclaiming that all foreign vessels would henceforth require a license to fish in British waters, thus giving rise to a resource-based dispute with the Dutch. The 1630s outbreak of the fishing dispute

⁸ Tuck, above n 4, 148.

⁹ Malcolm Shaw, *International Law* (6th ed, 2008) 24.

¹⁰ Tuck, above n 4, 86.

also gave rise to Charles I's peace-time implementation of 'Ship Money' in order to raise funds for the protection of the English fishing trade. 'Ship Money' was an emergency tax available to the monarch at his prerogative (ie without parliamentary approval) with the purpose of raising funds quickly in times of war, from coastal counties, in order to resource the navy. The Ship Money crisis contributed significantly to the larger constitutional crisis of Charles' reign and hence to the English Civil War. Modern international law was thus born out of the power struggles and the legitimacy struggles of emerging mercantile nations, hungry for markets, and out of the competing theories of governance that accompanied those struggles.

Thomas Hobbes is of course a central figure in the development of modern political theory, especially in the liberal tradition with its concern for checks and balances as between competing entitlements seen as inherent. Grotius lived long enough to read Hobbes and Hobbes was sufficiently interested in Selden's *Mare Clausum* to send for a copy while away from England.¹¹ Radical in a philosophical rather than in a political sense, Thomas Hobbes explored in *Leviathan* the duties and entitlements attending on legitimate governance whether the sovereign was a sole natural person (the monarch) or a collective ('a council'). In either case, sovereignty was seen by Hobbes as giving rise to the transfer of power from the populus to that sovereign, in effect a waiving or 'relinquish[ing]' of each 'man's ... right of resisting him to whom he so transferreth it.'¹² In

¹¹ Ibid, 81; 119; also see 148-9. On these topics also see Andreas Wagner, 'Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth,' (2011) 31 *Oxford Journal of Legal Studies* 565.

¹² Tuck, above n 4, 121.

other words sovereignty itself – the seigniorial or dominance relationships of submission and ‘sway’ – was being actively ‘interrogated.’

The relationships between sovereign entities, as exemplified by ‘cod wars’ or by armed conflicts over religion in continental Europe, were never far from the minds of the political theorists of the seventeenth century any more than from the minds of the international lawyers.¹³ Liberal political theory in the hands of Locke, and of both James and John Stuart Mill in the nineteenth century, was bound up with considerations of the colonies and of Empire. All the way down to the liberal theorists of the twentieth century such as John Rawls, the rights of individuals and of collectives have been framed in ways that reflect larger ideas on the relationships between polities at the international level. Rawls’ own *Law of Peoples*¹⁴ is an attempt, if generally considered a remarkably unsuccessful one, to explicate these connections and implications.

All of this tells us that power relations at the international level form the context within which norms of international law are conceptualised and articulated. Alongside this, political obligations of all kinds were undergoing theoretical analysis within a variety of intellectual traditions. Within liberal political theory for example, Hobbes himself had been careful to distinguish between ‘obligation’ and ‘liberty’¹⁵ in the context of rights, such that the latter term conveys optionality or choice as in the waiving of an entitlement. An analysis of conduct at the international level,

¹³ See Martti Koskeniemi, *From Apology to Utopia* (2005) 89.

¹⁴ John Rawls, *The Law of Peoples* (1999).

¹⁵ Tuck, above n 4, 130.

such as the waging of war, inevitably involves such questions of the legitimacy of decision-making.¹⁶

III Kelsen, Law, and Power

During the twentieth century and under the influence of that century's own violent conflicts, international lawyers and scholars of international relations such as Morgenthau parted conceptual company precisely over the point that international law has its own contribution to make to a much larger, collective intellectual effort. Kelsen has a great deal to tell us about this;¹⁷ as well as attempting to work out the details of a norm-based analysis of international law, Kelsen made considerable progress with establishing the conceptual criteria for such a project. For example Kelsen demonstrated the inadequacy of 'consent' as a theoretical basis for an intellectually satisfactory account of international law. While this would be to go beyond Kelsen's account, it could be said that the notion of consent in international legal theory is no more than the echo of a 'great powers' discourse. To the extent that any substance can be detected in it, a consent-based 'theory' reflects a world constructed on the basis of the whims of potentates.

Inclinations and moral values are not, for Kelsen, the proper basis for a systematic international law. In the time of the Weimar Republic German-speaking scholars were expected to share a view of the corrupt nature of contemporary international law, as manifested by the asymmetrical agreements entered into at Versailles in 1919. So much for the utopian idea

¹⁶ Stephen Neff, *War and the Law of Nations* (2008) 167.

¹⁷ Von Bernstorff, above n 5, 173, 202.

of an international law that transcends national interests, was the received view; international law is no more than a facade for the exaltation of the strong over the weak. Kelsen's contemporary Carl Schmitt, his equal in intellectual capacity if not in intellectual or personal integrity, developed a theoretical account of international law that brought raw power to centre stage, a kind of right-wing Marxism in which instead of economic activity forming the determining base for all aspects of human society and human history, that foundational role was reserved for executive decision making. Schmitt's was an extreme version of the capitulation of international law to power, yet it illustrates the conundrum: international law is at the same time about power, and not about power.

The same can perhaps be said of law in general. One way in which law has been rather successful in dealing with the problem of power has been to treat not of power 'with a capital P' but rather with powers 'plural.' For example, administrative law has traditions of analysing implied powers, attributed powers, inherent powers and so on. This is of significance not only in the domestic setting, but also in terms of its more abstract dimensions, as a way of articulating legal power. It is also of some direct significance in international law, in the context of international institutions.¹⁸ To discuss 'powers' rather than 'power' might be considered avoidance or more kindly, pragmatism. However it might suggest a worthwhile line of enquiry: to treat power in an analytic manner, rather like rights and obligations have been treated in various traditions relevant to international law. What is needed is an intellectual framework or apparatus in which powers are analysed in a somewhat atomistic or 'micro' manner

¹⁸ Explored, for example, by Jan Klabbers, *An Introduction to International Institutional Law* (2002).

and yet in which some semantic connection with larger senses of power is maintained. Within legal theory, there is only one serious candidate, given such a ‘position description:’ the theory of Wesley N. Hohfeld.

IV HOHFELD: POWER AS A LEGAL RELATIONSHIP

It is now therefore possible to address the question of what conceptual assistance Hohfeld might provide to the articulation of power within international legal theory. Hohfeld’s analytic scheme was first put forward nearly one hundred years ago.¹⁹ It comprises in essence a schematic or table displaying the interrelationships among eight terms. Hohfeld’s objective was to be precise about legal relationships. The eight Hohfeldian terms are divided into two domains or ‘orders.’ The first order includes rights, privileges and duties. This is the more familiar ‘half’ of Hohfeld’s account. The second order includes power.²⁰ Hohfeld’s account of legal power takes the form of a set of assertions concerning four matters: the capacity in some actor to change existing legal relations; the vulnerability in another actor to having such changes made; the availability for some actor of protections against certain changes; and the specific prohibition in some actor of the changes with respect to which another actor holds a protection.

¹⁹ Wesley N. Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’, (1913) XXIII *Yale Law Journal* 16. Karl Llewellyn was strongly influenced by Hohfeld; in turn Llewellyn taught legal theorist William Twining. Twining taught James Allan, my own teacher in legal theory, so that a tenuous lineage may thus be asserted.

²⁰ Relationships between the orders (for example relationships between powers and privileges) are rather obscure and will not be discussed here.

It should be emphasised that Hohfeld expressed no interest in what might be called the moral or ‘internal’ correlation of legal relations. Various philosophical and political traditions, such as the Kantian, focus on such correlations, asserting for example that an agent who is entitled to make claims on the basis of a right, will thereby incur responsibilities or other obligations.²¹ This attitude has sometimes surfaced within international law: statehood in general, and territorial sovereignty in particular, may be said to bring with it both duties and rights. In contrast to this ‘deontological’ approach, Hohfeld’s analysis is rigorously instrumental or as one might say, ‘external.’ Duties and reciprocal obligations bind together different agents.²² A legal community is constructed through the intertwining of these reciprocal connections. To change the metaphor, Hohfeldian legal relationships are like the bonds between amino acids in the structure of DNA – pairs match up in specific ways, and the multiple combinations of the simple basic units suffice to generate immensely varied forms of life. Hohfeld’s approach was pre-Socratic in its ambition: if the units of legal relationship can be identified, then all forms of their combination will be open to analysis.

While Hohfeld’s vision was grand in some respects, it was relatively modest in others. Hohfeld’s field of enquiry was private law among individual natural persons, as exemplified by contractual and property-based relationships (the time-honoured disputes over ‘Whiteacre’ and so

²¹ For example the citizen may have both prescribed rights and prescribed duties or responsibilities, with both kinds of attribute arising from citizenship as such, ie integrated. This approach is hinted at by the title of Victoria’s ‘Charter of Rights and Responsibilities’ but hardly explicated within the text of the Charter, whose provisions are Hohfeldian rather than Kantian: generally speaking citizens have rights and officials have the corresponding duties.

²² John R. Morss, ‘On Having your Legalism and Eating It Too [Comment on Naffine, *Law’s Meaning of Life*],’ (2010) 35 *Australian Journal of Legal Philosophy* 116.

on). It is something of a step from that domain to the domain of international law with its interactions of complex collectives. But the applicability of Hohfeld's scheme to the legal interrelations of collectives has been demonstrated²³ and by extension, its applicability to international law has been proposed.²⁴

Hohfeld's methodology involved two broad axioms. The first axiom is that legal relations are always reciprocal (or 'intersubjective' perhaps), so that there are always two ways to look at every legal relationship: from its two 'ends' so to speak. For example, one can look from the 'duty end' or from the 'right-claim end' of any duty—claim relationship. As Kramer puts it, in that respect Hohfeld's argument is simply that every 'up' has a 'down.' The second axiom is that all actual legal relations are exclusive of other possible legal relations. If X has a *duty* to perform Y (thus honouring a right claim held by Z), X cannot at the same time have a *privilege* ('liberty') to perform Y. Of course X may be at the same time under a duty vis-a-vis Z and at the same time enjoying various privileges, rights and so on.

Focusing on the second order, for Hohfeld there are four legal relationships which are closely interrelated: power, liability, immunity, and disability. *Power* is the capacity to change legal relations such as entitlements. Every incidence of power thus presupposes an incidence of *liability*, a vulnerability to such 'external' change of relevant legal relations. Each power is narrowly defined, and so is each liability. As Hohfeld stresses

²³ Matthew Kramer, Nigel Simmonds, and Hillel Steiner, *A Debate Over Rights* (1998).

²⁴ John R. Morss, 'The Legal Relations of Collectives: Belated Insights from Hohfeld,' (2009) 22/2 *Leiden Journal of International Law* 289.

throughout his account, power and liability are two sides of the same coin. Neither is logically prior to the other. *Immunity* and *disability* are linked in a parallel manner. Every immunity presupposes, and is correlative with, a corresponding disability. Immunity refers to a precise form of protection against the exercise of a power. Disability characterises the precise and narrow restriction guaranteeing the immunity. Further, the two axes (the two sets of pairs of terms) are logically related. Power and disability are contradictories. A power to alter certain legal relations is strictly incompatible with a disability (in the same agent) to alter those very same legal relations. A power is not incompatible with a disability to alter a *different* set of legal relations. On the same line of reasoning, immunity and liability are incompatible to the extent that their referents coincide. Thus each of the four ‘positions’ can be reduced to any of the others. Liability is the counterpart of power; disability is the contradictory to power; immunity is the counterpart to the contradictory to power. In this way power may be said to be the key to Hohfeld’s second order; but the same may be said of each of the other three terms.

This logic-chopping may seem excessive. As with the application of any logical scheme it is a matter of seeing whether the formula is helpful, not merely coherent. Hohfeld’s account represents a tool with which to ‘open up’ our understanding of legal relationships at the global level. One way in which it does so is by offering an alternative vocabulary and hence an alternative set of conceptual implications. Thus self-determination, which is usually thought of as a right,²⁵ might perhaps be more accurately defined as a power. Self-determination involves a competence or a capacity to

²⁵ Jeremy Waldron, ‘Two Conceptions of Self-Determination’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (2010) 397.

effect changes in legal relations of various kinds; and the assertion of constitutional authority often accompanies the declaration of independence. More plausibly self-determination might be a complex collection of powers, immunities, privileges and so on, that is to say a bundle of Hohfeldian attributes. In general it is likely that *norms* should be thought of as such aggregates of Hohfeldian attributes. The detailed articulation of an Hohfeldian approach to power in international law awaits a further opportunity. The forthcoming centenary (in 2013) of the first publication of Hohfeld's ground-breaking analysis might be an appropriate time to explore this proposal at greater length and in that process, to investigate the connections to a collective approach to rights in the international domain.²⁶

²⁶ John R. Morss, 'Will, Interest, and Waldron's Warning: Toward an International Law of Collectives', MS in preparation 2011.

THE ORIGIN IN INTERNATIONAL LAW OF THE INHERENT RIGHT OF SELF-DEFENCE AND ANTICIPATORY SELF-DEFENCE

MURRAY COLIN ALDER*

Abstract

This article draws on the work of early legal scholars to identify the origin of the inherent right of self-defence and anticipatory self-defence in international law. The purpose of this examination is to identify how some contemporary scholars have misconceived the origin of anticipatory self-defence and, as a consequence, have confused whether anticipatory self-defence coexists with the *Charter of the United Nations 1945*.

I THE ISSUE

The inherent right of self-defence and anticipatory self-defence are well-known features of international law, but what are their origins? Are they products of a formal source of international law, or are they intrinsic to the state? Are they different, or are they one and the same?

Article 51 of the *Charter of the United Nations 1945*¹ recognises the ‘inherent right of self-defence’ and preserved this right against impairment

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by anything in the treaty. The *Charter* was the first multilateral treaty to expressly recognise and preserve this right since the inception of international law.

However, this reference to the inherent right of self-defence was almost not made. The *travaux preparatoires* to Article 51 evince the debate among states as to whether such reference was necessary in order for the right to coexist with the treaty.² This was because the right was considered intrinsic and inviolable to all states.³

An identical debate occurred during negotiations for the *General Treaty for the Renunciation of War 1928*⁴ which prohibited the use of war between states for any purpose other than self-defence. States did not consider it necessary to make express reference to the inherent right of self-defence in order to exempt it from the treaty's general prohibition of war. Further, Secretary Kellog and the British Government referred to the right as being 'inherent' to every state and that the right was also 'implicit' in all treaties.⁵

The Secretary said:

¹ *Charter of the United Nations 1945*, opened for signature 26 June 1945, 59 Stat 1031 (entered into force 24 October 1945).

² *United Nations Conference on International Organisation, San Francisco 1945*, Committee III/4 23 May mtg 4 xxii and Committee III 13 June mtg 2 xxi. See also Institut de Droit International, *Present Problems of the Use of Force in International Law*, Rapporteur Emmanuel Roucouas, (2008) Session de Santiago, 67-165, 72 [2].

³ *United Nations Conference on International Organisation, San Francisco 1945*, Amendments to Dumbarton Oaks Proposals, i 661, 693; iii 635 and vi 717, 720.

⁴ *1928 General Treaty for Renunciation of War as an Instrument of National Policy*, opened for signature 28 August 1928, 94 LNTS (1929) 57 (entered into force 24 July 1929).

⁵ William E Borah, *Hearing before the Committee on Foreign Relations on the General Pact for the Renunciation of War, Signed at Paris 27 August 1928*, United States Senate, Seventeenth Congress, Second Session, Part 1, 7 and 11 December 1928, 1-12. The United States Senate Committee at the completion of its hearings described the immutability of the inherent right in similar terms; see *Report of the U.S. Senate*

It seemed to me incomprehensible that anybody could say that any nation would sign a treaty which could be construed as taking away the right of self-defence if a country was attacked. This is an inherent right of every sovereign, as it is of every individual, and it is implicit in every treaty. Nobody would construe the treaty as prohibiting self-defence. Therefore, I said it was not necessary to make any definition of “aggressor” or “self-defence”. I do not think it can be done, anyway, accurately. They have been trying to do it in Europe for six or eight years, and they never have been able to accurately define “aggressor” or “self-defence.”⁶

While the inherent right of self-defence was debated in the negotiations for each treaty, anticipatory self-defence was not. In fact, the term ‘anticipatory self-defence’⁷ had not manifested in international law since its inception around the 15th century. Instead, the term has relatively recently been used by some scholars and states to describe a wide spectrum of allegedly defensive action, ranging from using force against an imminent threat of unlawful force to using force against a potential foe which may, at some time in the future, acquire the means of posing an imminent threat of force.⁸

Committee on Foreign Relations, Congressional Record, vol 70, No 29, (1928) 1783-178 and Austen Chamberlain, *Further Correspondence with the Government of the United States Respecting the United States Proposal for the Renunciation of War*, Cmd. 3153 [in continuation of Cmd. 3109], London, 23 June 1928, 1 [3].

⁶ Borah, above n 6, 2. At 15, the Secretary said he believed that the *General Treaty* would not have been negotiated between any states if defining ‘aggression’ or ‘self-defence’ had been attempted.

⁷ That is, the legal authority in international law for a state to use armed force in self-defence before being physically attacked with armed force.

⁸ For example, Matthew Waxman, ‘The use of force against states that *might* have weapons of mass destruction’ (2009) 1 *Michigan Journal of International Law*, 1-77, 3 and 26-30 and George W Bush Jnr, President of the United States of America, *The National Security Strategy of the United States of America* (2002) White House

While most scholars in the existing debate identify state sovereignty as the origin of the inherent right of self-defence,⁹ there has been a near absence of a scholarly examination of the origin of anticipatory self-defence. Many contemporary scholars do not explain how anticipatory self-defence manifests, but rather simply describe it as ‘a right’ in international law.¹⁰

Documents <<http://www.whitehouse.gov/nsc/nss.pdf> at 20 January 2004> at 16 July 2004.

⁹ For example, Hersch Lauterpacht, *Oppenheim's International Law* (7th ed, 1952) vol 2, 153-155, 159 and 190-189 and 248; Henry Keith, *Wheaton's International Law* (6th ed, 1929) vol 1, 149-154; Charles Fenwick, *International Law* (2nd ed, 1934) 49, 52, 55-61, 146, 176, and 228-250; Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 5-6, 8-13, 24, 41-42 and 47-48; Daniel O'Connell, *International Law* (2nd ed, 1970) vol 1, 315-317; Christine Gray, ‘The Use of Force and International Legal Order’ in Malcom D Evans (ed), *International Law* (2nd ed, 2006) 98-99, 589 and 598; Arend and Beck, *International Law & The Use of Force* (1993) 18 and 72; Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (2nd revised ed, 1949) 106-107, 299; Stanimir Alexandrov, *Self-Defence Against the Use of Force in International Law* (1996) 19-27; Ernst Puttkamer, ‘Versailles Peace Treaty (1919)’ (1982) 4 *Encyclopedia of International Law*, 276-282; Jonathon Charney, ‘Universal International Law’ (1993) 87 *American Journal of International Law* 529, 532 and McCormack, ‘The Use of Force’ in Blay, Piotrowicz and Tsamenyi (eds), above n 6, 225; Timothy L H McCormack, ‘Anticipatory Self-Defence in the Legislative History of the United Nations’ (1991) 25 *Israel Law Review* 262-276; Thomas M. Franck, *Recourse to Force – State Action Against Threats and Armed Attacks* (6th ed, 2005); 3, 48-51 and Myra Williamson, *Terrorism, War and International Law* (2009) 82-97.

¹⁰ For example, Philip Jessup, *A Modern Law of Nations* (1948); Derek W Bowett, *Self-Defence in International Law* (1958) 33; Wolfgang Friedmann, *The Changing Structure of International Law* (1964) 260; Fredrick Northedge, *The Use of Force in International Relations* (1974) 201; McCormack, above n 10, 35-40; Hilaire McCoubrey and Nigel D White, *International Law and Armed Conflict* (1992) 92; Alexandrov, above n 10, 149; Malcom Shaw, *International Law* (4th ed, 1997) 789-790; Edward McWhinney, *The September 11 Terrorist Attacks and the Invasion of Iraq in Contemporary International Law* (2004) 34-6 and 52-53; Gray, *International Law and the Use of Force* (2nd ed, 2004) 130; Yoram Dinstein, *War, Aggression and Self-Defence* (4th ed, 2005) 182-187; Antonio Cassese, *International Law* (2nd ed, 2005) 357-363; Rebecca Wallace, *International Law* (5th ed, 2005) 284; Franck, above n 10, 97-108; Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (2nd ed, 2005) 230; Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (2005) 96; Stephen Hall, *International Law* (2nd ed, 2006) 308 [9.28]; Gillian

This implies that anticipatory self-defence is a legal right separate to the inherent right of self-defence. Some suggest that anticipatory self-defence is a legal right which originated in international customary law.¹¹

So, to begin with, what did early legal scholars write about the origin of the inherent right of self-defence?

II THE INHERENT RIGHT OF SELF-DEFENCE

Early legal scholars¹² assist us to understand the origin of the inherent right of self-defence. They wrote at a time when international law, known then as the ‘Law of Nations’, was developing closely behind the evolution of the sovereign state. Prior to the formation of the sovereign state, sovereignty was vested in a single person, often a Prince or a Monarch. The scholars write that a fundamental aspect of the sovereign power of a Prince was his right to use war for the settlement of legal disputes with, and self-defence against, peoples outside his sovereignty. In time, this right was then assumed by the sovereign state as it emerged on the international plane as the principal entity of the developing Law of Nations.

Triggs, *International Law: Contemporary Principles and Practices* (2006) 577 [10.16] and 578 [10.16]; Michael W Doyle, *Striking First: Preemption and Prevention in International Conflict* (2008) 11-15 and Waxman, above n 9 6-7.

¹¹ For example, Ian Brownlie, *International Law and the Use of Force between States* (1963) 42, 257-261, 366-368 and 429.

¹² For example, Balthazar Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri III* (1582); Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (1625); Alberico Gentili, *Hispanicae Advocatiois Libri Duo* (1661); Francesco de Vitoria, *De Indis et de Ivre Belli Relectiones* (1696); Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (1688); Emer de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) and Christian Wolff, *Jus Gentium Methodo Scientifica Perfractatum* (1764).

The scholars described the sovereign right to use war by drawing on the laws and practices of powerful city states such as Athens and Rome, of contemporary European powers and religious and natural law.¹³ ‘War’ to Grotius was ‘the condition of those contending by force’.¹⁴ Pufendorf described war as ‘the state of men who are naturally inflicting or repelling injuries or are striving to extort by force what is due to them.’¹⁵ Wolff described ‘war’ as the preparation for, or the use of, force by way of arms against an enemy¹⁶ and de Vattel described ‘war’ as ‘that state in which we prosecute our rights by force’.¹⁷ The essence of the meaning of war did not alter in the centuries immediately after the early scholars.¹⁸

¹³ ‘Natural Law’ theory is concerned with man’s obligations as a citizen, ethics and the bounds of lawful government action and evaluates the content of laws against moral principles. For contemporary views of the early scholars work in respect of this theory, see for example Ralph McInerny, ‘Thomistic Natural Law and Aristotelian Philosophy’ in John Goyette, Mark Latkovic and Richard Myers (eds) *St Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives* (2004) 25; Marett Leiboff and Mark Thomas, *Legal Theories in Principle* (2004) 54; Brian Bix, ‘Natural Law: The Modern Tradition’ in Jules Coleman and Schott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) 61-66; David Lyons, ‘Moral Aspects of Legal Theory’ in Kenneth Himma and Brian Bix (eds) *Law and Morality* (2005) 109-114 and Vilho Harle, *Ideas of Social Order in the Ancient World* (1998) 99.

¹⁴ Grotius, above n 12, 91-137. His definition purposefully excluded ‘justice’ because the investigation of what can be considered a ‘just’ war was the object of his work; 34. Lassa Oppenheim, *Oppenheim’s International Law* (9th ed, 1992) vol 1, 1 accepted Grotius’ definition of ‘war’. He wrote, in respect of the importance of recognising that it is governments that go to war for the purpose of the laws of war, that ‘the laws of war belong equally to insurgents not yet recognised as a state but recognised as having belligerent rights, which they would not be if they did not possess a government.’

¹⁵ Pufendorf, above n 12, 9 [8].

¹⁶ Wolff, above n 12, 405 [784]-[785].

¹⁷ Vattel, above n 12, 235 [1]. He made the distinction between ‘public war’ ‘which takes place between Nations or sovereigns, which is carried on in the name of the public authority and by its order’ and ‘private war’ which takes place between individuals’; 235 [2]-[3].

¹⁸ For instance, John Westlake, *International Law* (1913) Part II, War, 1 who described war as ‘the state or condition of government contending by force’.

The opinions of the scholars about war were also derived from, and in turn reflected, certain fundamental human instincts and behaviours. This influence is perhaps explained by the fact that sovereign power had been vested in and exercised by a Prince, thereby favouring a greater connection between sovereign power and human conduct. Thus, to explain his view that the right of a state to use war was derived from its sovereignty, Ayala described this right as an extension of man's natural right to use war to revenge wrongs committed against him personally, to settle disputes and to defend himself.¹⁹ Grotius wrote:

Meanwhile we shall hold to this principle, that by nature every one is the defender of his own rights; that is the reason why hands were given to us.²⁰

Vattel also held this view and added that if the sovereign was unable to protect its citizens from another's war, the right may properly be exercised by the individual against the invader.²¹ Wolff considered a sovereign state's natural right to remain uninjured by another as identical as that right possessed by man and the right of each to defend itself from such injury was the same.²²

The scholars viewed the sovereign right to use war as a necessary aspect of a state's collective organisation. Pufendorf considered man's natural law was 'deducible from the requirements of human nature' and therefore the

¹⁹ Ayala, above n 12, vol II, 9-10, 18.

²⁰ Grotius, above n 12, 92, 102-137 and 164.

²¹ Vattel, above n 12, 13-14, 235-236 [4]-[5] 235 [1].

²² Wolff, above n 12, 9 [3], 20 [28], 28-29 [43], 129-130 [252]-[254], 139 [273], 313 [613] and 314 [615]. This is because he regarded a sovereign state, as regards to another, as a free person living in a state of nature; 9 [2].

‘law of nature and the law of nations are one and the same thing’.²³ Wolff expressed the same view, however, he made a distinction between the fundamental principles of natural law, which apply equally to men and states, and their application to each object.

Underlying the scholars’ views is that they considered the formation of an international society as a natural continuum of man’s development of municipal law.²⁴ Their work and the work of others who followed considered that a new sovereign state,²⁵ upon its inception, innately possessed the sovereign right to use war.²⁶ In expressing this view, scholars did not simply analogise the sovereign right with man’s natural right to use war. Rather, they suggested that the sovereign right was a manifestation of man’s natural right. Wolff did so succinctly:

But the right of a nation [to use war] is only the right of private individuals taken collectively, when we are talking of a right existing by nature. Of

²³ Pufendorf, above n 12, Book II, 226 [156]; Book VII, 1118-1119 [3]-[4] and Book VIII, 1301 [885] and 1305 [889].

²⁴ Especially Wolff, above n 12, for instance, 28-30 [43]-[44] and 145 [285]. See Westlake, above n 18, 11-13.

²⁵ Grotius, above n 12, 14-15, 44, 102-103. Pufendorf, above n 12, 984 described a sovereign state as a ‘compound moral person, whose will, intertwined and united by the pacts of a number of men, is considered the will of all, so that it is able to make use of the strength and faculties of the individual members for the common peace and security.’ Wolff, above n 12, 5, 9[2] believed that a nation arose as a matter of the law of nature and regarded it as an individual free person living in a state of nature and was constituted by its individual citizens who united to form it. He described a nation succinctly at 91 [174] as ‘a number of men associated in a state.’ Sovereignty was exercised by the ruler of the state over all its land, but the principle of sovereignty was different to the principle of public or private ownership of parts of the land; 60 [102].

²⁶ For example, Pufendorf, above n 12, Book VII, 1013 [5], 1055-1063 [722]-[727] and Book VIII, 1148 [784]; Wolff, above n 12, 11-13 [7]-[9] and 20-24 [28]-[34] and Vattel, above n 12, 235 [4]. For the views of subsequent scholars who shortly followed, see, for instance, Westlake, above n 18, 111-121; William E. Hall, *International Law* (8th ed, 1907) 82 and Lauterpacht, above n 9, vol 1 [119].

course such a right belongs to a nation only because nature has given such a right to the individuals who constitute the nation.²⁷

That early scholars believed the origin of a state's right to use war was sovereignty leads to the conclusion that this right pre-existed the Law of Nations. This is because the sovereign state must have first existed in order to create this body of law. The relevance of this conclusion is that the sovereign right to use war was not 'created' by any formal source of the Law of Nations (being primarily in this early era international customary law and treaty). Instead, the right was incorporated into the Law of Nations through recognition. The effect of this incorporation is discussed later.

Early scholars also categorised war as either offensive or defensive in nature. Vitoria described this division as forming the two dimensions of war within the Law of Nations. He believed war to be lawful under natural law and written law.²⁸ In his view, the right to use war offensively, or defensively, was equal. Offensive war included the avenging of a wrong done to the state by another and taking punitive action so that future wrongs would be discouraged.²⁹ Defensive war was for the protection of the sovereign state against armed force and was equally justified for an individual as it was for the state.³⁰

²⁷ Wolff, above note 12, 315 [617].

²⁸ Vitoria, above n 12, 164, point 31 and 166-167.

²⁹ Ibid 167.

³⁰ Ibid 167-168. The defence of property, Vitoria believed, required a person being attacked to flee if circumstances permitted. If circumstances did not so permit, force in defence of property was permitted. However, if defence was made for self in fear of physical harm, no obligation rested on the person attacked to flee. He may use force without considering alternative action.

In Vitoria's view, the only distinction in the scope of authority between an individual and a state in defensive war came immediately after an attack; it was only a state which could avenge force, or a wrong committed against it, if the immediacy of the situation passed.³¹ His concept of defensive war was broad and not limited to reacting to the threat or use of external armed force, but of also retrieving dispossessed property of the sovereign state.³²

Ayala made an identical division of the legal concept of war. He wrote that offensive war could only be declared by the sovereign power of the state (except in limited circumstances such as pressing necessity, or in the absence of the Prince) and that defensive war was 'open to any one by the law of nature'.³³ He saw the sovereign right of a state to use war defensively as having been derived from the right of self-defence provided to man by nature and that both rights could be exercised to ward off an attack to the extent the threat no longer existed.³⁴

Pufendorf also considered the just causes of war to be naturally divided into offensive and defensive categories. He described offensive war to be 'those by which we extort debts which are denied us, or undertake guarantees for the future' and defensive war as 'those in which we defend and strive to retain what is ours'.³⁵ Wolff considered the ability of a sovereign state to defend itself from armed force was ultimately the factor which measured its power and ability to survive within the developing

³¹ Ibid 168.

³² Ibid 169-170.

³³ Ayala, above n 12, vol II, 8-9, 11.

³⁴ Ibid 9-10, 18.

³⁵ Pufendorf, above n 12, Book VIII 1294 [881] and 1298 [884].

system of the Law of Nations.³⁶ He expressed his division of war in the following way:

A defensive war is defined as one in which any one defends himself against another who brings war against him. But that is called an offensive war which is brought against another who was not thinking of bringing a war, or when any one assails another with arms.³⁷

Vattel attributed offensive war to that state which first took up arms and described the legitimate purpose of offensive war generally as for the enforcement or protection of certain rights. He described defensive war as an exercise of the ‘right of self-defence against an offensive war, whether the latter was justified, or not.’³⁸

The legal bases used by the scholars to categorise war as either offensive, or defensive, were intrinsic to the theory of ‘just war’. This categorisation is important because the scholars appear to have used the various manifestations of ‘law’ as they applied to individuals at that time – that is, ‘natural’, ‘moral’, ‘written’ and ‘Gospel’ law – to form the basis for the same categorisation in the Law of Nations. In this way, ‘law’ defined the legal characteristics of offensive and defensive war in the Law of Nations. War, in order to be justified by this law, was in turn required to be motivated by the enforcement, or protection, of legal rights possessed by the sovereign state.

³⁶ Wolff, above n 12, 9-10 [3]-[4], 20 [28], 26 [38], 41-42 [69], 129 [252] and 313 [613]. See also Westlake, above n 18, 55-64.

³⁷ Wolff, above n 12, 314 [615].

³⁸ Vattel, above n 12, 235 [3]-[5].

Thus, it seems evident from the work of early scholars that the sovereign right to use war defensively manifested a state's sovereignty and therefore pre-existed the Law of Nations. It will be seen below that the sovereign right became part of this developing body of law through the process of recognition and incorporation. The recognition of this right was made through the creation of the principles of immediacy and necessity which functioned to restrict when and why the right could lawfully be exercised.³⁹ It can therefore be assumed, in the absence of a treaty or other substantive law intervention, that the legal right of self-defence subsequently discussed in the negotiations for the *General Treaty* in 1928 and expressly recognised by Article 51 of the *Charter* in 1945 as the 'inherent right of self-defence' was the same legal right recognised by and incorporated into the Law of Nations centuries before.

If sovereignty was the origin of a state's right of self-defence, what was the origin of anticipatory self-defence?

III ANTICIPATORY SELF-DEFENCE

The work of early scholars also assists us to identify the origin of anticipatory self-defence. However, this assistance arises indirectly in those works, as the term 'anticipatory self-defence' was not one used by them to describe the legal authority of a state to use armed force to repel a threat of armed force. The answer to this question instead lies in how the legal

³⁹ These principles were recognised as international customary law principles in *Caroline* [1837] 30 B.F.S.P. 195, but the early scholars establish that they functioned in the Law of Nations long before that case.

scope⁴⁰ of the sovereign right to use war defensively was naturally formed by the substantive principles of the Law of Nations which restricted when and why the right was exercised.

Early scholars considered an exercise of the sovereign right to use war defensively against a threat or use of armed force as the purest form of self-defence under the Law of Nations. Grotius examined the justness of exercising this right against the threat of injury to a state by drawing legal principles from the right of self-defence derived by individuals from natural law. The two underlying principles evident in his logic were the immediacy of the threat of armed force and the necessity to repel that force with defensive force *before* the self-defending state was physically attacked:

The danger, again, must be immediate and imminent in point of time. I admit, to be sure, that if the assailant seizes weapons in such a way that his intent to kill is manifest the crime can be forestalled; for in morals as in material things a point is not to be found which does not have a certain breadth. But those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived, and deceive others.⁴¹

Grotius emphasised the importance of the imminence of a threat of armed force in this regard:

Further, if a man is not planning an immediate attack, but it has been ascertained that he has formed a plot, or is preparing an ambushade, or that

⁴⁰ By 'legal scope', I mean the range of conduct against which the sovereign right was lawfully exercised within the law.

⁴¹ Grotius, above n 12, Book II, 173-175 and 549.

he is putting poison in our way, or that he is making ready a false accusation and false evidence, and is corrupting the judicial procedure, I maintain that he cannot lawfully be killed, either if the danger can in any way be avoided, or if it is not altogether certain that the danger cannot otherwise be avoided.⁴²

Grotius again:

Quite untenable is the position, which has been maintained by some, that according to the law of nations it is right to take up arms in order to weaken a growing power which, if it become too great, may be a source of danger... But that the possibility of being attacked confers the right to attack is abhorrent to every principle of equity.⁴³

When Grotius' definition of war is recalled, it is evident from his concept of self-defence that if an individual or state was taken by surprise by the actual use of armed force, the ensuing hostilities were better described as 'war'. Thus, it might be concluded that self-defence under the Law of Nations was effected when the sovereign right to use war defensively was exercised against an imminent threat of armed force. This conclusion is supported by the work of other scholars.

Pufendorf⁴⁴ saw the occasion for exercising the sovereign right to use war defensively as arising before an actual injury was sustained by a self-defending state.⁴⁵ To Pufendorf, the very purpose of defensive war on the

⁴² Ibid Book I, 49, Book II 174-175 and 575.

⁴³ Ibid Book II, 184. See Westlake, above n 18, Part II, War, 19-25.

⁴⁴ Pufendorf, above n 12, Book II 264-294 [182]-[202].

⁴⁵ Ibid 275 [184] where he wrote, 'For self-defence does not require one to receive the first blow or only to elude or ward off the blows which are aimed.' However, he did believe that avoidance of impending force was preferable if it could be achieved, or

part of a sovereign state was to avoid such injury, just as it was for individuals under the law of nature.⁴⁶ He thought that defending one's self before suffering injury was a matter of reason⁴⁷ and that the natural instinct of a sovereign state to do so was because it was the natural instinct of man to do so.⁴⁸ If it was otherwise, it would mark the 'end of mankind':⁴⁹

And so when a man, contrary to the laws of peace, undertakes against me such things as tend to my destruction, it would be a most impudent thing for him to demand of me that I should thereupon hold his person inviolate, that is, that I should sacrifice my own safety so that his villainy may have free play.⁵⁰

Pufendorf thought the earliest point at which the sovereign right to use war defensively arose was when the threat had evolved to a point where injury could immediately be occasioned by the self-defending state if the aggressor decided to act:

The beginning of the time at which a man may, without fear of punishment, kill another in self-defence, is when the aggressor, showing clearly his desire to take my life, and equipped with the capacity and the weapons for his purpose, has gotten into the position where he can in fact hurt me, the

even to endure a slight injury if doing so did not cause much detriment to the state; 267-269 [184]-[185]. The overriding motivation for exercising the right was to achieve effective defence, not revenge; 270 [186].

⁴⁶ Ibid 264 [182] where he wrote that the law of nature permits violence in self-defence in order to preserve safety.

⁴⁷ Ibid 283 [195] and Book VIII 1292 [880]. At Book II 585 and Book III 1314 [895], Pufendorf agreed with Grotius on the bases for defensive war enabling sovereignty to be gained over an aggressor's territory.

⁴⁸ Ibid Book VIII 1292-1294 [880]-[881]. The distinction between the legal right of self-defence in both jurisdictions and the substantive rules which regulated in each jurisdiction are consistently maintained by all the early scholars.

⁴⁹ Ibid Book II 265 [183].

⁵⁰ Ibid 265 [182]. See also 272-274 [188]-[189].

space being also reckoned as that which is necessary, if I wish to attack him rather than to be attacked by him.⁵¹

The reasoning used by Pufendorf demonstrates that the nature of the weapon possessed by the aggressor was a factor in determining when the principle of immediacy was fulfilled. This is because the range and power of the weapon were pivotal to a self-defending state's determination of when it was likely to suffer injury if those weapons were actually used.⁵² He considered the right to use war defensively against a threat of armed force to be absolute and the exercise of this right was not determined by the nature of the threat having gained a certain degree of seriousness (in contrast to the imminence of the threat):

And this holds good not merely if an enemy has undertaken to use every extremity against me, but also if he simply wishes to injure me within certain limits, for he has no greater right to do me a slight injury than a severe one.⁵³

Thus, in Pufendorf's opinion, the sovereign right to use war defensively against a threat of armed force permitted the self-defending state to cross the border with the threatening state and repel or destroy the threat as far as it manifested.⁵⁴ This right applied equally to the defence of allies, but only when they requested, so that 'the defensive war is in their name, not ours.'⁵⁵ Of such paramount importance was the sovereign right that it was

⁵¹ Ibid.

⁵² Ibid 276-277 [190]-[191].

⁵³ Ibid Book II 269 [185], Book III 1298 [884] and 1302 [885].

⁵⁴ Ibid Book II 270-271 [186], 356 [242], Book III 1294 [881] and 1296 [881].

⁵⁵ Ibid Book III 1305-1306 [889].

considered just even if exercised genuinely, but mistakenly, against another.⁵⁶

Wolff also considered that the sovereign right to use war defensively functioned against a threat of armed force.⁵⁷ In his view, the likelihood of such a threat evolving into actual force was sufficient to trigger its exercise.⁵⁸ Vattel defined the legal scope of the sovereign right in the following manner:

We may say, therefore, in general, that the foundation or the cause of every just war is an injury, either already received or threatened. The justifying grounds of war show that a State has received an injury, or that it sees itself seriously enough threatened to authorize it to ward off the injury by force.⁵⁹

Vattel illustrated the fundamental importance to self-defence of acting against an imminent attack:⁶⁰

But suppose the safety of the State is endangered; our foresight can not extend too far. Are we to delay averting our destruction until it has become inevitable?... If an unknown man takes aim at me in the middle of a forest I am not yet certain that he wishes to kill me; must I allow him time to fire in order to be sure of his intent? Is there any reasonable casuist who would

⁵⁶ Ibid Book II 272 [187].

⁵⁷ Wolff, above n 12, for example 315 [618], where he wrote that ‘a wrong done or likely to be done, the war that is brought without precedent or threatened wrong is not a just war, consequently it is unjust, nor has any one a right of war except the one to whom either a wrong has been done or is offered or threatened.’ At 319 [627] he considered it a just defensive war if a sovereign state was threatened by a war that was neither justifying or persuasive and that all states have a right to use defensive war for all their security against a state that threatens such a war. See also 320 [629].

⁵⁸ Ibid 314 [617].

⁵⁹ Vattel, above n 12, 248 [42].

⁶⁰ Even when exercised justifiably, but mistakenly; *ibid* 172-173.

deny me the right to forestall the act?... Must we await the danger? Must we let the storm gather strength when it might be scattered at its rising?⁶¹

Vattel also identified two factors which constituted such a threat: the ability to carry the threat into actual war and the ‘will to injure’.⁶² He described exercising the sovereign right to use war defensively as a ‘duty’, but this right did not exist against offensive war which itself was just. In such circumstances, the state threatened with attack should ‘offer due satisfaction’ and, only if refused, did the right to use defensive war become just.⁶³

In a broad sense, it is evident from the work of early scholars that the natural behaviour of a sovereign state to use armed force to repel an imminent threat of armed force reflects a deep human defensive instinct of striking first in self-defence. To so strike after being physically attack may reduce one’s ability to self-defence, or in the most serious circumstances, one’s own existence. Other disciplines in contemporary times also recognise the existence and operation of this instinct.⁶⁴

⁶¹ Ibid 248-249 [44]. In a material deviation from Wolff, Vattel believed that the growing strength of a neighbouring state, if it in itself became disproportionately greater than another, justified defensive war. See also Westlake, above n 18, 120.

⁶² Vattel, above n 12, 248-249 [44].

⁶³ Ibid 246 [35]-[36]. However, Vattel does not delineate between just and unjust in each conflict. He recognises the possibility both sides of a conflict can act with just cause in which the distinction between offensive and defensive war becomes unclear. In such uncertain circumstances, both are considered to have acted justly until the cause is decided. See also Brownlie, above n 11, 6-9.

⁶⁴ See, for example, Daniel Goleman, *Emotional Intelligence* (1995) 7, 60, 136, 205, 227; John E Warren, *Emotional Power* (2004) 225-227; John Ratey, *A User’s Guide to the Brain* (2001) 66, 88, 114, 161-162, 171, 228-229, 232; Robert Winston, *Human Instinct – How Our Primeval Impulses Shape Our Modern Lives* (2002) 37-42, 49, 61-62. For leading legal scholarly views which supports this observation, see Westlake, above n 18, 78-79 and Brownlie, above n 11, 261.

In a substantive legal sense, two principles are evident in the work of early scholars which restricted when the sovereign right to use war defensively could be exercised and which reflected the human defensive instinct. These principles were immediacy and necessity.⁶⁵ The principle of immediacy meant that the threat of armed force had gained such a temporal proximity to becoming a use of force that the threatened state needed to act immediately if it was going to defend itself. The principle of necessity meant that the threatened state had no viable means other than armed force to prevent the imminent threat of becoming a use of armed force.

The functions jointly fulfilled by the principles of immediacy and necessity can therefore be seen as having defined the ‘legal scope’ of the sovereign right to use war defensively in the Law of Nations. This scope was the imminent threat, or use, of armed force directed at the state. Some observations are made of this legal scope which, in turn, assists us to gain a better understanding of the origin of anticipatory self-defence than that exhibited in contemporary scholarly work.

The earliest point in time at which the sovereign right to use war defensively could lawfully be exercised in any conflict was when a threat of armed force fulfilled the principles of immediacy and necessity. For a state to have used armed force in the purported exercise of this right before these two principles were fulfilled would, as a question of law, have fallen outside the bounds of self-defence as determined by the Law of Nations. As

⁶⁵ A third principle of proportionality which governed the extent to which the sovereign right to use war defensively could be exercised is also evident in the work of early scholars and remains a substantive international customary law principle in international law today. However, this principle is not relevant to this article.

a consequence of the division of war into its offensive and defensive categories, such force could only be described as offensive war.

IV CONCLUSION

It is clear that early scholars considered the origin of the right to use war defensively (which was eventually recognised by Article 51 of the *Charter* in 1945 as the ‘inherent right of self-defence’) to be state sovereignty. The scholars described a single right of a state to use war which manifested a state’s sovereignty and this right, as seen, was exercised for offensive and defensive purposes within the legal framework of the Law of Nations. The principles of immediacy, necessity and proportionality, in turn, were the means by which the Law of Nations restricted when, why and to what extent the sovereign right was exercised for defensive purposes.

It is also clear from the work of early scholars that they did not categorise anticipatory self-defence as a distinct legal right separate from the sovereign right to use war. In fact, they did not see anticipatory self-defence as a legal concept within the Law of Nations. Thus, insofar as ‘anticipatory self-defence’ is a term used now by some scholars to characterise a state’s legal authority to defend itself against an imminent threat of armed force before 1945, that authority was actually vested in the sovereign right. This was reflected in state practice in self-defence to 1945. Therefore, it is concluded that the origin of anticipatory self-defence is also state sovereignty by virtue of the origin of the sovereign right.

This article is relevant to identifying an important underlying question of law in the existing (and unresolved) scholarly debate about whether anticipatory self-defence coexisted with the *Charter* in 1945. Defining anticipatory self-defence is fundamental to this debate, but is neglected by it. As seen, some scholars in this debate view anticipatory self-defence as a distinct legal right in international law which is either intrinsically possessed by states, or is an international customary law right.

The view that anticipatory self-defence is a distinct legal right in international law in the existing scholarly debate confuses how many legal rights of self-defence are possessed by a state. This confusion (in combination with other factors beyond this article) has obfuscated the intent of Article 51 of the *Charter* in 1945 which was, in its relevant part, to recognise the inherent right of self-defence and protect that right from impairment by anything in the treaty.

AUSTRALIA'S FAILURE TO ADDRESS THE HARMS OF INTERNET PORNOGRAPHY

MICHELLE EVANS*

Abstract

Pornography is readily available via the internet and can be accessed effortlessly and most often free of charge. Pornography objectifies the women used in it, and in addition, women as a class of persons, sending a clear message of inequality which reinforces the social subordination of women in society. Australia's approach to the regulation of internet pornography, via Schedules 5 and 7 of the *Broadcasting Services Act 1992* (Cth) is one of censorship where members of the public can complain to the Australian Communications and Media Authority ('ACMA') about pornography they encounter on the internet and find offensive. Such an approach is premised upon pornography having the potential to harm the moral fibre of the viewer and of society. This paper argues that such an approach fails to recognise pornography's real harms including its harm to women's equality, and fails to provide redress to women harmed during the production, and as a result of the viewing of pornography. This paper suggests that, although there may be jurisdictional challenges to be overcome with respect to the international nature of the internet, Australia should adopt the civil rights ordinance drafted by law Professor Catharine A MacKinnon and feminist writer Andrea Dworkin. The ordinance is the only

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legal model which directly addresses these harms and directly empowers women to take action against pornographers.

I INTRODUCTION

Most Australians have effortless access to the internet. As at June 2010, 77% of the Australian population aged 14 years and over had internet access in their homes, 40% had access at work and 15 percent at other locations. Further, during June 2010, 13% had accessed the internet via their mobile phones.¹

Women's suffering and inequality is continually trafficked on a global scale via the internet.² Women are used in pornography and their abuse and objectification is uploaded and immortalised on web sites depicting rape, incest, sexual abuse, torture, and other forms of pain and suffering forced upon them in a sexual context.³ New technology helps to facilitate and perpetuate this degradation and exploitation by making it easy for men to become pornographers via their own pornographic web sites, or by uploading pornography to existing web sites.

¹ Australian Communications and Media Authority, *Communications Report 2009-10 Series Report 1 – Australia in the Digital Economy: The Shift to the Online Environment* (11 November 2010), 2.

² For a discussion of pornography as trafficking see Catharine A MacKinnon, 'Pornography as Trafficking' in David E Guinn and Julie DiCaro (eds), *Pornography: Driving the Demand in International Sex Trafficking* (Captive Daughters Media, 2007), 31.

³ For a description of the types of pornography available via the internet, see generally Michael Flood and Clive Hamilton, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (The Australia Institute, 2003). Additional internet pornography is described in Michelle Evans, 'Censorship and Morality in Cyberspace: Regulating the Gender-Based Harms of Pornography Online' *Southern Cross University Law Review* 11 (2007), 1.

This paper argues that Australia is failing to adequately address the harms of internet pornography.⁴ It will first outline the current legislative approach which attempts the almost impossible task of censoring the internet. It will then outline how this approach fails to address the real harms to those women forced to perform in pornography, and raped, harassed and assaulted because of the consumption of it. Finally, this paper suggests that Australia should adopt Catharine MacKinnon and Andrea Dworkin's civil rights ordinance (legislation) to regulate internet pornography as an issue of sex discrimination.⁵ Unlike Australia's current approach, the ordinance addresses these harms and empowers women to fight back against the pornography industry and the inequality that it promotes.

⁴ This paper does not provide a detailed discussion of Australia's laws with respect to child pornography. The writer wishes to acknowledge that Australia is taking child pornography seriously by taking a zero tolerance criminal law approach to the possession, distribution and production of child pornography. Thus, Australia has strongly recognised the devastating harms to children used in child pornography and sexually and emotionally abused as a result of the viewing of it. However, there has been a reluctance to acknowledge that adult pornography is also harmful. These harms are detailed later in this paper in the section 'A failure to address pornography's harms'. In addition, there is a proliferation of internet pornography, regarded as adult pornography because of its use of women over the age of 18, which promotes the sexual abuse of children. For example, the genre of 'teen pornography' is readily available on the internet with titles such as 'barely legal', 'youngest teens on the net', 'Lolita' and 'Schoolgirl'. There are also numerous web sites that promote incest. See, Michael Flood and Clive Hamilton, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, Discussion Paper 52 (Canberra: The Australia Institute, 2003), 23 and 34.

⁵ 'Model Anti-pornography Civil Rights Ordinance' in Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights A New Day for Women's Equality* (Organizing Against Pornography: 1988), Appendix D, 138. Sections of the ordinance referred to in this paper are from this version of the ordinance.

II WHAT IS AUSTRALIA DOING ABOUT INTERNET PORNOGRAPHY?

Australia's attempt to regulate internet pornography is contained in Schedule 5 and Schedule 7 to the *Broadcasting Services Act 1992* (Cth) ('the Act'). There is considerable overlap between the Schedules, with Schedule 7 adding to the content that can be regulated to include content accessible via mobile phones, links from one web site to another and live content available via the internet and mobile phones. The Act provides that an Australian resident can complain to the Australian Communications and Media Authority ('ACMA') about content that they have found and consider to be offensive.⁶ The ACMA will then investigate⁷ to determine whether the content is 'prohibited content' or 'potential prohibited content'.⁸

In Schedule 5, 'prohibited content' is defined by reference to by reference to the classification categories of 'RC', 'X 18+' or 'R 18+' and in terms of whether content is hosted in Australia or outside Australia.⁹ Content that would be classified RC includes child pornography, bestiality and violent sexual material. Content classified as 'X 18+' includes real sexual activity. Material classified 'R' includes implied or simulated sexual activity.¹⁰

⁶ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 22(1) and 25; Schedule 7, clause 37 and 41.

⁷ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 26(1); Schedule 7, 43(1).

⁸ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 30(1) and (2); Schedule 7, clause 20 and 21.

⁹ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 10(1) and (2).

¹⁰ ACMA web page "Prohibited online content" located at <http://www.acma.gov.au/WEB/STANDARD/pc=PC_90102> accessed 8 December 2010.

In relation to Internet content hosted in Australia, prohibited content is that which has been classified RC or X 18+ by the Classification Board¹¹ or content that has been classified R 18+ by the Classification Board¹² if access to the Internet content is not subject to a restricted access system (for example, an age verification system).¹³ Equivalent provisions are repeated in Schedule 7¹⁴. Schedule 7 additionally provides that prohibited content includes content hosted or provided from Australia¹⁵ that has been classified MA 15+ if access is provided by a mobile phone service or any other service that provides access to audio or video content upon payment of a fee, if it is not subject to a restricted access system.¹⁶

Schedule 7 details the types of notices that the ACMA can issue if the content is prohibited content hosted within Australia. These depend on the nature of the content. If the content is provided by a 'hosting service' (stored internet content), the ACMA can issue a final take-down notice, demanding that the content is removed¹⁷; if the content is 'live content' (live video or audio content), a final-service cessation notice is issued directing the provider not to provide the live content¹⁸; and if the content can be accessed using a 'links service' (a link on a website to another web site), a final link-deletion notice can be issued, directing that the link is removed.¹⁹

¹¹ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 10(1)(a).

¹² *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 10(1)(b)(i).

¹³ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 10(1)(b)(ii).

¹⁴ *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 20(1)(a); Schedule 7, clause 20(1)(b)(i); Schedule 7, clause 20(1)(b)(ii).

¹⁵ *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 3(1) and (2).

¹⁶ *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 20(1)(c) and 20(1)(d).

¹⁷ *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 47.

¹⁸ *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 56.

¹⁹ *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 62.

Additionally, Schedule 5 provides that if the Internet content is hosted outside Australia, it will be prohibited content if it has been classified RC or X 18+ by the Classification Board.²⁰ If the ACMA is satisfied that Internet content hosted outside Australia is prohibited content or potential prohibited content (discussed below), the ACMA must, if it considers the content to be of a sufficiently serious nature to warrant referral to a law enforcement agency in or outside Australia, notify the content to a member of an Australian police force.²¹ In addition, the ACMA must also notify the internet service provider so they can take reasonable steps to block the prohibited content.²² Internet service providers are required to provide filtering software²³, and so the ACMA must also notify makers and

²⁰ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 10(2).

²¹ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 40(1)(a)(i). Alternately, if there is an arrangement between the ACMA and the chief of an Australian police force under which the ACMA can notify another person or body, the ACMA can notify that other person or body (Schedule 5, clause 40(1)(a)(ii)).

²² *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 40(1)(b). See also section 19.2(b), 'Content Code 3: Providing Access to Content Hosted Outside Australia' in *Internet Industry Codes of Practice: Codes for Industry Co-Regulation in Areas of Internet and Mobile Content (Pursuant to the Requirements of the Broadcasting Services Act 1992)*, May 2005, version 10.4.

²³ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 60(2)(d). See also section 19.3-19.6, and Schedule 1, 'Content Code 3: Providing Access to Content Hosted Outside Australia' in *Internet Industry Codes of Practice: Codes for Industry Co-Regulation in Areas of Internet and Mobile Content (Pursuant to the Requirements of the Broadcasting Services Act 1992)*, May 2005, version 10.4. In addition to filtering software, the Australian government has recently launched a 'Cybersafety help button' which can be downloaded free of charge. The button can be double clicked while a person is using the internet to give them advice about cyber-bullying or other 'unwanted contact', 'inappropriate or offensive material', or 'scams or fraud' including the ability to talk to a counsellor. See Australian Government Department of Broadband, Communications and the Digital Economy Web page, 'Cybersafety help button – questions and answers' at <www.dbcde.gov.au/online_safety_and_security/cybersafetyhelpbutton_download/questions_and_answers#1> accessed 30 December 2010. The Cybersafety help button is

suppliers of filter software who are listed in a Registered Code of Practice so that they can include the content as content to be blocked by their filter software.²⁴ This means that unless pornography was for example, child pornography and contrary to the criminal law, little action can be taken to remove it from the internet. Schedule 7 also permits the ACMA to refer Australian content to law enforcement agencies if it is of a ‘sufficiently serious nature’.²⁵

The ACMA may determine that unclassified content hosted in Australia is ‘potential prohibited content’ if there is a substantial likelihood that if the content were to be classified by the Classification Board it would be classified ‘RC’ or ‘X 18+’.²⁶ If content is potential prohibited content, the ACMA must issue a written notice called an ‘interim take-down notice’ to the provider of content provided by a ‘hosting service’²⁷; an interim service-cessation notice’ to a live content provider²⁸; or an interim link-deletion notice to a links service provider.²⁹ These notices are directions not to host or provide access to the content or link until the ACMA notifies the host or provider of the Classification Board’s classification.³⁰ The ACMA must then request that the Classification Board classify the Internet

part of Australia’s censorship regime and does not address the harms detailed later in this paper in the section ‘A failure to address pornography’s harms’.

²⁴ Section 19.2(a) ‘Content Code 3: Providing Access to Content Hosted Outside Australia’ in *Internet Industry Codes of Practice: Codes for Industry Co-Regulation in Areas of Internet and Mobile Content (Pursuant to the Requirements of the Broadcasting Services Act 1992)*, May 2005, version 10.4.

²⁵ *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 69.

²⁶ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 11; Schedule 7, clause 21.

²⁷ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 30(2); Schedule 7 clause 47(2).

²⁸ *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 56(2).

²⁹ *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 62(2).

³⁰ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 30(2)(a)(i).

content.³¹ After the Classification Board provides written notice to the ACMA of its classification, the ACMA must then give the Internet content host a written notice setting out the classification³² and if the Internet content is prohibited content, issue a final take-down notice; an interim service-cessation notice, or a final link-deletion notice.³³

It is not an offence for a provider to host prohibited or potential prohibited content. However, providers must comply with all notices ‘as soon as practicable’, or by 6pm the following business day at the latest.³⁴ The failure of a provider to comply with a notice is an offence³⁵ and may also be subject to civil penalties.³⁶

III A FAILURE TO ADDRESS PORNOGRAPHY’S HARMS

Regrettably, the censorship approach adopted by Schedules 5 and 7 is inadequate for two reasons. Firstly, it is almost impossible to censor the internet. Secondly, and most significantly, a censorship approach does little to address the real harms women suffer due to pornography because it regards pornography’s harm to be the corruption of morals instead of real harm to women and to equality.³⁷

³¹ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 30(2)(a)(ii); Schedule 7, clause 47(2)(d); 56(2)(e), 62(2)(d) and 22.

³² *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 30(4)(a); Schedule 7, clause 47(4)(a), 56(4)(a), and 62(4)(a).

³³ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 30(4)(b); Schedule 7, clause 47(4)(b); 56(4)(b), and 62(4)(b).

³⁴ *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 53(1) and (2), 60(1) and (2), 68(1) and (2).

³⁵ *Broadcasting Services Act 1992* (Cth), Schedule 5, clause 86, Schedule 7, clause 106.

³⁶ *Broadcasting Services Act 1992* (Cth), Schedule 7, clause 107.

³⁷ Catharine A MacKinnon, ‘Not a Moral Issue’ in Drucilla Cornell, (ed) *Feminism and Pornography* (Oxford University Press, 2000), 170:

Leaving aside the fact that censorship has traditionally been used to censor women's speech including legitimate forms of sexual expression, and information about topics such as contraception,³⁸ at a basic level, the internet is a vast network of information (including pornography) which is simply too voluminous for censorship to have an impact on.³⁹ Even if the Act did have an impact on the hosting of internet pornography in Australia, there is still a vast network of pornography hosted overseas which can be readily viewed from Australia.

Obscenity law is concerned with morality, specifically morals from the male point of view, meaning the standpoint of male dominance. The feminist critique of pornography is politics, specifically politics from women's point of view meaning the standpoint of the subordination of women to men. Morality here means good and evil; politics means power and powerlessness. Obscenity is a moral idea; pornography is a political practice. Obscenity is abstract; pornography is concrete. The two concepts represent two entirely different things.

MacKinnon refers to 'obscenity' in this quotation. 'Obscenity' has its origins in the criminal law and concerns the suppression of materials which are deemed to be indecent or obscene in accordance with prevailing community standards.

'Censorship' is a subset of obscenity which usually does not involve the criminal law but which, like obscenity, involves the classification of materials in accordance with their level of offensiveness with reference to prevailing community standards. Both censorship and obscenity involve the suppression of materials deemed to be harmful to both the individual and society's moral fibre.

See also Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989), 196.

³⁸ See generally Varda Burstyn (ed) *Women Against Censorship* (Douglas & McIntyre, 1985).

³⁹ See Annabel Butler, 'Regulation of Content of On-Line Information Services – Can Technology Itself Solve the Problem it has Created?' (1996) *University of New South Wales Law Journal* 19(2), 193 at 209:

The sheer volume of internet material, its transient nature and the rapidity of transmission make inspection of content almost impossible. The internet has doubled in size every nine months for the last ten years and currently has over 50 million participants. The quantity of information that passes through the internet every day cannot be visually scanned. Each day, over a million web pages appear, disappear or are subject to change.

In fact, the Act may even encourage Australian pornographers to move content that would contravene it overseas.⁴⁰ Even if a complaint is made to an overseas law enforcement agency, little could be done unless the pornography is unlawful in that country such as being child pornography. Also, if the ACMA issues a take-down notice directing an Internet service provider not to host specified pornography, there is nothing to stop a pornographer making the same pornography available through a different Internet service provider or web page.

Secondly, and most significantly, the censorship approach adopted by the Act fails to take into account address ‘what pornography really is’⁴¹ and what pornography *does*. That is, it fails to address the real harms of pornography to women that have been well documented by scientists, and have been recognised by courts and tribunals internationally. Instead, a censorship approach regards pornography as having the potential to harm the moral fibre of men, who may be depraved or corrupted by the sight of women’s naked bodies.⁴² Consequently, censorship serves to promote pornography by making it more ‘sexy’ and appealing because the viewer believes they are accessing something that is forbidden.⁴³

⁴⁰ Peter Chen, ‘Pornography, Protection, Prevarication: The Politics of Internet Censorship’ (2000) *University of New South Wales Law Journal*, 23(1) 221, 222. See also, Steven Siegloff Clark, ‘The Broadcasting Services and Online Services Act 1992 (Cth)’ (1999) *Flinders Journal of Law Reform*, 3(2) 299, 308.

⁴¹ Testimony of Jaye Morra at the Massachusetts Hearings quoted in Catharine A MacKinnon and Andrea Dworkin, *In Harm’s Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997), 414. Jaye Morra used the phrase, ‘what pornography really is’ in her testimony.

⁴² Catharine A MacKinnon, ‘Pornography’s Empire’ in *Are Women Human? And Other International Dialogues* (The Belknap Press of Harvard University Press, 2006), 112-113.

⁴³ Catharine A MacKinnon, ‘Not a Moral Issue’ in Drucilla Cornell (ed) *Feminism and Pornography* (Oxford University Press, 2000), 184-185.

Pornography's real harms have been attested to by many men, women and children who have suffered abuse at the hands of pornographers and those who use it. This evidence reveals that the pornography is 'not a moral issue'.⁴⁴ Rather, it is an issue of actual physical and psychological harm to the women who are forced to perform in it, and who are raped, assaulted, abused, discriminated against and insulted because of it.⁴⁵

Scientific studies support the link between pornography and harm, in particular, where exposure to pornography has led to misogynistic and sexually callous attitudes toward women.⁴⁶ There is also recent Australian evidence of harm whereby the consumption of pornography in isolated aboriginal communities led to extensive sexual abuse of children in those communities.⁴⁷

There has also been judicial recognition of the harm pornography causes, in the form of sexually violent behaviour that results from the viewing of

⁴⁴ Catharine A MacKinnon, 'Not a Moral Issue' in Cornell, Drucilla (ed) *Feminism and Pornography* (Oxford University Press, 2000), 170. See also MacKinnon, Catharine A, *Toward a Feminist Theory of the State* (Harvard University Press, 1989), 196.

⁴⁵ See Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997). See also, Linda Lovelace, *Ordeal* (Citadel Press, 1980) and Gloria Steinem, 'The Real Linda Lovelace' in Diana E.H. Russell, (ed), *Making Violence Sexy: Feminist Views on Pornography* (Teachers College Press, 1993), 23. For a detailed discussion of the ways in which pornography harms, see, Catharine A MacKinnon, *Sex Equality* (Foundation Press, 2001), 1532-1562.

⁴⁶ Some of this research is summarized in Edna F Einsiedel, 'The Experimental Research Evidence: Effects of Pornography on the 'Average Individual'' in Catherine Itzin (ed) *Pornography Women Violence and Civil Liberties A Radical New View* (Oxford University Press, 1992), 265-266.

⁴⁷ *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'* Report of the Northern Territory Board of Enquiry into the Protection of Aboriginal Children from Sexual Abuse (30 April 2007), 199; See also *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 333 per French CJ.

pornography. In *R v Butler* the Canadian Supreme Court noted, ‘...the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence.’⁴⁸

As identified by MacKinnon and Dworkin, pornography is also an issue of inequality in which patriarchy is affirmed by the gender constructs created in it.⁴⁹ Pornography’s role in maintaining inequality between men and women was recognised in the United States case of *American Booksellers Association Inc v Hudnut*⁵⁰ where Judge Easterbrook recognized that, ‘Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets...’⁵¹ Similar statements can be found in the Canadian Supreme Court case of *R v Butler* mentioned above.⁵²

⁴⁸ *Attorney General’s Commission on Pornography Final Report* (US, 1986), Vol 1, page 326 (‘Meese Commission Report’) cited in *R v Butler* (1992) 1 SCR 452, 502 (Sopinka J).

⁴⁹ See generally, Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights A New Day for Women’s Equality* (Organizing Against Pornography: 1988). See also Ann Russo, ‘Feminists Confront Pornography’s Subordinating Practices: Politics and Strategies for Change’ in Gail Dines, Robert Jensen and Ann Russo, *Pornography: The Production and Consumption of Inequality* (Routledge, 1998), 9.

⁵⁰ *American Booksellers Association Inc v Hudnut* 771 F.2d 323 [7th Cir. 1985], cited in Catharine A MacKinnon and Andrea Dworkin, *In Harm’s Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997), 465.

⁵¹ *American Booksellers Association Inc v Hudnut* 771 F.2d 323 [7th Cir. 1985], cited in Catharine A MacKinnon and Andrea Dworkin, *In Harm’s Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997), 465, 472.

⁵² See, for example *R v Butler* (1992) 1 SCR 452, 496-497 (Sopinka J).

It was Catharine MacKinnon and Andrea Dworkin who first identified the link between pornography and inequality, in which pornography creates a hierarchy in which men are shown as superior and dominant and women are inferior, submissive and objectified. Dworkin stated that, in pornography we see, 'the active subordination of women: the creation of a sexual dynamic in which the putting down of women, the suppression of women, and ultimately the brutalization of women is what sex is taken to be...'⁵³ This subordination of women in a sexual context is carried through to negative social perceptions about women.⁵⁴

There is also a substantial body of evidence about the role of pornography as an instruction manual for rape and sexual abuse in the home.⁵⁵ Rapists

⁵³ Dworkin, Andrea, 'Against the Male Flood: Censorship, Pornography and Equality' (1985) 8 *Harvard Women's Law Journal*, 1, 9.

⁵⁴ Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989), 197:

Pornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality. In this perspective, pornography, with the rape and prostitution in which it participates, institutionalizes the sexuality of male supremacy which fuses the erotization of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constructs the meaning of that sexuality. Men treat women as whom they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way.

Same sex pornography also perpetuates inequality. For a detailed discussion, see Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (UBC Press, 2004), 108. Kendall asserts that rather than being a source of liberation and a positive affirmation of gay male identity, gay male pornography can be as harmful as heterosexual pornography because it celebrates and sexualizes inequality by mimicking the hierarchies seen in heterosexual pornography. See also, Christopher N Kendall, 'The Harms of Gay Male Pornography: A Sex Equality Perspective' in David E Guinn and Julie DiCaro (eds) *Pornography: Driving the Demand in International Sex Trafficking* (Captive Daughters Media, 2007), 153.

⁵⁵ See Generally, Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997). See also Testimony of RMM at the Minneapolis Hearings quoted in Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997), 113-114:

have also been inspired by, and have used violent pornography as a manual for abduction and rape.⁵⁶ Women have also suffered substantial psychological harm and detriment as a result of having pornography forced upon them in male dominated workplaces. This is often accompanied by derogatory comments and verbal threats and intimidation⁵⁷, increased workload, stress and denial of opportunities for training and advancement⁵⁸, and was part of a series of events leading to rape by a co-worker⁵⁹.

IV WHAT SHOULD AUSTRALIA BE DOING?

Australia should take internet pornography seriously by adopting the civil rights ordinance drafted by MacKinnon and Dworkin. In fact, Mackinnon herself has noted that the ordinance would be ‘well suited’ to address the harms of internet pornography.⁶⁰ The ordinance could be incorporated into

He would read from the pornography like a text book. In fact, when he asked me to be bound, when he finally convinced me to do it, he read in the magazine how to tie the knots, and how to bind me in a way that I couldn't get out. And most of the scenes that we – most of the scenes where I had to dress up or go through different fantasies – were the exact scenes he had read in the magazines.

⁵⁶ *State v Herberg* 324 N.W.2d 346, 347 (Minn. 1982) discussed in Pacillo, Edith L. ‘Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography’ (1994) 28 *Suffolk University Law Review* 123, 123. For a discussion of pornography as a cause of rape, see Diana E.H. Russell, *Dangerous Relationships: Pornography, Misogyny and Rape* (Sage Publications, 1998), 113-151.

⁵⁷ See for example, *Horne & Anor v Press Clough Joint Venture & Anor* (1994) EOC 92-556. See also *Ueckert v Australian Water Technologies Pty Ltd* (2000) EOC 93-104.

⁵⁸ *Thompson v Courier Newspaper Pty Ltd* (2005) EOC 93-382.

⁵⁹ *Lee v Smith v Ors* (2007) EOC 93-456 and *Lee v Smith & Ors (No 2)* (2007) EOC 93-465.

⁶⁰ Catharine A MacKinnon, ‘Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace’ [1995] 83 *Georgetown Law Journal*, 1959, 1966.

Schedules 5 and 7, and could also be inserted into existing sex discrimination legislation.⁶¹

The ordinance is 'up front' about pornography's harms and directly lists them in a 'Statement of Policy'. This states that 'pornography is a practice of sex discrimination'⁶² and identifies pornography as 'a systemic practice of exploitation and subordination based on sex that differentially harms and disadvantages women.'⁶³ It also lists, in some detail, more specific physical harms caused by pornography⁶⁴ including rape and sexual abuse, as well as psychological harm. In doing so, the ordinance affirms that pornography's harms are specific harms to women in the form of sexual inequality, harassment, rape, sexual assault and discrimination to name a few.

The ordinance directly addresses pornography's harms by empowering those harmed in or by the production and distribution of pornography by allowing them sue the makers and distributors of pornography, to obtain damages, and to obtain injunctive relief to stop pornography being sold, exhibited and distributed.⁶⁵ MacKinnon and Dworkin made a deliberate decision to draft the ordinance from a civil rights perspective in order to

⁶¹ For a detailed analysis of Australia's existing sex discrimination legislation and of how the ordinance can better address the harms of pornography, see Michelle Evans, 'Pornography and Australia's Sex Discrimination Legislation: A Call for a More Effective Approach to the Regulation of Sexual Inequality' (2006) 8 *University of Notre Dame Law Review*, 81.

⁶² Ordinance, section 1, clause 1.

⁶³ Ordinance, section 1, clause 2.

⁶⁴ Ibid.

⁶⁵ Catharine A MacKinnon, 'Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace' [1995] 83 *Georgetown Law Journal*, 1959, 1966; Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997), 4.

take the power of enforcement away from police and prosecutors, and into the hands of women harmed.⁶⁶ In addition, the range of damages available under the ordinance – including compensatory and punitive damages⁶⁷ – impacts on pornographers financially, hence directly impacting their motivation to abuse and exploit.⁶⁸

Under the ordinance a woman has a cause of action if she is coerced into performing in pornography; has pornography forced on her (for example in the workplace by a work colleague); is assaulted or attacked due to pornography; or if she is defamed through pornography⁶⁹ (for example using a person's likeness in pornography to humiliate or ridicule them). The ordinance also makes it sex discrimination to sell, exhibit or distribute pornography.⁷⁰ This allows any woman to bring a complaint against pornographers and those who profit from pornography for harm to women as a class.⁷¹

⁶⁶ Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Organizing Against Pornography, 1988), 54.

⁶⁷ Ordinance, section 5(2).

⁶⁸ Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Organizing Against Pornography, 1988), 55. See also, Gail Dines, 'The Big Business of Pornography' in David E Guinn and Julie DiCaro (eds) *Pornography: Driving the Demand in International Sex Trafficking* (Captive Daughters Media: 2007), 89.

⁶⁹ Ordinance, section 3.

⁷⁰ Ibid.

⁷¹ Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Organizing Against Pornography, 1988), 45.

V JURISDICTIONAL ISSUES

There are of course challenges in applying this ordinance to the internet. The international nature of the internet raises jurisdictional issues as to whether a cause of action under the ordinance is within the jurisdiction of the Australian courts. However, jurisdictional problems are avoided where both the victim and perpetrator are located in Australia, regardless of where the internet pornography is made or uploaded. For example, if in Australia, a co-worker forces internet pornography on another co-worker; if a perpetrator rapes as a consequence of viewing internet pornography; or if a woman is forced to perform in pornography, she can sue the makers of that pornography and can apply for injunctive relief to prevent the pornography continuing to be available via the internet.

Difficulties arise when an Australian victim seeks to sue the makers, sellers or distributors of pornography who may be located overseas. However, in the case of *Dow Jones & Company Inc v Gutnick*⁷² a plaintiff was successful in suing for internet defamation in the State of Victoria where his reputation was harmed, even though the material defaming him was uploaded in the United States. This case could be followed with respect to the defamation through pornography cause of action under the ordinance. Hence, a woman could bring a defamation claim in Australia where pornography using her likeness was viewed, even if the pornography was uploaded and hosted outside of Australia.

⁷²*Dow Jones & Company Inc v Gutnick* (2000) 210 CLR 575.

If Australia adopted the ordinance it could also negotiate agreements with other countries with respect to jurisdiction. Due to the international expanse of the internet this would be a challenging undertaking. However, international co-operation, with respect to illegal internet content, has been achieved before through the INHOPE Association ('INHOPE'). INHOPE's mission includes the establishment of internet hotlines around the world so that urgent action can be taken to report and prevent illegal activity on the internet, such as the trading of child pornography and publication of racist hate material. There is an international membership of INHOPE including governments and law enforcement agencies, the ACMA and other members from the internet industry around the world. Members co-operate to target illegal content and meet regularly to 'share knowledge and best practice'.⁷³ In light of this, an agreement between these members with respect to jurisdiction under the ordinance is not as far-fetched as it would at first appear.

VI CONCLUSION

MacKinnon once noted that pornography on the internet raises the same issues 'as pornography poses everywhere else: whether anything will be done about it.'⁷⁴ However, it is imperative that something *must* be done about it. The ordinance must be adopted in Australia because it directly addresses pornography's harms and empowers women to fight back against the pornography industry and the inequality that it perpetuates. Whilst there

⁷³ INHOPE Web page, 'About INHOPE' located at <www.inhope.org/en/about/about.html> accessed 30 December 2010.

⁷⁴ Catharine A MacKinnon, 'Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace' [1995] 83 *The Georgetown Law Journal*, 1959, 1967.

are some difficulties in applying the ordinance to the internet, unless and until the ordinance is adopted, women will remain disempowered. Until the ordinance is adopted, the pornography industry will continue to flourish from the trade of objectification, abuse and suffering of women; women used in pornography will continue to be silenced and objectified, having no voice to speak out, and no ability to hurt their abusers back; and the harmful effects of pornography to women's equality will remain largely hidden. Andrea Dworkin once said of the ordinance:

This law educates. It also allows women to do something. In hurting the pornography back, we gain ground in making equality more likely, more possible – some day it will be real. We have a means to fight the pornographers trade in women. We have a means to get at the torture and the terror. We have a means with which to challenge the pornography's efficacy in making exploitation and inferiority the bedrock of women's social status. The civil rights law introduces into the public consciousness an analysis: of what pornography is, what sexual subordination is, what equality might be...The civil rights law gives us back what the pornographers have taken from us: hope rooted in real possibility.⁷⁵

⁷⁵ Dworkin, Andrea, 'Against the Male Flood: Censorship, Pornography and Equality' in Drucilla Cornell (ed), *Feminism and Pornography* (Oxford University Press, 2000), 38.

**INTERNATIONAL ARBITRATION AMENDMENT ACT 2010
(Cth) - TOWARDS A NEW BRAND OF AUSTRALIAN
INTERNATIONAL ARBITRATION**

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Abstract

On 6 July 2010, the *International Arbitration Amendment Act 2010 (Cth)*,¹ amending the *International Arbitration Act 1974 (Cth)*,² came into force in Australia after receiving Royal Assent. The Amending Act introduces and implements important reform in relation to Australia's international arbitration regulatory framework. These reforms will impact on parties involved in cross-border construction disputes who choose to have their disputes resolved in Australia, or who choose to enforce a foreign arbitral award in Australia. This paper examines the significant features of the Amending Act and summarizes the key changes that it implements in the area of international arbitration practice and procedure in Australia. Part I canvasses the background and scope of the review of the IAA and Amending Act. Part II addresses the key amendments with respect to the enforcement of foreign arbitral awards. Part III discusses the incorporation

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¹ The *International Arbitration Amendment Act 2010 (Cth)* is referred to as 'the Amending Act' throughout this paper.

² The *International Arbitration Act 1974 (Cth)* is referred to as 'the IAA' throughout this paper.

of the UNCITRAL Model Law on International Arbitration (as amended in 2006)³ and the practical effect that this will have on international arbitral disputes governed by the IAA (as amended). Lastly, the paper considers in Part IV the salient features of the ‘opt-in’ and ‘opt-out’ regime introduced by the Amending Act and the increased powers available to arbitrators under the new regime.

I INTRODUCTION

The growing importance of arbitration as a means for resolving construction disputes has resulted from the many of the perceived advantages of arbitration over traditional litigation in the courts. The perceived benefits relate to such matters as confidentiality, privacy, expertise of arbitrators, reduced costs, speedier final resolution, flexibility, preservation of continuing business relationships and avoidance of crowded court lists. Some of these perceived benefits are more illusory than real, but the point remains that arbitration is a viable and at times a more effective and more efficient alternative for resolving disputes than traditional litigation through the courts.

It is generally recognised that the best feature and most prominent advantage of arbitration over traditional court litigation can be found in the context of cross-border disputes. This is particularly so in the context of enforceability, where by reason of the New York Convention which has been signed by 144 State members, a party who receives a favourable arbitral award can, with much greater ease and effectiveness, enforce that

³ The *UNCITRAL Model Law on International Arbitration (as amended in 2006)* is referred to as the Model Law (2006) or the ‘2006 Model Law’ throughout this paper.

award in any one of the Convention countries. There is simply no parallel regime (in terms of global application) to enforce a judgment obtained in a State court of one country in other countries. In the context of cross-border construction transactions, between parties who ordinarily reside in different countries, it is imperative that they include in their contract an agreement to arbitrate any disputes arising out of or under their contract so as to provide an effective means for enforcing any award obtained following the dispute resolution process. If the parties do not have an arbitration clause in their contract, there is a real, and not insignificant, risk that a party who obtains a favourable judgment may not be able to enforce it against the other contracting party who has its assets in a different jurisdiction.

International arbitration is, in many respects, a self-contained market which operates within a wider industry of dispute resolution services available to parties involved in cross-border transactions who fall into dispute. And within the market of international arbitration, there are institutional bodies and countries vying for position to convince parties to use their particular brand of international arbitration dispute resolution services. In fact, it has been noted recently that with the goal of becoming more competitive in this market, several international arbitration institutions operating within our region, such as the Singapore International Arbitration Centre and the Australian Centre for International Commercial Arbitration, have recently modified their rules, administrative process, fee structure and have established impressive new facilities to encourage parties to resolve their disputes in those particular regions.⁴

⁴ Stephen McCormish, 'New Dawn for International Arbitration', *Lawyers Weekly*, 2 September 2010.

The amendments introduced by the Amending Act are also an integral part of a broader movement to establish Australia's place as a preferred forum for international arbitration. Whilst Australia will always have to contend with its tyranny of distance from other countries, in order to maximize the attractiveness of Australia as a forum for international arbitration, it was necessary for Australia to reform its regulatory framework. This was, in part, due to several decisions of the courts (which are discussed in this paper) which introduced some uncertainty into the application of the regulatory framework which existed prior to the Amending Act and which generally had the effect of working against Australia promoting itself as a venue of choice for parties to resolve their disputes. This is important for parties who are involved in cross-border transactions of all types, including those in the construction industry, as the choice of venue and regulatory regime which governs arbitration proceedings can make a real and significant difference to the effectiveness and efficiency of the arbitral process.

Significantly, the Amending Act gives the force of law to most of the key provisions of the Model Law (2006). Following the enactment of the Amending Act, Australia became one of only nine jurisdictions to adopt the Model Law (2006)⁵, thereby signalling to the broader arbitration community its intent to establish itself as a progressive venue for the resolution of international arbitral disputes with the view to remaining at the forefront of international developments. In itself, this represented a

⁵Those jurisdictions are Australia (2010), Georgia (2009), Ireland (2010), Mauritius (2008), New Zealand (2007), Peru (2008), Rwanda (2008), Slovenia (2008) and Florida (2010).

significant step towards improving the certainty, efficiency and cost-effectiveness of international arbitration in Australia.

At the same time, it will take time before the full benefit and utility of the amendments to the regulatory framework manifest themselves at a practical level as parties, arbitrators and the courts alike deal with the practical effect of the amending provisions for the first time. Nevertheless, on their face, the amendments to the IAA, together with a judiciary that is supportive of arbitration, have the potential to dramatically improve the Australian international arbitration landscape.

PART I - BACKGROUND AND SCOPE OF THE AMENDING ACT

On 21 November 2008, the Attorney-General, Robert McClelland, announced a wide ranging review of the IAA and released a discussion paper⁶ as the basis for stimulating debate and framing consultation on potential amendments to be made to the IAA. A webpage was created on the Attorney-General's website outlining the scope of the review and, ultimately, links to 30 submissions and comments made by various interested organisations, practitioners, Judges, barristers and academics were established to provide transparency and promote discussion on which proposed amendments ought to be adopted⁷ The discussion paper outlined the following three objectives in amending the IAA, being to:

⁶Attorney-General's Department, *Review of the International Arbitration Act 1974*, Discussion Paper, November 2008 ('Discussion Paper').

⁷See Attorney General's Department, *Review of International Arbitration Act 1974*, (2008) <<http://www.ag.gov.au/internationalarbitration>>.

- (i) ensure it provides a comprehensive and clear framework governing international arbitration in Australia;
- (ii) improve the effectiveness and efficiency of the arbitral process while respecting the fundamental consensual basis of arbitration; and
- (iii) consider whether to adopt ‘best-practice’ developments in national arbitral law from overseas.⁸

In addition to these objectives, the review also cited the aim of ensuring that the IAA ‘best supports international arbitration in Australia’.⁹ The Attorney-General also issued a media release on 21 November 2008 outlining the impetus for the review of the IAA. The Attorney-General cited the need to ensure that the IAA provides a ‘clear and comprehensive framework governing international arbitration in Australia’ and that the Australian Government’s aim was ‘to adopt international best-practice developments in arbitral law’.¹⁰ Behind these stated reasons for the review were a number of problematic decisions by the Australian courts, including *Australian Granites Limited v Eisenwerk*¹¹, *Resort Condominiums International Inc v Bolwell and Another*¹² and *American Diagnostica Inc v Gradipore*¹³, which had created uncertainty in the law.¹⁴

Further, given that the Model Law was amended in 2006, it was necessary to update the IAA to reflect those amendments. Importantly, the Attorney-General also highlighted the Australian Government’s commitment to

⁸Discussion Paper, above n 6, 2.

⁹Ibid [4].

¹⁰Attorney-General’s Department, ‘Australian Government Moves to Modernise International Arbitration’ (Press Release, 21 November 2008).

¹¹[2001] 1 Qd R 461 (‘*Eisenwerk*’).

¹²[1995] 1 Qd R 406.

¹³(1998) 44 NSWLR 312.

¹⁴See also Juli Tomaras, *International Arbitration Amendment Bill 2009*, No. 163, 1 June 2010, 5.

‘developing Australia as a regional hub for international commercial dispute resolution’, noting the importance of Australia’s participation in the ‘dramatic growth of international commercial arbitration in recent years, particularly in the Asia-Pacific region’.¹⁵ This movement toward Australia becoming a regional hub for international arbitration was recently reaffirmed by the Attorney-General when he stated at the launch of the Australian International Disputes Centre in Sydney that he saw ‘a vibrant international arbitration culture as a vital tool for Australian business in the modern, global economy’. He further stated that a key component of building that culture would be to promote an “Australian brand of arbitration” — one that genuinely meets the needs of the parties ... [by] doing away with unnecessary formalities and get[ting] on with identifying and solving the real dispute in issue... arbitration [which] delivers swift and cost-competitive outcomes.’¹⁶

With these objectives in mind, the review of the IAA covered the following areas:¹⁷

- the meaning of the writing requirement for an arbitration agreement and whether it should be amended to reflect the broader, updated definition in the Model Law;
- the removal of the Australian courts’ residual discretion to refuse to enforce awards, reversing the potential effect of *Resort Condominiums*;

¹⁵ Above, n 10.

¹⁶ Attorney-General Robert McClelland, ‘Remarks at the Launch of the Australian International Disputes Centre’ (Speech delivered in Sydney on Wednesday, 3 March 2010).

¹⁷ See generally, Discussion Paper, above n 6.

- the exclusion of the application of State and Territory laws to international commercial arbitrations taking place in Australia - reversing *Gradipore*;
- the reversal of the *Eisenwerk* decision such that adoption by the parties of a set of institutional arbitral rules would not result in an implied opting out of the Model Law;
- the clarification of drafting inconsistencies in relation to the opt-in provisions of the IAA;
- the adoption of the 2006 amendments to the Model Law;
- clarification of whether the courts or other authority should exercise various functions under the Model Law, such as those in relation to the appointment and challenges to arbitral tribunals;
- whether the Federal Court should be given exclusive jurisdiction over all matters arising under the IAA;
- some other recommendations for improving the IAA.

Almost a year after consultation and consideration of the various submissions and relevant case law, journal articles and overseas arbitral practice, the International Arbitration Amendment Bill 2009 (Cth) was read for the first time in the House of Representatives on 25 November 2009.¹⁸ International arbitration practitioners reviewed the 2009 Bill and provided further submissions to the Government seeking amendments to the Bill clarifying and adding certain measures. In particular, clarification was sought in relation to the application of the 'opt-in' regime under the IAA and new provisions were proposed concerning security for costs, additional powers for arbitral tribunals to obtain and consider evidence, and the

¹⁸International Arbitration Amendment Bill 2009 (Cth).

immunity from liability for entities charged with appointing arbitrators.¹⁹ The Government adopted some of the proposed amendments and circulated a Schedule of Amendments. The International Arbitration Act Amendment Bill 2010 (Cth) was passed by the Houses of Representatives on 13 May 2010 and the Senate on 17 June 2010. The Amending Act was then given Royal Assent and commenced operation on 6 July 2010.²⁰

The amendments to the Act can generally be divided into the following four categories:²¹

- a) Amendments to the application of the Act and the Model Law.
- b) Amendments concerning the interpretation of the Act.
- c) Amendments to provide additional option provisions to assist a party to a dispute.
- d) Miscellaneous amendments to improve the operation of the Act.

Before exploring in detail some of the more specific amendments to the IAA implemented by the Amending Act, it is important to highlight the addition of a new ‘Objects’ section to the IAA under section 2D. The new section 2D reads as follows:

The objects of this Act are:

¹⁹ Supplementary Explanatory Memorandum, *International Arbitration Amendment Bill 2009* (Cth).

²⁰ It should be noted that Items 6, 8 and 25 of Schedule 1 commenced on 7 December 2009, being the commencement date of the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth).

²¹ As set out in the Outline to the Revised Explanatory Memorandum, *International Arbitration Amendment Bill 2010* (Cth), incorporating the Amendments made by the House of Representatives to the Bill as Introduced (‘Revised Explanatory Memorandum’).

- (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
- (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
- (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
- (d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and
- (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
- (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

The new section 2D should be read with the addition of section 39 to the IAA, which details the matters that courts must have regard to when interpreting and exercising various functions and powers under the IAA, such as in relation to the enforcement or setting aside of arbitral awards. More specifically, section 39(2)(a) requires courts to have regard to the objects of the IAA. As the Explanatory Memorandum makes clear, these objects were inserted into the IAA principally to further the primary purpose of the IAA, namely, to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes.²² Moreover, it is apparent that these objects are designed to ensure that Australian courts take a more 'facilitative', and arguably a more 'pro-

²²Ibid [4]-[7].

international arbitration’, approach, in the sense of being more willing to enforce foreign awards (and less willing to set aside awards made within Australia) and paying due regard to and giving effect to the various international instruments regulating the field.

PART II - ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

A *New Federal Court jurisdiction*

A key area of focus by Parliament in the Amending Act was that of the enforcement of foreign arbitral awards. It is not surprising that this area of the IAA should receive such attention as an important distinguishing feature and strength of arbitration compared to other international dispute resolution processes, including litigation, is that it is generally easier and more effective to enforce arbitral awards than judgments internationally. Overall, a clear intention to facilitate and ‘streamline’ arbitral enforcement mechanisms can be deduced from the Amending Act. This intention is particularly evident in how the various enforcement-related amendments are designed to increase certainty in the law principally by limiting and, in some cases, removing the courts’ discretion to refuse to enforce foreign arbitral awards.

A key issue addressed by the Amending Act, is the jurisdictional uncertainty in Australia in respect of the application of the IAA and the States’ and Territories’ Commercial Arbitration Acts²³ to the enforcement

²³*Commercial Arbitration Act 2010 (NSW)* (replacing the *Commercial Arbitration Act 1984 (NSW)*; *Commercial Arbitration Act 1984 (Vic)*; *Commercial Arbitration Act 1990 (Qld)*; *Commercial Arbitration Act 1986 (SA)*; *Commercial Arbitration Act 1985*

of international arbitral awards. For example, in *Brali v Hyundai Corp*²⁴, the NSW Supreme Court held that a foreign award gives rise to a cause of action under State law thereby conferring jurisdiction on the State court to enforce the arbitral award.²⁵ Further, the prospect of having a number of different State and Territory Supreme Courts continuing to interpret the same legislative framework gave rise to some concern of inconsistent findings across different jurisdictions within Australia, which, if correct, would do little to enhance Australia's reputation in the international community.

In an attempt to address these concerns, the Government suggested in its 2008 Discussion Paper that the Federal Court of Australia should be given exclusive jurisdiction for all matters arising under the IAA. Indeed, the Attorney-General noted at the time that 'one advantage of such a move... may be the development of a more uniform body of jurisprudence in applying the IAA.'²⁶ This suggestion received staunch criticism from the Chief Justices of the State and Territories Supreme Courts who argued that '[n]othing is more calculated to undermine this sense of [judicial] collegiality or the prospect of a national judiciary than this kind of

(WA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1986* (ACT); and *Commercial Arbitration Act 1985* (ACT).

²⁴(1988) 15 NSWLR 734.

²⁵*Ibid* 743.

²⁶ Attorney-General Robert McClelland, 'Simply resolving disputes, International Commercial Arbitration Conference: Making it Work for Business', (Speech delivered at Hotel Intercontinental, Friday, 21 November 2008).

suggestion’.²⁷ The Chief Justices also disputed the existence of any lack of consistency between the courts.²⁸

Perhaps, because of this criticism, but more likely because of the political complexities involved, instead of being conferred with exclusive jurisdiction, the Federal Court was conferred with *concurrent* jurisdiction over IAA matters together with the State and Territory Supreme Courts.²⁹ This is reflected in section 8(3) of the IAA, which provides that ‘a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.’ An earlier version of the Bill suggested there might be an additional leave requirement to be sought from the Court. This requirement had the potential to create an additional hurdle to enforcing a foreign award by conferring a broad catch-all discretion upon courts to refuse enforcement.³⁰ Lobby groups were successful in persuading the Government to amend the Bill to remove the requirement for leave.

There can be little doubt that the conferral of jurisdiction on the Federal Court over IAA matters ought to result in increased efficiency in relation to the enforcement of arbitral agreements and awards in Australia and is a welcome change. However, the precise impact of the introduction of the

²⁷ Chief Justices of the States and Territories, Submission to Attorney-General’s Department, *Review of the International Arbitration Act 1974 (Cth)*, 10 December 2008, 1.

²⁸ Ibid.

²⁹ Concurrent jurisdiction over IAA matters was conferred on the Federal Court by the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2008 (Cth)*, Sch 2.

³⁰ See The Honourable Justice Clyde Croft, ‘Arbitration Law Reform and the Arbitration List G of the Supreme Court of Victoria’ (Paper presented at BDPS discussion night, 5 May 2010), 10.

Federal Court into the framework regulating arbitration agreements and awards in Australia, both from a jurisprudential standpoint as well as at a practical level, remains to be seen. In particular, it remains to be seen to what extent the arbitration community embraces the Federal Court as their venue of choice when court assistance is sought.

It is hoped that the creation of new specialist arbitration lists, such as the recently established List G of the Supreme Court of Victoria will also enhance the quality, certainty, efficiency and cost-effectiveness of arbitral enforcement proceedings in Australia and may do so as much as, or even possibly more than, the simple conferral of jurisdiction on the Federal Court. This seems plausible not least because allocating Judges with international arbitration expertise to these new lists creates a more targeted approach to handling litigation in relation to arbitrations. As His Honour Justice Croft, the Judge in charge of Arbitration List G of the Supreme Court of Victoria, recently opined, '[o]ne of the benefits of the Arbitration List is that a consistent body of arbitration related decisions will be developed by a single judge or group of judges. This should provide parties with greater certainty when judicial intervention or support is required.'³¹ Moreover, from this point of view, consistency in decision making, facilitated through the creation of dedicated arbitration lists, whether in the Supreme or Federal Courts, is as essential to improving the attractiveness of Australia as a forum for international arbitration as is the conferral of jurisdiction on the Federal Court.

³¹Ibid 24.

However, there does remain a residual concern that a single port of call has not been established for international arbitration matters which come before the courts, and the success of the reforms made under the Amending Act will depend, in part, on the judicial approach adopted. For example, with the introduction of specialist lists not only for arbitration matters but also other disciplines throughout Australia, it remains to be seen how the courts will deal with an arbitration related issue which manifests itself in a matter, which otherwise, would be dealt with in a different list due to the subject matter which forms the substance of the overall dispute.

B *Interplay of IAA and State Commercial Arbitration Acts*

A further area of uncertainty in Australia's arbitral award enforcement regime targeted by the Amending Act was in relation to the previous section 8(2) of the IAA which provided that 'a foreign award may be enforced in a court of a State or Territory as if the award had been made in that State or Territory *in accordance with the law of that State or Territory*' (emphasis added). This provision had been interpreted by the courts to mean that an application for enforcement of a foreign award had to be made having regard to the applicable State or Territory legislation rather than under the IAA.³² Stakeholders in the field have expressed concern that this interpretation potentially added to the grounds available for a court to refuse to enforce an award, in addition to those outlined under sections 8(5) and 8(7) of the IAA, as the uniform State and Territory legislation

³² See for example *Brali v Hyundai Corp* (1988) 15 NSWLR 734; *International Movie Group Inc and Anor v Palace Entertainment Corporation Pty Ltd* (Unreported, Supreme Court of Victoria, Mahony M, 7 July 1995).

gives the courts a wider discretion on which to refuse to enforce an award³³ Accordingly, by removing any reference to the law of a State or Territory in section 8(2), Parliament has moved to enhance the certainty of the law in this area by evincing a clear intention that courts should no longer apply the law of State and Territories in enforcing awards and may only refuse to enforce awards on the limited grounds listed in sections 8(5) and (7) of the IAA.³⁴

C Removal of residual discretion of a court to refuse enforcement

In addition to the above amendments relating to the grounds for refusing to enforce awards, the Amending Act also introduced section 8(3A) into the IAA which clarifies that a court may only refuse to enforce an award in the circumstances provided for in sections 8(5) and 8(7).³⁵ As the Revised Explanatory Memorandum notes, this amendment was required in response to judicial authority which held that the grounds under sections 8(5) and (7) were not exhaustive such that the courts retained a residual discretion to refuse to enforce foreign awards. In particular, the intent of the amendment was to legislate out of existence the effect of the decision in *Resort Condominiums Inc v Bolwell*³⁶ where the Queensland Supreme Court held that a court retains a discretion to refuse to enforce a foreign arbitral award even if none of the grounds in section 8 of the IAA are made out.

³³ See Revised Explanatory Memorandum, [24]-[25]; and ACICA, Submission to Attorney-General's Department, *Review of International Arbitration Act 1974 (Cth)*, 8.

³⁴ See also *International Arbitration Act 1974 (Cth)*, s 8(3A); and Revised Explanatory Memorandum, [26 and 40].

³⁵ See Revised Explanatory Memorandum, [36]-[42].

³⁶ *Resort Condominiums Inc v Bolwell* [1995] 1 Qd R 406.

The existence of a residual discretion by which courts could refuse to enforce awards potentially where none of the grounds contained in sections 8(5) and 8(7) had been made out introduced uncertainty into this area of the law and was inconsistent with the New York Convention, and, in so doing, arguably had a negative impact on Australia's reputation as an attractive forum for international arbitration. Accordingly, by effectively removing this residual discretion, this amendment to the IAA reduces the uncertainty of the law relating to the enforcement of foreign awards in Australia.

*D Amendments to public policy basis for refusing to enforce an
arbitral award*

Previously under the IAA, section 8(7) provided that a court may refuse to enforce an award where to enforce it would be contrary to public policy, implementing Article V(2)(b) of the New York Convention. However the expression 'public policy' as used in section 8(7) was not defined, thereby posing a threat to the proper functioning of the enforcement provisions of the IAA.³⁷ To address this, the Amending Act inserts section 8(7A) which provides as follows:

(7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:

- (a) the making of the award was induced or affected by fraud or corruption;
- or
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.

³⁷The Honourable Neil Brown QC and Sam Luttrell, Submission to Attorney-General's Department, *Review of the International Arbitration Act 1974 (Cth)*, 16 January 2009, 4.

The new section 8(7A)³⁸ provides guidance on when the enforcement of a foreign award would be ‘contrary to public policy’. By adding some definition to the ‘public policy’ ground for refusing to enforce an award, Australia is doing what it can to lead the way in the development of a clearer and more effective system for the enforcement of foreign arbitral awards.

PART III - IMPLEMENTATION OF THE 2006 AMENDMENTS TO THE MODEL LAW

A Model law now covers the field

Under the new section 21 of the IAA, parties are no longer able to exclude the operation of the Model Law. Prior to the amendment of section 21, it was possible for the parties to opt-out of the application of the Model Law by agreeing that any dispute between them would be settled otherwise than in accordance with the Model Law. The parties could, for example, choose to adopt an alternative law³⁹ to apply to an arbitral proceeding or simply agree that the Model Law will not apply. While this ability to tailor the governing law of arbitration was consistent with arbitration’s consensual underpinnings, it gave rise to a number of problems.

³⁸ It should be noted that the new section 8(7A) now replicates section 19 of the IAA, thereby ensuring a consistent interpretation of the expression ‘contrary to public policy’.

³⁹ For example, parties could expressly state in their arbitration agreement that the domestic *Commercial Arbitration Act* applies which would ultimately result in greater court supervision.

First, while the parties could choose to opt-out of the Model Law, other provisions of the IAA could continue to apply even though those provisions were reliant upon the Model Law.⁴⁰ Second, particular difficulties could arise if parties had agreed to exclude the Model Law but had not specified an alternative law to govern an arbitration.⁴¹ In such a case, a dispute between the parties will be further compounded by the need to decide what law will govern the arbitral proceedings. Finally, the unamended formulation of section 21 has given rise to problematic decisions such as *Eisenwerk*.⁴²

In *Eisenwerk*, the Queensland Court of Appeal held that if parties have chosen to adopt a set of institutional arbitral rules (in that case the ICC Rules) to govern an arbitration, then they had in that case evinced an intention to exclude the operation of the Model Law for the purposes of section 21 of the IAA.⁴³ Such an implied exclusion has the detrimental consequence of depriving a party of an avenue for recourse under the Model Law that ought properly be available to it. The *Eisenwerk* decision, it is submitted, is clearly wrong and has been subject to criticism for its failure to recognise that the Model Law can co-exist with alternative systems of arbitral rules.⁴⁴ We note with some concern that the Qld Court of Appeal recently had an opportunity to itself overrule *Eisenwerk* but declined to do so.⁴⁵

⁴⁰ Revised Explanatory Memorandum, [112].

⁴¹ Ibid.

⁴² *Eisenwerk* [2001] 1 Qd R 461.

⁴³ *Eisenwerk* [2001] 1 Qd R 461, 466.

⁴⁴ See Revised Explanatory Memorandum, [113]; Croft, above n 30, 8-9.

⁴⁵ *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219

To address these concerns, the Amending Act has revised section 21 of the IAA to provide simply that if the Model Law applies to an arbitration, the law of a State or Territory relating to the arbitration does not apply to that arbitration. The new section 21 is aptly headed ‘Model Law covers the field’ and the ability to opt-out of the Model Law’s application has noticeably been removed. This illustrates a clear Parliamentary intention to have the Model Law apply in all cases of international arbitration governed by the IAA. The amendment to section 21 also clarifies the position that if the Model Law applies, then any potentially applicable State or Territory laws (such as the state Commercial Arbitration Acts) have no residual application. Such a position makes clear, particularly to the courts, that the exclusive application of the IAA and the Model Law should not be undermined. The choice of an institutional set of procedural rules will now also not exclude the operation of the Model Law. This amendment to section 21 also settles the much vexed issue of whether State and Territory laws have any residual application in the context of international arbitration. It is now clear that no such residual application exists.

However there have been concerns expressed that the removal of the ability to opt-out of the Model Law has ‘undesirably compromise[d] party autonomy’.⁴⁶ The response to these concerns is contained in the Model Law itself. In particular, Article 19 of the Model Law preserves the ability of the parties to decide what procedural rules will govern an arbitration, and Article 28 contemplates the parties’ right to decide the law that will apply to the substance of their dispute. On its face, it does not seem possible for the Model Law to always ‘cover the field’ harmoniously in

⁴⁶ See Croft, above n 30, 9.

circumstances where the parties have chosen to adopt a set of rules for the procedural aspects of the arbitration. In such circumstances, there are two potentially conflicting sets of rules - the Model Law and the arbitral rules chosen to govern procedure. However by enacting the new section 21, Parliament must have intended for the Model Law to ‘co-exist’ with any alternative rules which the parties have nominated to govern the arbitration. In practice, we suggest that what this is likely to mean is that the nominated rules will apply, but in the event that the nominated rules do not provide for the particular issue in dispute, then the parties may have recourse to the Model Law. Such an interpretation arguably strikes a desirable balance between maintaining the autonomy of the parties on the one hand and ensuring that the Model Law covers the field in relation to international arbitration.

B *Implementation of the 2006 Amendments*

Part III of the IAA by incorporating the Model Law into Australian domestic law⁴⁷ includes the 2006 amendments to the Model Law⁴⁸ (save for the provisions relating to *ex parte* orders which do not apply). Although the original 1985 formulation of the Model Law played a significant role in assisting member states to reform and modernise their international arbitration laws, there was certainly room for improvement to make the Model Law more efficient and relevant in the face of an ever changing global economy.

⁴⁷*International Arbitration Act 1974* (Cth), s 16.

⁴⁸*International Arbitration Act 1974* (Cth), s 15(1) and Schedule 2.

Accordingly, on 7 July 2006 the Model Law was amended by UNCITRAL at its thirty-ninth session.⁴⁹ Broadly speaking, the 2006 revision to the Model Law consisted of the following amendments:

- the inclusion of a new Article 2A, which provides guidance when interpreting the Model Law;
- the relaxing of the writing requirement for an arbitration agreement in Article 7;
- the adoption of a new chapter IVA on interim measures and preliminary orders; and
- the inclusion of provisions relating to the challenge of an arbitral tribunal.

Each of these amendments is considered in greater detail in the following section.

C Article 2A - promoting a uniform interpretation of the Model Law

One of the amendments made to the Model Law in 2006 was the introduction of a new Article 2A, which reads as follows:

Article 2A. International origin and general principles

- (1) In the interpretation of the [Model Law], regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith.

⁴⁹ Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17).

- (2) Questions concerning matters governed by the [Model Law] which are not expressly settled in it are to be settled in conformity with the general principles on which the [Model Law] is based.

Article 2A is modelled on a similar provision in the United Nations Convention on Contracts for the International Sale of Goods.⁵⁰ It exists as an aid for interpretation and seeks to promote a uniform understanding of the Model Law.⁵¹ Whilst it is an interpretive provision, its objects are similar to the interpretive provision contained in the Amending Act, being to encourage a more facilitative and pro-international arbitration approach.

D Writing requirement in Article 7

Although the 2006 revision of the Model Law provides member states with the option to significantly relax the formalities for arbitration agreements, the Commonwealth Parliament has chosen to adopt a middle ground on the issue of formalities in the Amending Act. Under Article 7 of the 1985 Model Law, an arbitration agreement had to be in writing. In contrast, the 2006 amendments to Article 7 allows member states to choose between two formality requirements for arbitration agreements. The first option (“**Option 1**”) provides that an arbitration agreement must be in writing or at least evidenced in writing.⁵² The second option (“**Option 2**”) omits the writing requirement altogether, simply stating that an arbitration agreement is one where the parties have agreed to submit all or certain disputes to

⁵⁰ *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

⁵¹ UNCITRAL, *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006*, [4].

⁵² Model Law (2006), art 7 (Option 1).

arbitration.⁵³ The Amending Act implements Option 1 into the IAA⁵⁴, thereby adopting a middle ground between the relatively strict writing requirement under the 1985 Model Law and the relaxed requirement under Option 2 of the 2006 Model Law. Option 1 is not as strict as the 1985 incarnation in that it is sufficient if the content of an arbitration agreement is recorded in any form (even if the arbitration agreement was concluded orally or by conduct), but Option 1 does not go so far as doing away with formality requirements altogether as is the case with Option 2.

The adoption of the middle ground in Option 1 is a laudable step. First, the writing requirement in Option 1 avoids the potentially costly and lengthy process of ascertaining the existence of an arbitration agreement in the absence of any written record of the agreement. Second, by maintaining a writing requirement, the Amending Act ensures that the Model Law will only apply in circumstances where the parties have objectively intended to submit their disputes to arbitration.⁵⁵ In the absence of such a writing requirement, there is a risk that an arbitration agreement may be inferred or implied from the circumstances of the case and such a risk is untenable in light of the consensual nature of arbitration. In essence, the adoption of Option 1 is a move away from a strict need for the whole of the arbitration agreement to be in writing towards a more flexible definition of ‘arbitration agreement’ that encompasses agreements that have been recorded in any

⁵³ Model Law (2006), art 7 (Option 2).

⁵⁴ See *International Arbitration Act 1974* (Cth), s 16(2). It should also be noted that a new s 3(4) has been inserted into Part II of the Act (which uses the New York Convention definition) so that Part II and Part III of the *International Arbitration Act 1974* (Cth) have the same definition for ‘agreement in writing’.

⁵⁵ See Chartered Institute of Australian Arbitrations, Submission to the Attorney-General’s Department, *Review of the International Arbitration Act 1974* (Cth), 10 (‘CIARB Submission’).

form, whether or not those agreements have been concluded orally, by conduct or by other means. For these reasons, it is hoped that the adoption of the flexible definition of ‘arbitration agreement’ in Option 1 will ensure that the Model Law continues to have relevance in the continually evolving arena of international trade and commerce.

E Interim measures and preliminary orders

One of the key amendments made to the Model Law in 2006 was the introduction of a robust regime for interim measures and preliminary orders. Prior to the 2006 amendments, Article 17 of the 1985 Model Law gave a party to an arbitration agreement a basic right to request an interim measure from an arbitral tribunal. However, the type of interim measure available to the party was limited to a protective measure in relation to the subject-matter of the dispute. For example, an arbitral tribunal could, at the request of one of the parties, make an order requiring the other party to preserve its assets in order to prevent that party from dissipating those assets and prejudicing the outcome of the arbitration. It was also possible for an arbitral tribunal to make an order for security against the party seeking the protective interim measure. This was the extent of an arbitral tribunal’s ability to make interim orders. The principal concern that emerged in relation to Article 17 of the 1985 Model Law was that there appeared to be no ability for the courts to enforce an interim measure ordered by an arbitral tribunal.⁵⁶ While the 1985 Model Law empowered the courts to enforce an arbitral award,⁵⁷ it did not allow the courts to enforce an interim measure. Accordingly, in theory, compliance with an

⁵⁶ See Croft, above n 30, 7; and Revised Explanatory Memorandum, [70].

⁵⁷ Model Law (1985), art 35.

arbitral tribunal's interim measure was solely at the whim of the party against whom it was made.

To address these concerns, a hotch-potch of measures were used to make interim measures enforceable. For example, the former section 23 of the IAA provided that an arbitral award is be taken to include an interim measure. This meant that a court could use its ability to enforce an arbitral award under Article 35 of the Model Law in order to enforce an interim measure. However Article 9 of the 1985 Model Law preserved the right of a party to request an interim measure of protection direct from a court. Accordingly a party had the option of seeking an interim measure from an arbitral tribunal, the court or from both an arbitral tribunal and the court. The danger with this option, as His Honour Justice Croft points out, is that it raises issues of res judicata in that the court may be called upon to adjudicate on issues which have already been determined by an arbitral tribunal.⁵⁸ Not only would such a situation pose a waste of valuable resources for those involved, there is also a risk that the decision of the arbitral tribunal may be inconsistent with a decision of the court.

The 2006 amendments to the Model Law, and its incorporation into the IAA through the Amending Act, represents a significant overhaul of the interim measures regime. Specifically, a new Chapter IV A has been inserted into the Model Law which, amongst other things⁵⁹, deals with:

⁵⁸ Croft, above n 30, 7-8.

⁵⁹ See also Model Law (2006), arts 17D (allows modification, suspension or termination of an interim measure); 17E (an arbitral tribunal may require a party seeking an interim measure to provide appropriate security); 17F (ability to require parties to disclose a material change in circumstances which formed the basis of the interim measure); and 17G (party requesting an interim measure is liable to pay for the costs

- the granting of interim measures;⁶⁰
- preliminary orders (*ex parte* orders);⁶¹ and
- the recognition and enforcement of interim measures;⁶²

Save for the provisions relating to preliminary orders (or *ex parte* orders)⁶³, the regime on interim measures in Chapter IV A has been incorporated into the IAA and it is worthwhile briefly considering the important aspects of that regime.

Article 17 of the 2006 Model Law specifies the types of interim measures that may be ordered by an arbitral tribunal, and the conditions that must first be satisfied before such an order can be made. The interim measures that may be ordered by an arbitral tribunal include an order maintaining or restoring the status quo;⁶⁴ an order requiring a party to act or refrain from acting to avoid imminent harm or prejudice to the arbitral process;⁶⁵ an order to preserve a party's assets out of which an award may be satisfied;⁶⁶ and an order preserving evidence relevant to the resolution of the dispute⁶⁷. Whilst these interim measures in the 2006 Model Law share the same 'protective' element as their predecessor in the 1985 Model Law, they go further than their predecessor in clearly elucidating for an arbitral tribunal

and damages caused by the measure being granted); and 17J (court retains ability to order interim measures).

⁶⁰ Model Law (2006), arts 17 and 17A.

⁶¹ Model Law (2006), arts 17B and 17C.

⁶² Model Law (2006), arts 17H - 17I.

⁶³ See *International Arbitration Act 1974* (Cth), s 18B.

⁶⁴ Model Law (2006), art 17(2)(a).

⁶⁵ Model Law (2006), art 17(2)(b).

⁶⁶ Model Law (2006), art 17(2)(c).

⁶⁷ Model Law (2006), art 17(2)(d).

the types of interim measures that may be ordered. Further guidance is also given to an arbitral tribunal in the form of Article 17A of the 2006 Model Law, which sets out preconditions for the granting of an interim measure.

Generally speaking, Article 17A requires a party requesting an interim measure to satisfy the arbitral tribunal firstly that an award of damages would be inadequate to repair the harm that they may suffer, and that such harm substantially outweighs any harm that the other party may suffer if the measure were granted; and secondly that they have a prima face case on the merits. The introduction of these preconditions not only ensures that arbitral tribunals exercise a structured discretion when granting an interim measure, but they also put the parties on notice of the preliminary hurdles that must first be crossed before an interim measure can be granted.

Preliminary orders, unlike interim measures, are not available under the IAA. Article 17B of the 2006 Model Law allows a party, in the absence of the other, to approach the arbitral tribunal and seek a preliminary order directing the other party not to frustrate the purpose of an interim measure. Accordingly, to the extent that a preliminary order may be granted in the absence of one of the parties, it is an *ex parte* order.

However despite Article 17B of the 2006 Model Law, section 18B of the IAA provides that a party cannot apply for a preliminary order and an arbitral tribunal may not grant such an order. The provisions relating to preliminary orders in the 2006 Model Law are the only amendments made to the Model Law which have not been incorporated into the IAA by the Amending Act. The reason for this exclusion stemmed from the concerns

that a preliminary order, being of an *ex parte* nature, would be antithesis to the consensual nature of arbitration and would deprive parties of the basic right to procedural fairness.⁶⁸

While on their face these concerns appear valid, they may be misguided in a number of respects. First, Article 17B allows the parties to contract out of the right to apply for preliminary orders. Accordingly, if the parties had agreed not to contract out of Article 17B and to retain the ability to apply for a preliminary order, then they would have in effect consented to a valid preliminary order being made against them.⁶⁹ Second, and related to the first, is that the choice to contract out of or to retain the ability to apply for a preliminary order is consistent with the doctrine of party autonomy, an important bedrock upon which arbitration is built. Third, while a preliminary order is made *ex parte*, there are measures in the Model Law to ensure that a balance is struck between the need to protect the party requesting the preliminary order and the need to afford the other party an opportunity to be heard. For example, a preliminary order may only be granted if an arbitral tribunal considers that prior disclosure of the request for an interim measure to the other party would frustrate the purpose of the measure.⁷⁰ In other words, an arbitral tribunal must first be satisfied that the risk of frustrating the purpose of an interim measure outweighs the need to disclose the request to the other party.

Further, Article 17C of the 2006 Model Law provides that when an arbitral tribunal has granted a preliminary order against a party, the tribunal must

⁶⁸ See for example Discussion Paper, above n 6, 6; and CIARB Submission, above n 55, 10.

⁶⁹ Croft, above n 30, 8.

⁷⁰ Model Law (2006), art 17B(2).

immediately notify that party of the order, give that party an opportunity to present its case and then decide promptly on any objection to the preliminary order. In this way, a preliminary order serves as a temporary protective measure to preserve the status quo, with both parties still having the right to present their case in relation to the preliminary order. This process is similar to the process prescribed by Order 9 of Chapter II of the Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 and Practice Note No, 2 of 2010 - Arbitration Business, for the enforcement of a foreign award under the IAA. If the *ex parte* process (with the right for an aggrieved party to come back before the court) is appropriate for the purpose of enforcement of an award, then why should it also not be appropriate for the purpose of obtaining a preliminary order?

Significantly, the 2006 revision of the Model Law has addressed concerns that an interim measure lacks enforceability by a court. Article 17H now provides for the recognition and enforcement of an interim measure. More specifically, it provides that an interim measure shall be recognised as binding and enforceable upon application to a competent court. Not only does the new Article 17H give ‘teeth’ to the otherwise ‘toothless’ interim measure regime that existed under the 1985 Model Law, it also avoids the need that previously existed to equate an interim measure with an arbitral award in order for an interim measure to be enforceable. It was desirable to separate the enforcement system for an interim measure on the one hand and an arbitral award on the other, because an interim measure is only a interim protective measure whereas an arbitral award finally determines the issues in dispute which are dealt with in that award. Article 17I of the 2006 Model Law goes further and sets out the grounds on which a court may

refuse to recognise or enforce an interim measure. These grounds are generally the same as those grounds for refusing to enforce an arbitral award and include:

- incapacity of one of the parties or an invalid arbitration agreement;⁷¹
- that the party against whom the measure is made was not able to present their case or given proper notice of the appointment of the arbitrator or the arbitral proceedings;⁷²
- that the party in whose favour the measure was granted has not complied with an order for security;⁷³
- that the interim measure has been terminated or suspended⁷⁴
- that the recognition and enforcement of the interim measure would be contrary to the public policy of Australia.⁷⁵

Ultimately, the introduction of a more robust system for interim measures is a step in the right direction. The new regime sets out the conditions that must be satisfied before an interim measure may be granted; the types of measures available to the parties; and an effective means for recognising and enforcing interim measures. In doing so, the new regime clearly spells out to the parties the landscape in relation to interim measures, and it is hoped that this will instil in the parties a greater level of confidence in the arbitral regime that they have chosen to determine their dispute.

⁷¹ Model Law (2006), arts 17I(1)(a)(i) and 36(1)(a)(i).

⁷² Model Law (2006), arts 17I(1)(a)(i) and 36(1)(a)(ii).

⁷³ Model Law (2006), art 17I(1)(a)(ii).

⁷⁴ Model Law (2006), art 17I(1)(a)(iii).

⁷⁵ Model Law (2006), art 17I(1)(b)(ii) and Article 36(1)(b)(ii). See also *International Arbitration Act 1974* (Cth), s 19 for guidance on the meaning of ‘contrary to public policy’.

F *Challenging the appointment of arbitrators*

The recent amendments to the IAA have clarified the circumstances when the appointment of an arbitrator may be challenged on the grounds of bias. Article 12(2) of the Model Law provides that an arbitrator may only be challenged if the circumstances give rise to ‘justifiable doubts as to the impartiality or independence’ of the arbitrator. For the purposes of Article 12(2), a new section 18A has been inserted into the IAA which provides that there will be ‘justifiable doubts as to the impartiality or independence’ of an arbitral tribunal only if there is a real danger of bias on the part of the arbitral tribunal in conducting the arbitration. The introduction of the ‘real danger of bias’ test heralds the adoption of the approach in the English decision in *R v Gough*⁷⁶ and a move away from the established ‘reasonable apprehension of bias’ test as previously established by Australian courts.⁷⁷ The fundamental difference between the two tests is that the former (the ‘real danger of bias’ test) is a stricter test than the latter (the ‘reasonable apprehension of bias’ test). The practical effect of section 18A is that it will make it more difficult than in the past to successfully mount a challenge against an arbitral tribunal on the grounds of bias.

⁷⁶ In *R v Gough* [1993] AC 646 at 670, Lord Goff of Chieveley formulated the bias test as follows: ‘I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, *or with arbitrators*... [H]aving ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party the issue under consideration by him’ (emphasis added).

⁷⁷ See for example decisions in *R v Webb* (1993) 181 CLR 41; *ICT Pty Ltd v Sea Containers Ltd* [2002] NSWSC 77 and *Gascor v Elliot & Ors* [1997] VR 332.

In their submission to the Attorney-General on the review of the IAA,⁷⁸ the Honourable Neil Brown QC and Sam Luttrell argued convincingly that a move towards a stricter test for bias is a positive one. First, they have observed that there are an increasing number of bias challenges being brought as a procedural tactic in high value international arbitrations. It is their view that the introduction of a stricter test would deter frivolous or unfounded claims of bias being made against arbitral tribunals, saving the parties time and costs.⁷⁹ Second, Brown and Luttrell point out that an arbitral tribunal, unlike a judge, is not a part of the judicial arm of government. The role of an arbitrator derives from a contractual source, unlike a judge who serves a public function. Arguably an arbitral tribunal should not be subject to the same level of scrutiny that a judge should properly be subjected to.⁸⁰ Ultimately, by introducing the ‘real danger of bias’ test in section 18A, Australia is more fully recognising the differences between arbitration and litigation and moving towards a system of arbitral laws that is better suited to the circumstances of arbitration.

PART IV - NEW OPTIONAL PROVISIONS

A *The new Division 3*

Division 3 of the IAA contains provisions that supplement the Model Law. Prior to the Amending Act coming into operation, Division 3 contained a small number of provisions that parties could choose to apply to a dispute between them. For example, under the old regime parties could opt-in to

⁷⁸Brown and Luttrell, above n 37.

⁷⁹Ibid 12.

⁸⁰Ibid 12-13

provisions relating to the consolidation of arbitration proceedings, interest and costs. The Amending Act makes two important changes to Division 3. First, a greater gamut of provisions has been introduced into Division 3, designed to further assist parties to resolve their dispute in a fairer and more effective manner. For example, there are now provisions allowing parties to apply to a court for a subpoena⁸¹ or relief where a party fails to assist an arbitral tribunal⁸². Second, the new provisions in Division 3 apply either on an opt-in or opt-out basis, depending on the nature of the provision and not on a purely opt-in basis as was the case under the former Act. If a provision is an ‘opt-in provision’, then the parties must expressly elect to have that provision apply to a dispute. An ‘opt-out provision’ on the other hand will apply to a dispute automatically unless the parties have agreed that it will not apply. Significantly, many of these opt-out provisions increase the powers available to arbitral tribunals and this is discussed in further detail below.

Set out in the table below is a summary of the provisions in Division 3 including whether they apply on an opt-in or an opt-out basis.

Section	Description of the provision	Opt-in/ opt-out
23	<i>Parties may obtain subpoenas</i>	Opt-out
23A	<i>Failure to assist an arbitral tribunal</i>	Opt-out
23B	<i>Default by a party to an arbitration agreement</i>	Opt-out

⁸¹*International Arbitration Act 1974 (Cth)*, s 23.

⁸²*International Arbitration Act 1974 (Cth)*, s 23A.

23C	<i>Disclosure of confidential information</i>	Opt-in
23D	<i>Circumstances in which confidential information may be disclosed</i>	Opt-in
23E	<i>Arbitral tribunal may allow disclosure in certain circumstances</i>	Opt-in
23F	<i>Court may prohibit disclosure in certain circumstances</i>	Opt-in
23G	<i>Court may allow disclosure in certain circumstances</i>	Opt-in
23H	<i>Death of a party to an arbitration agreement</i>	Opt-out
23J	<i>Evidence</i>	Opt-out
23K	<i>Security for costs</i>	Opt-out
24	<i>Consolidation of arbitral proceedings</i>	Opt-in
25	<i>Interest up to making of award</i>	Opt-out
26	<i>Interest on a debt under an award</i>	Opt-out
27	<i>Costs</i>	Opt-out

The notable additions to Division 3 include:

- sections 23 and 23A which allow parties to obtain assistance from the court;
- sections 23C to 23G relating to confidentiality; and

- sections 23H to 23K relating the death of a party, evidence and security for costs.

B *Obtaining court assistance*

As the Explanatory Memorandum to the Amending Act notes, one of the significant concerns expressed by stakeholders during the review of the IAA was the lack of an ability to seek assistance from the court.⁸³ The need for assistance is particularly acute in circumstances where one of the parties is attempting to frustrate the arbitral process. For this reason, sections 23 and 23A have been incorporated into Division 3. Section 23 allows a party to apply to a court for a subpoena requiring a person to appear for examination before an arbitral tribunal and/or to produce a document to the tribunal.⁸⁴ Section 23A allows a party to seek assistance from the court in circumstances where a person fails to assist an arbitral tribunal. A person fails to assist a tribunal where, for example, that person refuses to appear before the tribunal or to produce documents.⁸⁵ In such cases, a party may request the court to make an order requiring the person to appear or to produce documents. Generally speaking, judicial involvement in arbitral proceedings should be kept to a minimum to preserve the fundamental distinctions between the two forms of dispute resolution.⁸⁶ However where the efficiency of arbitral proceedings are

⁸³ Revised Explanatory Memorandum, [135].

⁸⁴ It should be noted that s 23 of the *International Arbitration Act 1974* (Cth) requires certain conditions to be satisfied before a subpoena will be issued.

⁸⁵ For further examples of when a person fails to assist a tribunal, see *International Arbitration Act 1974* (Cth), s 23A(1).

⁸⁶ See for example Revised Explanatory Memorandum, [136]; Peter Megens and Beth Cubitt, 'The Continuing Role of State Supreme Courts in domestic International Arbitration in Australia', (2010) 21 *Australasian Dispute Resolution Journal* 124.

being hampered by a party's attempt to frustrate the proceedings, then the ability to call upon the court's assistance in a supervisory capacity is necessary to ensure that the arbitral process proceeds efficiently.

*C Confidential information*⁸⁷

One of the consequences flowing from the contractual nature of an arbitration is that an arbitration is a private dispute resolution process between the parties. This is unlike litigation where the parties submit their dispute before the courts of the State for adjudication. The latter dispute resolution process must necessarily remain transparent to preserve public confidence in the State adjudication process, but, by reason of its very nature, no such requirement is deemed necessary for arbitration.

However, in *Esso Australia Resources Ltd v Plowman*⁸⁸ the High Court of Australia held that whilst arbitration proceedings were private, in that members of the public were not entitled to attend, they were not confidential. In some quarters, this decision has been seen to put Australia out of touch with the law in other jurisdictions and at a forensic disadvantage in promoting itself as a venue of choice for parties to determine their arbitral disputes. Accordingly, in a number of the submissions which were provided to the Attorney-General as part of the review of the former IAA, the desirability of enacting a statutory duty of confidentiality (subject to defined exceptions) was recommended.⁸⁹

⁸⁷ See *International Arbitration Act 1974 (Cth)*, s 15(1) for the definition of 'confidential information'.

⁸⁸ (1995) 183 CLR 10.

⁸⁹ See CIARB Submissions Upon a Review of the *International Arbitration Act 1974* dated 23 January 2009, 20-21; Clifford Chance Submission in Response to the

It is the authors view⁷ that parties should be at liberty to agree to keep key aspects of their dispute which is the subject of an arbitration proceeding confidential, thereby, for example, avoiding commercially sensitive information from being disclosed to the public.

The Amending Act recognises this as an advantage of arbitration, and introduces a number of opt-in provisions modelled on the *Arbitration Act* 1996 (NZ). These new provisions afford parties greater protection of confidential information relating to an arbitration. A new section 23C has been added to Division 3 which prohibits parties and the arbitral tribunal from disclosing confidential information relating to an arbitral proceeding. Sections 23D and 23E go on to specify when confidential information may be disclosed.⁹⁰ Finally sections 23F and 23G specify when a court may allow or prohibit the disclosure of confidential information. The inclusion of these new opt-in provisions makes it easier for parties to readily include in an arbitration agreement a comprehensive regime for the protection of confidential information.

Discussion Paper of November 2008, dated 26 January 2009, 35-38; ILSAC Submission on Discussion Paper Concerning Review of the *International Arbitration Act* 1974 of November 2008, dated 20 January 2009, 9-10; NSW Bar Association's comments on the Review of the *International Arbitration Act* 1974 dated 14 January 2009, 16; The Law Society of NSW Review of the *International Arbitration Act* 1974 dated 15 January 2009, 5.

⁹⁰ For example see *International Arbitration Act* 1974 (Cth), s 23D which provides that confidential information may be disclosed with the consent of the parties; to an adviser of the parties; or if disclosure is required by a court-ordered subpoena. Further s 23E allows an arbitral tribunal to make an order allowing the disclosure of confidential information in certain circumstances.

One potential criticism of the Amending Act is that it does not go far enough in the sense that the confidentiality provisions are included on an opt-in basis, not an opt-out basis. This view is not shared by the authors.

As noted in the submissions of the Victorian Bar⁹¹, in the US, neither the Federal Arbitration Act nor the Uniform Arbitration Act contain specific confidentiality provisions. The point being that it is not universal practice to legislate for confidentiality. In addition to the opt-in provisions under the IAA, parties involved in arbitration proceedings in Australia are able to incorporate confidentiality obligations into those proceedings by choosing institutional procedural rules which expressly impose confidentiality obligations on the parties or by entering into a specific confidentiality agreement (which is enforceable by the courts). It is the authors' view that these provisions sufficiently protect parties who want to keep their arbitral disputes confidential.

D Increased powers of the arbitral tribunal

Generally, the powers of an arbitral tribunal consist of those powers which the parties have expressly given to the arbitral tribunal in the arbitration agreement (which also include those contained in the set of institutional rules and arbitral law chosen by the parties). The Amending Act introduces a regimen of opt-out provisions in Division 3 that increase the powers available to arbitrators for international arbitrations now conducted in Australia. For example, unless the parties agree otherwise, arbitral

⁹¹ Submissions of the Victorian Bar in Response to the November 2008 Discussion Paper Reviewing the *International Arbitration Act 1974*, dated 24 December 2008, [44] and [45].

tribunals may make orders in respect of evidence, security for costs, interest and the costs of the arbitration. Set out below is a summary of these provisions.

Section 23J allows an arbitral tribunal, in certain circumstances, to make an order relating to the inspection of evidence held by one of the parties to the arbitration.

Section 23K allows the arbitral tribunal, in certain circumstances, to make an order requiring one of the parties to an arbitral tribunal to pay security for costs. The arbitral tribunal has a very wide discretion whether to order a party to provide security for the other party's costs.⁹² However, section 23K(2) specifically provides that the arbitral tribunal shall not make such an order solely on the basis that: (i) the party is not ordinarily resident in Australia; (ii) the party is a corporation incorporated or association formed under the law of a foreign country; or (iii) the party is a corporation or association the central management or control of which is exercised in a foreign country. These provisions are quite clearly intended to give foreign entities comfort that they will not be unfairly targeted, so as to not undermine Australia's goal of being seen by the international community as an attractive venue for parties to resolve their disputes. To this extent, the approach adopted in the IAA is similar to the approach adopted in Hong Kong, Singapore and the United Kingdom.⁹³

Section 25 allows an arbitral tribunal to make an award of interest for the period of time between the date the cause of action arose and the date on

⁹² Revised Explanatory Memorandum, [173].

⁹³ Revised Explanatory Memorandum, [174].

which the award is made. Section 26 goes further and allows the arbitral tribunal to award interest, including compound interest, on debts due under an award. Although sections 25 and 26 existed under the former IAA, they now clearly apply on an opt out basis (previously there were drafting inconsistencies in the IAA which suggested that these provisions may have applied on an opt-in basis) and the power to award compound interest on debts due under the award is an added power.

Finally section 27 allows an arbitral tribunal to make orders in relation to the costs of an arbitral proceeding, including directions about the taxation or settlement of costs and any limitations on costs. Section 27 now clearly applies on an opt out basis (previously there were drafting inconsistencies in the IAA which suggested that these provisions may have applied on an opt-in basis). The fact that these provisions are now clearly on an opt-out basis means that, in practical terms, there is more scope for application by the arbitral tribunal in arbitration proceedings conducted in Australia.

By implementing these increased powers of arbitral tribunals on an opt-out basis, the Amending Act creates an appropriate balance between the desire to preserve party autonomy in deciding the limits of an arbitral tribunal's powers and the desire for arbitral tribunals to have power to make orders in relation to matters which are often over-looked by the parties - matters such as security for costs, interest and costs orders.

Ultimately, the changes introduced by the Amending Act to Division 3 of the IAA represent an overhaul of the existing provisions that apply to an arbitral proceeding. The new provisions, together with the ability to opt-in or opt-out of those provisions, allow parties to easily tailor a number of

aspects of an arbitral proceeding to suit their needs simply by picking and choosing which provisions they would like to apply or not apply to the dispute between them. With increased flexibility and options available to parties who choose to resolve their disputes in Australia, it is hoped that this will further help to stake out Australia's position on the international arbitration map.

V CONCLUSION

The amendments introduced by the Amending Act are part of a broader movement to establish Australia's place as a preferred forum for parties to resolve their international arbitration disputes. Whilst Australia will always have to contend with its tyranny of distance from other countries, the amendments to the regulatory framework, which underpins how international arbitration matters proceed and are supervised, ought to maximize the attractiveness of Australia as a forum for international arbitration.

This is brought about, in part, by the greater certainty which now exists under the IAA. For example, following the amendments, it is now clear the Australian courts no longer have a residual discretion to refuse to enforce a foreign award which comes under the auspice of the New York Convention but are limited to the narrow grounds set out in section 8 of the Act. The amendments also cement in the Model Law so it applies to any international arbitration matter conducted in Australia and eliminates the uncertainty that existed in the past as to the role and relevance of the State Acts which govern domestic arbitration and the interplay between the

Model Law and a set of institutional rules chosen by the parties. So too with interim measures, which have been clarified in the Amending Act and which now are able to be fully recognized and enforced by the courts.

Further, by reason of the Amending Act, parties who chose Australia as their venue for their dispute now have more options and choices at their disposal through the array of opt-in and opt-out provisions now set out in the IAA. This is all aimed at providing parties with more tools to assist them in resolving their disputes as efficiently as possible and to providing an avenue of relief against recalcitrant parties, thereby facilitating and enhancing the effectiveness of the arbitration process.

Whilst it will take time before the full benefit and utility of the amendments to the regulatory framework manifest themselves at a practical level, the amendments to the IAA, together with an experienced and internationally recognized local profession and a supportive judiciary, have the potential to re-shape the international arbitration landscape in Australia and produce the sort of efficiency, cost and certainty of outcomes that parties require. If the amendments are successful in playing their part in achieving that outcome, then Australia will be well placed to achieve its goal of becoming a regional hub for international arbitration. For those who are involved in cross-border transactions, the amendments to the IAA gives them added reason to choose Australia as the venue of choice for resolving their disputes.

INTERACTIONS BETWEEN THE MEDIA AND THE CRIMINAL JUSTICE SYSTEM

CHRISTOPHER TOWNSEND*

Abstract

The criminal justice system and the media interact in various capacities. The reliance of the public on the information perpetuated by the media in relation to proceedings within the criminal justice system has significantly translated into a decrease in faith within the community. Previous studies have shown that when presented with media accounts of crime, in comparison to the full account of the proceedings participants were less likely to be satisfied that justice had been done. Taking this into account is important within the field of criminal law, as this decrease of faith is current and can translate to a decrease of community unity, an increase of vigilante acts, and less reporting of crime. Action on the part of the executive is important in addressing this issue to ensure faith in the system is restored.

I INTRODUCTION

The interaction of the media with the Australian criminal justice system has a significant impact on the community's perception of the effectiveness and perpetuation of justice. Selective coverage of criminal trials, agenda setting, as well as information framing are all methods which produce the media's prominent entertainment role.¹ The reliance of the public on the

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¹ Richard L Fox, Robert W Van Sickel & Thomas L Steiger, *Tabloid Justice: Criminal Justice in an Age of Media Frenzy* (2nd ed, 2007), 9.

media for information as well as entertainment poses a disparity between objectives pursued, and objectives gained. However, the public still continues to rely on the media as a means to understand and assess the criminal justice system and the process contained within.²

What this research intends to achieve is a deeper understanding of how the media interacts with the criminal justice system and how this translates into the public's confidence, or lack thereof, in the perpetuation of justice. It will show how the media purports to favour reporting methodology that elicits negative perceptions of the justice system and how this translates into the public's lack of faith in that system. Having an understanding of how the media's interaction with the criminal justice system translates into the public's articulation of what constitutes a 'crime', and more importantly, what constitutes 'justice' is of great importance within the scope of criminology and criminal law.³ Utilizing this understanding by developing statutory reforms and media moderation, we can increase the community's support of the criminal justice system, and restore faith in the process contained within.

II OBJECTIVES OF THE MEDIA

The objectives of the media within the scope of the criminal justice system can be seen to have been derived from various sources. The overarching want to inform, educate and entertain are the foundations of what

² Gregg Barak, 'Mediatizing Law and Order: Applying Cottle's Architecture of Communicative Frames to the Social Construction of Crime and Justice' (2007) 3 *Crime Media Culture* 101, 101.

³ Ibid.

Australian media sources purport to strive toward⁴. The ability of the media to bring events into the community's lives, no matter how remote, and to make them observable and meaningful comes within the scope of these objectives⁵. However as can be repeatedly seen the "educational function of the press is undermined by its entertainment role".⁶ Thus what is professed to be informative, meaningful and educational, is an entirely different final product. The media would argue in return, as they often have,⁷ that the way in which they report a story or set of facts comes within the notion of free press or free speech, and in the case of criminal proceedings, the accused's right to a fair trial.

A *Free Speech/Press and the Media*

The most historically contentious of these arguments is the notion that the community has the liberal ability to express oneself through free speech or in the case of the media, free press. However, unlike in the US where such a philosophy is entrenched within their constitution,⁸ Australia does not have the same provision.⁹ Justice Kirby also stated that such freedoms had no reliance on legal guarantees, however have their basis upon antiquated

⁴ Websites of major television networks: <http://www.7perth.com.au>, www.9perth.com.au, www.ten.com.au

⁵ Harvey Molotch and Marilyn Lester, 'News as Purposive Behavior: On the Strategic Use of Routine Events, Accidents and Scandals' (1974) 39 *American Sociological Review* 101, 101.

⁶ Richard L Fox, Robert W Van Sickel and Thomas L Steiger, *Tabloid Justice: Criminal Justice in an Age of Media Frenzy* (Lynne Rienner, 2nd ed, 2007), 6.

⁷ *Nationwide News v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

⁸ *The Constitution of the United States*, Amendment 1.

⁹ Michael Kirby, 'Reform and the Fourth Estate' in *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, 1983), 171, 172.

tradition.¹⁰ This tradition has been reinforced by the community's continued desire to be kept up-to-date with the news and current affairs¹¹, especially those of which are crime-related.¹²

The basis of free speech can be found within the writing of eminent philosopher John Stuart Mill who went so far as to say that:

There ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered.¹³

He did qualify this seemingly broad notion by saying that;

The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.¹⁴

In doing so he placed appropriate limits upon what he professed constituted free expression. This idea is contrary to that put forth by Professor Stanley Fish, who claims 'there is no such thing as free speech'¹⁵ and that any claim to such is invalid for the following reason:

¹⁰Michael Kirby, 'Reform and the Fourth Estate' in *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, 1983) 171,173.

¹¹ Richard L Fox, Robert W Van Sickel and Thomas L Steiger, *Tabloid Justice: Criminal Justice in an Age of Media Frenzy* (Lynne Rienner, 2nd ed, 2007), 7.

¹² Julian V Roberts and Anthony N Doob, 'News Media Influences on Public Views of Sentencing' (1990) 14 *Law and Human Behavior* 451, 452.

¹³ Can be found in the footnotes of Chapter II in; John Stuart Mill, *On Liberty* (1859), 31.

¹⁴ Ibid.

¹⁵ Stanley Fish, *There's No Such Thing as Free Speech* (Oxford University Press, 1994) 104.

When one speaks to another person, it is usually for an instrumental purpose: you are trying to get someone to do something, you are trying to urge an idea and, down the road, a course of action. These are reasons for which speech exists and it is in that sense that I say that there is no such thing as “free speech”, that is, speech that has its rationale nothing more than its own production.¹⁶

How these two ideas can be reconciled within the realm of free speech and press surrounding the criminal justice system are encapsulated by Lord Hewart, in *Rex v Sussex* where he said: ‘Justice should not only be done, but should manifestly and undoubtedly be seen to be done.’¹⁷

Within this quote it can be seen that whilst it is argued by Professor Fish that speech is purposive, and by John Stuart Mill that speech should be free, these ideas can and do overlap within the media’s interaction with the criminal justice system. The media has a purpose with its information delivery, and relies upon the traditional value of ‘free speech’ in order to tailor that information for such. These values have been attempted to be aligned with the constitutional implied freedom of political communication with limited success.¹⁸

The implied freedom of political communication within Australia is a freedom which has developed with reference to provisions in the Australian constitution¹⁹ and an increasing amount of case law. Its origin can be traced

¹⁶ Ibid.

¹⁷ *Rex v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256.

¹⁸ *Hogan v Hinch* [2011] HCA 4.

¹⁹ *Commonwealth of Australia Act* (Cth), ss 7, 24, 25, 61 and 61.

back to two cases; *Nationwide News Pty Ltd v Wills (Nationwide)*²⁰ and *Australian Capital Television Pty Ltd v Commonwealth (ACTV)*.²¹ Chief Justice Mason in *ACTV* described the freedom as being indispensable to the accountability of legislative and executive powers and that:

Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives.²²

However this seemingly straightforward right to free communication of ideas was qualified within the same judgment by Brennan J, who posited that any freedom was a restriction on legislation rather than an inherent personal right. He said:

Unlike freedoms conferred by a Bill of Rights in the American model, the freedom cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation; rather it is a freedom of the kind for which s 92 of the Constitution provides: an immunity consequent on a limitation of legislative power.²³

And finally Deane and Toohey JJ stated that:

²⁰ *Nationwide News Pty Ltd v Wills (Nationwide)* (1992) 177 CLR 1.

²¹ *Australian Capital Television Pty Ltd v Commonwealth (ACTV)* (1992) 177 CLR 106.

²² *Ibid* 137.

²³ *Ibid* 150.

In determining whether a purported law conflicts with the implication, regard must be had to the character of the impugned law. A law prohibiting or restricting political communications by reference to their character as such will be consistent with the prima facie scope of the implication only if, viewed in the context of the standards of our society, it is justified as being in the public interest.²⁴

These original comments by the High Court formed the basis of a test to determine whether the legislation infringes upon this implied freedom. This test was originally constructed within the case *Lange v Australian Broadcasting Corporation*,²⁵ was later modified in *Coleman v Power*²⁶ and is still applied currently.²⁷ What it asks of the legislation, is whether the law burdens the implied freedom and if so, does it do so in a reasonably appropriate manner to serve a legitimate end.²⁸ If the law does burden the implied freedom without a legitimate end or in a disproportionate manner, then it will be taken to have infringed the implied constitutional limitation. Otherwise it will be considered reasonably appropriate. Media outlets have attempted to utilize the implied freedom of political communication in a similar fashion as free speech rights available under the First Amendment in the US. The contention that communications such as reporting information from criminal trial proceedings ‘do not lose protection of the freedom recognised in *Lange* because they also deal with the

²⁴ *Australian Capital Television Pty Ltd v Commonwealth (ACTV)* (1992) 177 CLR 106, 169.

²⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 5.

²⁶ *Coleman v Power* (2004) 220 CLR 1.

²⁷ *Hogan v Hinch* [2011] HCA 4.

²⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 5; *Coleman v Power* (2004) 220 CLR 1.

administration of justice by the courts of a State'²⁹ was discussed in recent case law, such as *Hogan v Hinch*.

French CJ accepted in that case:

The range of matters that may be characterised as “governmental and political matters” for the purpose of the implied freedom is broad. They are not limited to matters concerning the current functioning of government.³⁰

However Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ qualified this by adding there must be a “direct” rather than “incidental” burden upon the communication³¹. Whilst this latest development within the scope of the implied freedom of political communication does little to entrench the ability of the media to utilize such as a means to deliver information to the public; it does potentially allow for future development due to the broad scope enunciated by French CJ.

B *Right to a Fair Trial and the Media*

As well as the free speech and press argument in favour of the media's reporting ability, the right to a fair trial is also important to consider. The right to a fair trial is outlined in the *International Covenant on Civil and Political Rights* and as Article 14(1) makes clear an essential aspect of this is a public hearing:

²⁹ *Hogan v Hinch* [2011] HCA 4, 94.

³⁰ *Ibid* 49.

³¹ *Ibid* 95, and as discussed by Gleeson CJ in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

All persons shall be equal before courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.³²

This article is replicated in a variety of other international instruments to which Australia is a party, further entrenching their importance. The *Universal Declaration of Human Rights* reinforces the presumption of innocence as well as reinforcing the principles set forth in the abovementioned articles when it provides in Article 11(1):

Every person charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.³³

As also can be seen within this Article, reference to a public trial is a central notion in the delivery of justice in a fair and humane manner.

³² *International Covenant On Civil And Political Rights*, adopted and open for signature, ratification and accession by General Assembly resolution 2200A(XXI) of 16 December 1966 (entered into force 23 March 1976, in accordance with Article 49); Article 14.

³³ *Universal Declaration Of Human Rights*, Article 11(1).

The idea of a public trial is one which is found at the core of our common law principles of fair and just criminal proceedings³⁴. It is considered necessary because it allows public and professional scrutiny of decisions in order to prevent any miscarriage of justice³⁵ and maintains confidence amongst the community of the court system's integrity.³⁶ As such a public trial implies the ability of the public to attend proceedings, as well as the reporting and publication of the proceedings.

The objectives of the media in terms of information delivery to the community can seemingly create issues as to the apparent nature of this freedom in practice. On the one hand, the increasing coverage of the media during criminal proceedings can hinder the ability of a jury to be impartial, and thus burden this right to a fair trial.³⁷ However, it can be argued that the coverage of said proceedings, allows for greater public scrutiny, and overall will increase the occurrence of trials conducted with regard to this inherent right³⁸. Exceptions to this principle of the public trial occur in instances where the court feels it necessary to impose an order suppressing details of the proceedings.³⁹

³⁴ *Scott v Scott* [1913] AC 417; *Russell v Russell* (1976) 134 CLR 495.

³⁵ *Russell v Russell* (1976) 134 CLR 495.

³⁶ *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47.

³⁷ Richard L Fox, Robert W Van Sickel and Thomas L Steiger, *Tabloid Justice: Criminal Justice in an Age of Media Frenzy* (2nd ed, 2007).

³⁸ Andrew T. Kenyon, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice' (2006) 27 *The Adelaide Law Review* 279, 282.

³⁹ s171 *Criminal Procedure Act 2004* (WA).

III THE COURTS' POWER TO REGULATE THE MEDIA

As discussed above there are exceptions to the principle of an open court that can be found in common law and are supplemented by statute.⁴⁰ Accordingly, there are three broad categories of suppression orders within the jurisdiction of Australia.⁴¹ Firstly at common law, if an open court would jeopardise the proper administration of justice the common law allows the court to suppress the proceedings.⁴² Superior courts have this inherent power to issue such orders in these instances⁴³. Also if there is a public policy interest, such as that of national security or the safety of individuals, the court has a similar power.⁴⁴ However, this potentially broad power has only been invoked in limited circumstances in past case law.⁴⁵ Secondly, some statutes restrict reporting in instances involving children under the age of 18⁴⁶, victims of sex-related crimes,⁴⁷ or matters within the scope of the *Family Law Act 1975* (Cth).⁴⁸ Finally, a statutory discretion is

⁴⁰ Andrew T. Kenyon, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice' (2006) 27 *The Adelaide Law Review* 279, 288.

⁴¹ Australia's Right to Know, *Report of the Review of Suppression Orders and the Media's Access to Court Documents and Information*, 13 November 2008.

⁴² *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131.

⁴³ Andrew T. Kenyon, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice' (2006) 27 *The Adelaide Law Review* 279, 288.

⁴⁴ *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131.

⁴⁵ Andrew T. Kenyon, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice' (2006) 27 *The Adelaide Law Review* 279, 288.

⁴⁶ *Children's Court of Western Australia Act 1988* s35(1); *Children And Young Persons Act 1989* (VIC) s26; *Young Offender's Act 1993* (SA) ss59, 59A.

⁴⁷ *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s40; *Sexual Offences (Evidence And Procedure) Act 1983* (NT) ss6-13; *Crimes Act 1906* (NSW) s578A; *Criminal Law (Sexual Offences) Act 1978* (QLD) ss6-11; *Evidence Act 1929* (SA) s71A; *Evidence Act 2001* (TAS) ss194K, s194L; *Judicial Proceedings Act 1958* ss3,4; *Evidence Act 1906* (WA) s36C.

⁴⁸ *Family Law Act 1975* (Cth).

provided for judicial officers of any court to issue an order in certain circumstances.⁴⁹

A Common Law Origins of the Courts' Power to Regulate the Media

The common law has developed more so in recent history to allow judicial officers the discretion to impose orders suppressing information gathered within the courtroom, and thus preventing the media from publishing any of the proceedings.⁵⁰ Whilst on one view the courts have no general authority to make orders to bind non-parties and their conduct outside the courtroom,⁵¹ it has been found that conduct outside the court frustrating the endeavours of justice can be considered contempt of court.⁵² Also the use of pseudonyms, and orders binding parties of the case can be used regardless.⁵³

An early, yet eminent consideration of the idea of open proceedings was expressed by Haldane LC in *Scott v Scott*⁵⁴ where he stated that the imperative role of courts is 'to do justice'.⁵⁵ With relation to publicity, Earl Loreburn in the same case noted that the principles and rules expressed by Haldane LC can be disregarded when necessity compels departure.⁵⁶ The

⁴⁹ S171 *Criminal Procedure Act 2004* (WA).

⁵⁰ *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47.

⁵¹ *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47.

⁵² Discussed in *Hogan v Hinch* [2011] with reference to *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465.

⁵³ Draft Court Suppression And Non-Publication Orders Bill 2009 (WA).

⁵⁴ *Scott v Scott* [1913] AC 417.

⁵⁵ *Scott v Scott* [1913] AC 417, 437.

⁵⁶ *Hogan v Hinch* [2011] HCA 4 as per French CJ; *R v Macfarlane; Ex Parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 as per Isaacs J.

idea that the administration of justice required in some instances the closing of the court to the public and the media required some development as to what constituted a valid reason in the circumstances. Restrictions merely based on unsavoury evidence,⁵⁷ morality⁵⁸ or embarrassment to one or more of the parties⁵⁹ have all been found to not constitute sufficient justification to undermine the open court and justice principle. This was acknowledged by Kirby P in *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v Local Court of NSW* where he noted:

It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms.⁶⁰

Reasons that have been considered exceptions to this principle, were identified by Einstein J in his judgment of *Idoport Pty Ltd v National Australia Bank Limited & Ors* as including:⁶¹

- (a) Cases where trade secrets, secret documents or communications or secret processes are involved;
- (b) Cases where disclosure in a public trial would defeat the whole object of the action (as in blackmail cases or cases involving police informers);
- (c) Cases involving the need to keep order in court;
- (d) Cases involving (in certain circumstances) national security;

⁵⁷ *R v Hamilton* (1930) 30 SR (NSW) 277.

⁵⁸ *Scott v Scott* [1913] AC 417.

⁵⁹ *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10.

⁶⁰ *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v Local Court of NSW* (1991) 26 NSWLR 131, 142.

⁶¹ *Idoport Pty Ltd v National Australia Bank Limited & Ors* [2001] NSWSC 1024, 20.

- (e) Cases involving the performance of administrative or other action that may be properly dealt with in chambers
- (f) Cases where the court sits as *parens patriae* involving wards of the state or those with mental illness.

As can be seen within this direction of case law, the proper administration of justice is the court's ultimate concern. If it is necessary to prevent the public viewing and media publishing of proceedings in order to achieve this end, then the court is within their power to make an order to that effect. As stated by McHugh JA in *John Fairfax & Sons Ltd v Police Tribunal of NSW*:

The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient.⁶²

As noted by McHugh JA in the passage above, the court must have sufficient evidence in favour of making an order, and that evidence should point in favour of suppressing proceedings in order to strive toward the fair administration of justice. In consideration of these ideas, it is important to

⁶²*John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476.

take into account the statutory role in the regulation of the media and how it interacts with the aforementioned common law.

B *The Courts' Ability to Regulate the Media And Statute*

As well as the common law providing guidance as to both the open justice principle and the use of suppression orders, statutory instruments are utilized by parliament to provide further authorisations to courts to do so as per French CJ:

Beyond the common law, it lies within the power of parliaments, by statute, to authorise courts to exclude the public from some part of a hearing or to make orders preventing or restricting publication of parts of the proceeding or of the evidence adduced.⁶³

Both Commonwealth and state or territory statutes have provisions that reaffirm the principle of open justice. At the Commonwealth level, an example of this can be seen in the *Family Law Act 1975* where s97(1) states:

Subject to subsections (1A) and (2), to the regulations and to the applicable rules of Court, all proceedings in the Family Court, in the Federal Magistrates Court, or in a court of a Territory (other than the Northern Territory) when exercising jurisdiction under this act, shall be heard in open court.⁶⁴

⁶³ *Hogan v Hinch* [2011] HCA 4, 27.

⁶⁴ *Family Law Act 1975* (Cth) s97; Other examples at Commonwealth level include the *Judiciary Act 1903* (Cth) s16 and the *Federal Court of Australia Act 1976* s17.

Similar provisions can be found in all jurisdictions in varying capacities⁶⁵ such as within the *Magistrates Court (Civil Proceedings) Act 2004* (WA) where s45(1) provides:

All proceedings in the court's civil jurisdiction are to be conducted in open court unless this act, the rules of court or another written law provides otherwise.⁶⁶

This can also be found in Victoria in the equivalent *Magistrates Court Act 1989* (Vic) where s125(1) allows:

All proceedings in the Court are to be conducted in open court, except where otherwise provided by this or any other Act or the rules.⁶⁷

Other statutes may not expressly provide for this principle however can be implied through other provisions that require orders to be made for the exclusion of the public whilst still taking into account the common law principle of open justice.⁶⁸ This can be seen in s18(1) of the *Supreme Court Act 1986* (Vic) which does exactly that:⁶⁹

The court may in the circumstances mentioned in section 19 –
(a) Order that the whole or any part of a proceeding be heard in closed court; or

⁶⁵ *Magistrates Court Act 1930* (ACT) s310; *Coroners Act 1980* (NSW) s30; *Summary Procedure Act 1921* (SA) s61; *Magistrates Court (Civil Division) Act 1992* (TAS); *Magistrates Court (Civil Proceedings) Act 2004* (WA) s45(1); *Magistrates Court Act 1989* (Vic) s125.

⁶⁶ *Magistrates Court (Civil Proceedings) Act 2004* (WA) s45(1).

⁶⁷ *Magistrates Court Act 1989* (Vic) s125.

⁶⁸ *Supreme Court Act 1986* (Vic).

⁶⁹ *Supreme Court Act 1986* (Vic) s18(1).

- (b) Order that only persons or classes of persons specified by it may be present during the whole or any part of a proceeding; or
- (c) Make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding.

Whilst this statute does not expressly provide for the public's ability to access and view proceedings, this provision allows for this to be implied. It also has the purpose of giving the court discretion as to when the power should be utilized within the ambit of the circumstances detailed in s19. However this discretion is usually quite strict and as put forth by Kirby P, 'utilized only when clearly necessary'.⁷⁰ French CJ adds to this by saying:

Where it is left by statute to a court's discretion to determine whether or not to make an order closing part of a hearing or restricting the publication of evidence or the names of parties or witnesses, such provisions are unlikely to be characterised as depriving the court of an essential characteristic of a court and thereby rendering it an unfit repository for federal jurisdiction. Nevertheless, a statute which affects the open-court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle.⁷¹

Courts around Australia have varying discretions to utilize provisions such as previously mentioned, to impose an order restricting the media's ability to publicise information about the proceedings. However in a lot of cases this is done unnecessarily, with the statute governing the proceedings

⁷⁰ *Re Applications by Chief Commissioner of Police (Vic)* (2004) 9 VR 275.

⁷¹ *Hogan v Hinch* [2011] HCA 4, 27.

already containing a presumption of information suppression.⁷² This includes proceedings that involve children as can be seen in the *Children's Court of Western Australia Act 1988* amongst many others, where s35(1) details:⁷³

Except where done in accordance with an order made under section 36A or in accordance with the *Prohibited Behaviour Orders Act 2010* section 34, a person shall not publish or cause to be published in any newspaper or other publication or broadcast or cause to be broadcast by radio or television a report of any proceedings in the court, or in any court on appeal from the court, containing any particulars or other matter likely to lead to the identification of a child who is concerned in those proceedings –

- (a) As a person against whom the proceedings are taken:
- (b) As a person in respect of whom the proceedings are taken:
- (c) As a witness: or
- (d) As a person against or in respect of whom an offence has or is alleged to have been committed.

Similar provisions containing this presumption can be found protecting adoption proceedings,⁷⁴ sexual offences⁷⁵ and similar sensitive topics. Statutes that do not have this inherent presumption of information suppression contained within can still provide a power to the court to make

⁷² Andrew T Kenyon, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice' (2006) 27 *The Adelaide Law Review* 279, 288 which discusses the 'doubling up' of suppression orders, and already statutory guards for type of proceeding.

⁷³ *Children's Court of Western Australia Act 1988* s35 (1); *Children and Young Persons Act 1989* (Vic) s26; *Young Offender's Act 1993* (SA) ss59, 59A.

⁷⁴ *Adoption Act 1988* (SA); *Adoption Act 1984* (Vic) ss120-121.

⁷⁵ *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s40; *Sexual Offences (Evidence And Procedure) Act 1983* (NT) ss6-13; *Crimes Act 1906* (NSW) s578A; *Criminal Law (Sexual Offences) Act 1978* (QLD) ss6-11; *Evidence Act 1929* (SA) s71A; *Evidence Act 2001* (TAS) ss194K, s194L; *Judicial Proceedings Act 1958* ss3,4; *Evidence Act 1906* (WA) s36C.

a non-publication order. However publication is not limited, unless such an order is made by the court.

C *The Media's Ability to Challenge Suppression Orders*

When such an order is made by the court, it is important to consider what ability the media has to challenge this restriction of publication. It is an established principle that the media has standing to challenge orders restricting publication of material within proceedings with restriction.⁷⁶ As discussed in *Nationwide News v District Court (NSW)* by Mahoney P:

To hold that media interests have a right to be heard upon such applications in the sense that they are, in the ordinary way, parties to them, would create a situation which would be unjust to the parties to the trial and would interfere with the fairness of the trial; see *John Fairfax & Sons Ltd v Police Tribunal of NSW*.⁷⁷

However taking into account that obvious restriction on the media's standing within proceedings he notes that:

In my opinion each media interest has a less choate and less extensive entitlement. It is not necessary for present purposes to attempt to mark out finally the precise boundaries of that entitlement. It is sufficient to hold that (subject to what I shall say) it is entitled to make an application to vary or terminate an order of the relevant kind and to have that application heard.⁷⁸

⁷⁶ *Re Bromfield; Ex Parte West Australian Newspapers Ltd* [1991] (Unreported, Malcolm CJ, Rowland & Nicholson JJ, 21 June 1991).

⁷⁷ *Nationwide News v District Court (NSW)* 40 NSWLR 486, 489.

⁷⁸ *Ibid.*

In circumstances where the media is present throughout the proceedings, and a proposed suppression order will bind the media authority, standing to be heard in this instance is also established. As noted:

If the media interest is in fact present when an application is made by the parties for a suppression order and the suppression order sought will bind the media interest, it is to be expected that ordinarily the trial judge will hear the media interest if it desires to be heard, at least to the extent that is consistent with justice of the trial.⁷⁹

Similar case law can be found in other jurisdictions establishing that the media has standing in certain proceedings. In *Re Bromfield; Ex Parte West Australian Newspapers* Nicholson J found that the media are different to that of other members of the public in that they are especially aggrieved by the implementation of suppression orders and thus should be given the opportunity to argue such. He stated:

The applicant is truly a “person aggrieved” by the determination as a consequence of the evidence relating to the nature of its business. Its business distinguishes it from members of the general public having no particular interest in the matter.⁸⁰

Even though such cases in these jurisdictions have been found to give the ability to the media to challenge suppression orders, Victoria is peculiar in that media lawyers have expressed concern that provisions in the *Supreme*

⁷⁹ Ibid 490.

⁸⁰ *Re Bromfield; Ex Parte West Australian Newspapers Ltd* [1991] (Unreported, Malcolm CJ, Rowland & Nicholson JJ, 21 June 1991).

Court Act have removed the right of appeal regarding this issue⁸¹. This can be seen in s17A(3) which provides:

Except as provided in Part 6.3 of Chapter 6 of the *Criminal Procedure Act* 2009, an appeal does not lie from a determination of the Trial Division constituted by a Judge of the Court or constituted by an Associate Judge made on or in relation to the trial or proposed trial of a person on indictment.

With the position in Victoria being that a suppression order is an interlocutory order, and therefore cannot be challenged until the conclusion of the proceeding⁸², it also means that rights of appeal within s17A(3) of such an order, as provided in Part 6.3 of the *Criminal Procedure Act* 2009 are limited as previously discussed.

These limitations upon the media's ability to report on proceedings within the court, in conjunction with their choices as to what to report and what methodology of reporting to utilize, both interact and impact the community's general perception of the justice system.

IV IMPACT OF THE MEDIA

The impact of the media upon the community's perception of the justice system is one which requires deep consideration. As noted by Martin CJ in an eminent speech:

⁸¹ Australia's Right to Know, *Report of the Review of Suppression Orders and the Media's Access to Court Documents and Information*, 13 November 2008, 21.

⁸² *Ibid.*

The difficulty is that people will take the cases about which they read or hear as representative of the justice system as a whole when, in fact, they are only representative of cases which have this character of “newsworthiness”.⁸³

The choice of media outlets of which cases to report can greatly shape expectations of the public, with only a small number of judgments reported upon. As such:

They might read or hear about, say, 50 cases each year in which it might be suggested that a sentence imposed upon an offender was lenient. They will not hear or read of the 90,000-odd cases in which there is no such suggestion. But they will take the 50 cases of which they know to be representative of the system as a whole, when in fact they are anything but.⁸⁴

As discussed previously, orders by the court may have suppressed the ability of the media to publish proceedings in the court. But whether or not this is a significant reason behind the choice of case reporting on behalf of the media is worthy of discussion. Looking toward statistics provided by courts of WA in 2008 we can see recorded suppression orders remaining similar in 2006-2007, however a significant increase in 2008:⁸⁵

Jurisdiction	2006	2007	2008 (until 31 July)

⁸³ The Hon Wayne Martin, Chief Justice of Western Australia, ‘Improving Access to Justice: The Role of The Media’ (Speech delivered at Curtin University, Western Australia, 15th October 2009).

⁸⁴ Ibid.

⁸⁵ Australia’s Right to Know, *Report of the Review of Suppression Orders and the Media’s Access to Court Documents and Information*, 13 November 2008, 40.

Supreme Court	17	29	4
District Court	50	30	32
Magistrates Courts	42	36	37
Children's Court	0	6	3
Coroner's Court	1	1	2
Total	110	102	75

A marked difference to that which can be found in suppression orders recorded in only the Supreme and District Courts of SA:⁸⁶

Jurisdiction	2006	2007	2008 (until 30 June)
Supreme & District Court	227	245	77
Total	227	245	77

Noting the differences between the two states can see a significant increase in the pro-rata statistic for 2008 in WA in comparison to previous years; comparable to a significant decrease in SA. Commentators have noted the increase in WA was most likely due to an influx of sexual assault charges made in remote Kimberley Aboriginal communities during 2008, and thus due to the inherent protection discussed previously in the *Evidence Act*; not indicative of judges use of discretion to suppress proceedings.⁸⁷ SA on the other hand has seen a marked decrease in the number of suppression orders recorded. Commentators have been unable to pinpoint reasons as to why

⁸⁶ Ibid.

⁸⁷ Ibid.

this is, however some have suggested that new provisions within the *Evidence Act*,⁸⁸ have allowed greater scope for challenging these orders.

These statistics show that there is a restriction on media outlets to comply with orders when made by the court. In doing so this may restrict which cases and how such cases are reported on. However when there is no such restriction, a large discretion on what to report is bestowed upon the reporters and the media outlets. Theories on the effects of this discretion have developed over the past 50 or so years, and therefore give us an opportunity to understand the impact on members of the criminal justice process, as well as the general public.

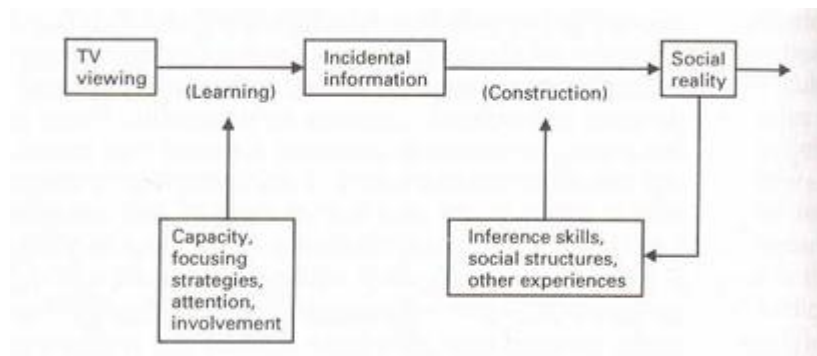
A *Theoretical Background on the Impact of the Media*

Researchers in the field of communications, media, public relations and many other disciplines have developed various theories and models explaining the effects of the media upon the public. These have been consistently investigated, developed and then often disproved,⁸⁹ however what we have been left with is an extensive range of models designed to cover various interactions between the media and the public. One of these models was developed upon the decline of support for the *Hypodermic Needle Model*, and was entitled the *Cultivation Theory*. This theory argues that the media has long-term effects on the public, but these effects are small, gradual and indirect. These gradual influences become significant

⁸⁸ *Evidence Act 1929* (SA) s 69A.

⁸⁹ As in the case of the Hypodermic Needle Model of the 1920's which implies that the media has a direct, immediate and powerful effect on its audiences, further disproved by Lazarsfeld and colleagues as discussed in Scheufele, D, and Tewksbury, D, 'Framing, Agenda Setting, and Priming: The Evolution of Three Media Effects Models' (2007) 57(1) *Journal of Communication*, 9, 10.

over an extended period of time and extended exposure to the medium. This theory can be seen conceptually depicted as below:⁹⁰



What this conceptual model illustrates is the suggestion that media is responsible for shaping its viewers formulation of social reality. Whilst this model, at a general level can include various mediums it can however be restricted to the ambit to which this research involves:

Interestingly, most news directors nonetheless believe that the preponderance of themes of danger and victimization in the news desensitizes and depresses news consumers. Their beliefs are echoed by many media critics and scholars.⁹¹

People who subject themselves to higher levels of exposure are therefore more likely to be influenced by the ways in which the world is framed by the media to which they expose themselves.⁹² Studies have shown that heavy viewers of mass media were more fearful of ‘walking alone at night’, and also tended to overestimate the prevalence of violent crimes.⁹³ What

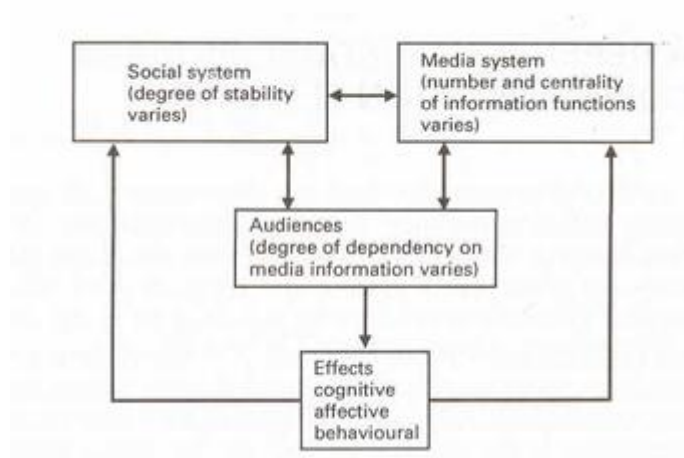
⁹⁰ Hawkins R P and Pingree, S ‘Television’s Influence on Social Reality’ in Wartella, E, Whitney, D and Windahl, S (eds) *Mass Communication Review Yearbook*, Vol 5 (Sage, 1983) 53.

⁹¹ Dolf Zillmann and Silvia Knobloch, ‘Emotional Reactions to Narratives about the Fortunes of Personae in the News Theater’ (2001) 29 *Poetics* 189, 190.

⁹² Gerbner, G, and Gross, L, ‘The Scary World of TV’s Heavy Viewer’ (1976b) 10(4) *Psychology Today*, 41, 44.

⁹³ Ibid.

this model therefore indicates is that the general conceptualization of the world on the part of the media can have a distinct effect on the public's understanding of the same. By the media constantly choosing to depict crimes of a violent nature and cases where sentences are likely to be viewed to be lenient this model would argue that based upon previous research, it is likely that viewers who are exposed to this kind of reporting, are more likely to overestimate the prevalence of violent crimes⁹⁴ and furthermore believe that sentencing in general is lax within the justice system. The more this relationship evolves the more the consumer becomes dependent on the media outlet for information.⁹⁵ From this the *Dependency Theory* and model of media systems was derived. This theory proposes that an integral relationship is born between the media, the consumer and the consumer's social group. As illustrated below:⁹⁶



What is depicted within this conceptual model is that, consumers depend on media information to meet certain needs and achieve certain goals. These goals can vary based on their social network, and their degree of dependency. How this model interacts with the *Cultivation Theory* is

⁹⁴ Ibid.

⁹⁵ Ball-Rokeach, S J, and DeFleur, M L 'A Dependency Model of Mass-Media Effects' (1976) 3 *Communication Research* 3, 5.

⁹⁶ Ibid 7.

interesting to note. Negative themes perpetuated by media reports have been found to hold great appeal to audiences regardless of the shaping effect theorized by the *Cultivation Theory* occurring.⁹⁷ Instead, often audiences seek out media that is adverse even in the form of negative ‘reality’ programming.⁹⁸ The continual seeking out of media that is negative can be considered to be odd, considering the adverse emotional reactions undoubtedly present within the viewer.⁹⁹ However this can be resolved with reference to biological factors as discussed in relevant research:

The “hedonistic paradox” of the appeal of aversion-evoking narratives tends to be resolved by referral to biological factors, specifically to motives serving self-preservation. The inclination to continually screen one’s environment for threats and dangers, in view of its obvious survival value through the millennia, is thought to be evolutionary defined and thus deep-rooted. This supposition is actually endorsed, although often only implicitly, by media representatives who attempt to justify the predominance of misfortune themes in the news.¹⁰⁰

What this means in terms of the previous two mentioned models is that viewers are consistently being shaped by the media to which they subject themselves to. For evolutionary, and biological reasons they are innately likely to seek out media that is negative for self-preservation reasons. In

⁹⁷ Dolf Zillmann and Silvia Knobloch, ‘Emotional Reactions to Narratives about the Fortunes of Personae in the News Theater’ (2001) 29 *Poetics* 189, 191.

⁹⁸ J Haskins, ‘*Morbid Curiosity and the Mass Media: A Synergistic Relationship*’ in: Crook, J A, Haskins, J B, and Ashdown, P G (eds), *Morbid Curiosity and the Mass Media: Proceedings of a Symposium* (1984, University of Tennessee and the Garnett Foundation, Knoxville), 2.

⁹⁹ Dolf Zillmann and Silvia Knobloch, ‘Emotional Reactions to Narratives about the Fortunes of Personae in the News Theater’ (2001) 29 *Poetics* 189, 191.

¹⁰⁰ *Ibid*, 191.

doing so, they become more dependent on the media to fulfil the 'surveillance function'¹⁰¹ and therefore meet these deeply rooted needs. This dependence may vary depending on the position or role in which the person plays within the criminal justice system; be it as a judge, jury member or as a member of the public who passively accepts information given without any connection to the proceedings.

B *Judges and the Media*

It is a commonplace assumption that judges within our criminal justice system act in an impartial, fair and just manner. The maxim in Australia is that:

No judge would be influenced in his judgment by what may be said by the media. If he were, he would not be fit to be a judge.¹⁰²

This is a similar presumption to which the United States accepts as stated:

Judges are supposed to be men of fortitude, able to thrive in a hardy climate and not sensitive to the winds of public opinion.¹⁰³

However to state that judges are somehow immune to media representations is axiomatically incorrect:

¹⁰¹ P Shoemaker, 'Hardwired for News: Using Biological and Cultural Evolution to Explain the Surveillance Function' (1996) 46 *Journal of Communication* 32, 32.

¹⁰² *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 (the BLF case) per Gibbs CJ quoting Lord Salmon at 33.

¹⁰³ *Craig v Harney* 331 US 367 (1947).

We live in a media culture to which no one is immune. Monarchs and popes react to media pressures. That judges should not is a noble idea and one we should cultivate. However, it is not a fact upon which law can safely be based.¹⁰⁴

In contrast it is argued that it is inherent within a judge's everyday tasks to prevent him or herself from allowing prejudicial media, facts or commentary from having any effect upon his or her final judgments:

It is the everyday task of a judge to put out of his mind evidence of the most prejudicial kind that he has heard and rejected as inadmissible. It is not uncommon for a judge to try a case which was the subject of emotional public discussion before the proceedings commenced. I find it quite impossible to believe that any judge of the Federal Court who may ultimately deal with the proceedings in that court will be influenced in his decision by anything he may have read or heard of the evidence given or statements made at the inquiry.¹⁰⁵

So the question that is asked of this information is how these conflicting viewpoints reconcile with the previously discussed theoretical models and theories. Even though judges may well have a greater ability to discern legal fact from sensationalized fact perpetuated from the media, one cannot assume that this will have no effect upon his or her attitudes or beliefs. Core to the *Cultivation Theory* is that media has an influence over all members of the public, regardless of their idiosyncrasies and central to the *Dependency Theory* is that this influence will increase as the information

¹⁰⁴ David Anderson, 'Lessons From An Impeachment' [1999] *1 University of Technology, Sydney Law Review* 63, 64.

¹⁰⁵ *BLF Case* (1982) 152 CLR 25.

provided fulfils certain needs¹⁰⁶. Whilst judges will have a greater understanding of the criminal justice system to that of an everyday citizen, and thus the fulfilment of ‘evolutionary self-preservation’ will not be strived for through these means there are other needs to which judges may rely upon. After all, advancement through judicial ranks is largely based upon reputation, and ambition to progress careers is undoubtedly of importance to many members of the judiciary:

It is not lack of ambition that makes men and women become judges and elevation to the bench does not eradicate ambition. Lower judges aspire to be higher judges, justices aspire to be chief justices and they all aspire to be remembered kindly by history.¹⁰⁷

This idea of self-interest was discussed by Gleeson CJ in *Forge v Australian Securities and Investments Commission*:

Judges are commonly promoted (by executive governments) within courts or within the judicial hierarchy. Such promotions may involve increased status and remuneration. Throughout the history of this Court, most of its members have arrived here by way of promotion. There may be some people who would say that could erode independence and impartiality.¹⁰⁸

Gleeson CJ goes on to qualify this statement by saying:

¹⁰⁶ Ball-Rokeach, S J, and DeFleur, M L, ‘A Dependency Model of Mass-media effects’ (1976) 3 *Communication Research*, 3, 6.

¹⁰⁷ David Anderson, ‘Lessons From An Impeachment’ [1999] *University of Technology, Sydney Law Review*, 63, 65.

¹⁰⁸ *Forge v Australian Securities and Investments Commission* [2006] HCA 44, 44.

It is not a matter to be dismissed lightly, but in the wider context it is not decisive. It is difficult to legislate against the pursuit of self-interest.¹⁰⁹

What the ideas of pursuing self-interest suggest is that the media could very well influence a judge who is mindful of potential career progression towards a more politically favourable judgement. In doing so they would fulfil needs suggested within the *dependent model* of media consumption, as well as influence his or her attitudes and perceptions as within the *cultivation model*. However in a lot of cases to which the public are most concerned about, the onus for a fair and just judgement can lay on the shoulders of twelve everyday citizens. Removing the enhanced ability to discern legal fact from media sensationalized jargon to which could be attributed to judges, one would assume that these citizens would be more at risk of falling victim to the media as a persuasion tool.

C *Jury Members and the Media*

It is well established that the role of the jury within the criminal justice system is to answer questions of fact. They are the ‘sole judges of the facts’ and the judge will merely direct them as to the ‘relevant legal principles’ and their application within the scope of the case.¹¹⁰ But is admissible evidence the sole influence on the jury member’s final decision? It has been discussed on many an occasion, with the consideration that jurors’ decisions may be derived from a broad range of relevant sources including

¹⁰⁹ Ibid.

¹¹⁰ Law Reform Commission of New South Wales, ‘*Consultation Paper 4 – Jury Directions*’ (2008), 63.

newspaper reports, radio and television news, advertising and the like¹¹¹. Just how much an influence outside coverage plays and whether this prevents the members of the jury from being impartial is open to speculation.

It has long been accepted that the idea of jury members having no predispositions and expectations is a legal fiction as stated in research by Diamond, Casper and Ostergren:

The legal fiction that the jury operates on a blank slate, influenced only by what it hears and sees in court, and not influenced by predispositions and expectations.¹¹²

However not only is the purpose of the jury to establish questions of fact, but it is to do this whilst representing the community¹¹³. In doing so the courts recognize that every member of the jury has their own opinions, biases, prejudices and predispositions¹¹⁴. In order for jury members to do their job correctly, they must represent the community and the community's wide range of opinions, biases, prejudices and predispositions:

¹¹¹ Edith Greene, 'Media Effects on Jurors' (1990) 14 *Law and Human Behavior* 439, 440.

¹¹² Diamond, Casper and Ostergren, 'Blindfolding the Jury' (1989) 52 *Law and Contemporary Problems* 247, 251.

¹¹³ Newton N Minow and Fred H Cate, 'Who is an Impartial Juror in an Age of Mass Media?' (1991) 40 *American University Law Review* 631, 656.

¹¹⁴ *Ibid.*

Among the twelve jurors there should be a cross-section of the community, certainly not usually accustomed to evaluating evidence, but with varied experiences of life and of the behaviour of people.¹¹⁵

In order for a jury member to represent the community they must be informed. Some commentators state that the exclusion of ‘well-informed, curious, even opinionated people’ is of the same category as exclusion based on sex, race or religion¹¹⁶. American commentators go as far as to say that:

While jurists agree that jurors need to be impartial, impartiality, as defined by the Supreme Court and the experience of other countries that use jury systems, does not mean uninformed or unopinionated. It does not require an unrealistic, undesirable, and unobtainable robot-like ability to disregard prior knowledge, whether obtained via the media or through first-hand experience. Persons with such traits, if they exist, are poor choices for jurors.¹¹⁷

So it can be deduced that commentators and judges alike have vouched for jury members that are well-informed as to all forms of media surrounding their community. After all they must be representative of the community, and substantial members of the community engage with the various media outlets. Whilst all this commentary surrounds the positives of jury members who engage with media outlets prior to entering the criminal justice system, some discussion as to their engagement whilst playing the role of juror must be noted.

¹¹⁵ Criminal Law and Penal Methods Reform Committee of South Australia, *Court Procedure and Evidence* (Third Report, 1975), 84.

¹¹⁶ Newton N Minow and Fred H Cate, ‘Who is an Impartial Juror in an Age of Mass Media?’ (1991) 40 *American University Law Review* 631, 656.

¹¹⁷ *Ibid.*

Having established jurors as representative members of their community, they are susceptible to the same interactions with the media as their friends and relatives. Their version of social reality is likely to have been shaped through their interactions with the media, and quite likely they have become dependent on these interactions. Research into jurors' media consumption habits in relation to their attitudes towards the case has shown to be affected with significance. Barille in 1984 investigated this in an attitudinal study, and found that people who rely on crime news were more likely have entrenched views of crime that are heavily distorted and overly violent¹¹⁸. They were also more likely to believe courts favour criminals over victims, and thus have an inherent sense of mistrust, and suspicion as opposed to those who engage in less crime-news consumption.¹¹⁹ Finally, they were also seen to support the use of force of police in the positive.¹²⁰ What all this means, is that continued exposure to crime-related media may well have an effect on jury members. However, these inherent effects of consistent crime-news consumption are likely to be found within a substantial portion of the community and thus be an issue we cannot resolve. After all, they are still theoretically representative of the community which is prosecuting the accused.

¹¹⁸ L Barille, 'Television and Attitudes About Crime: Do Heavy Viewers Distort Criminality and Support Retributive Justice?' in R. Surette (ed) *Justice and the Media: Issues and Research* (C.C. Thomas, 1984), 141.

¹¹⁹ G Gerbner, L Gross, M Eleey, M Jackson-Beeck, S Jeffries-Fox and N Signorielli, 'TV Violence Profile No. 8: The Highlights' (1977) 27 *Journal of Communication* 171, 179.

¹²⁰ L Barille, 'Television and Attitudes About Crime: Do Heavy Viewers Distort Criminality and Support Retributive Justice?' in R Surette (ed) *Justice and the Media: Issues and Research* (C.C. Thomas, 1984), 141.

D *The General Public and the Media*

The community relies on the criminal justice system to represent them, and to do what a reasonable person would consider to be fair and just. They expect crimes to be met with punishment relative to their culpability and:

[the] imposition of sanctions that are of a nature and of sufficient degree of severity to adequately express the public's abhorrence of the crime for which the sanction was imposed.¹²¹

In order for the public to become aware and thus satisfied that such a process is being carried out, they must turn to the media. But when they do they are confronted with a disparate body of information. The types of offences that are covered by the media are the ones that are least likely to occur.¹²² Meanwhile, the common offenses such as theft and burglary receive almost no air time. Media coverage of sentencing typically provide for sentences that would be likely to be seen as lenient. A great majority of sentencing coverage involve imprisonment, with little to no focus on fines or other orders.¹²³

With consideration of the abovementioned factors, it is no surprise that the public knows little to nothing about the sentencing process nor the trends of sentencing. It has been found that the public underestimates the severity of offences, overestimates the occasions to which offenders are released, and

¹²¹ John Tomaino, 'Punishment Theory', in Rick Sarre and John Tomaino (eds), *Exploring Criminal Justice: Contemporary Australian Themes* (South Australian Institute of Justice Studies, Adelaide, 1999), 162.

¹²² R Estep and P Macdonald, 'How Prime-Time Crime Evolved On TV, 1976-1983' (1983) 60 *Journalism Quarterly* 293, 299.

¹²³ Julian V Roberts and Anthony N Doob, 'News Media Influences on Public Views of Sentencing' (1990) 14 *Law And Human Behavior* 451, 453.

the number released on parole.¹²⁴ Surveys throughout the world find that the public are generally dissatisfied with sentencing regimes, and find that overall sentencing is far too lenient¹²⁵. A number of studies have been conducted into the links between media coverage, and these perceptions of the justice system. Roberts & Doob in 1990 demonstrated that upon exposure to crime stories in the newspaper, ratings of sentence leniency were significantly high. A very small percentage (16%) considered the sentences to be too harsh. Other indicators in this research allowed them to draw conclusions that had more information been provided to the participants it was likely that they might have had a different view entirely.¹²⁶

A second study, into the form of information given to participants and the effect this has on their perception on the sentence was also conducted. Participants were assigned different groups, and given different media accounts of the same crime. Similar to the first mentioned study, high levels of dissatisfaction with the sentence were found with the tabloid newspaper's account. Accounts that gave more facts as to issues and factors surrounding the sentencing process were more likely to be considered favourable, showing that context is key.¹²⁷

Perhaps the most significant study within the ambit of this research was a comparison between the provision of a newspaper account of a crime and

¹²⁴ Ibid.

¹²⁵ R Broadhurst and D Indermaur 'Crime Seriousness Ratings: The Relationship Between Information Accuracy and General Attitudes in Western Australia' (1982) 15 *Australian and New Zealand Journal of Criminology* 219, 220.

¹²⁶ Julian V Roberts and Anthony N Doob, 'News Media Influences on Public Views of Sentencing' (1990) 14 *Law and Human Behavior* 451, 456.

¹²⁷ Ibid.

consequent sentence, and the official court documents to groups of the participants. What was found was a significant difference between participants and the opinion of leniency (63% of media document group versus 19% of court document group). This shows a significant effect of the media's account of the same information upon the participant.¹²⁸

What is indicative of these research studies is the position of power media outlets have over the general public. A clear majority of people in the community rely on the information they are given on a daily basis by the media, and perhaps have little or no knowledge how to expand or find alternative and more accurate accounts of the same fact scenarios. In doing so they are forced to consume the overly constructed versions of social reality put forth in order to fulfil their entrenched dependence on information that assists in their self-preservation monitoring. But by falling into this paradox of media influence and dependence, they are ultimately giving away any sense of control over their own attitudes and values.

V CONCLUSION AND RECOMMENDATIONS

What has been discussed in this research is of significance within any community's justice system. Understanding how the public perceives the justice system is fundamental to its goal in providing the community a way to reprimand and deter criminality. In order for this goal to be achieved, the justice system needs to be seen by the community to be effective. The most common way in which a member of the community can do this is through interaction with the media. The media has a significant role to play within

¹²⁸ Ibid.

the perpetuation of justice, and must take this role seriously. In cases where a court has placed no restrictions on the publication of proceedings, a great deal of discretion lays within reporters and the media outlet to select and portray criminal proceedings in ways that can influence the public.

Research has been discussed through this paper that suggests that media outlets are not taking heed to this responsibility. They are over-representing violent crimes, and choosing to consistently screen proceedings which the public may view as lenient as opposed to those which they would not. These choices are having a significant effect upon the community in general. A large portion of the community consistently claims that justice is not being conducted in a consistent and fair manner. Rather they state that sentences are inherently lenient and the criminal justice system needs re-evaluation. These kinds of attitudes can be seen to have developed as per the various media communication models and theories discussed earlier with studies having shown that exposure to media accounts in comparison to more complete documents will change the perception of the participant.

For future development, government departments should take further extensive research into the effect of media outlets upon the community. Restoration of community faith in our criminal justice system is key. By implementing regulations upon our media that could possibly involve one or more of the following we can strive toward a greater community development:

- Mandatory legal training conducted by the Law Society for all reporters as to which are the crucial elements of the proceedings.

- A regulatory body to ensure compliance with legal training, with the ability to bring actions against media outlets.
- Programs to encourage legal awareness amongst the general public.
- Increased accessibility to information surrounding the courts and the criminal justice process.
- More government-funded education in schools about the legal process, and principles of crime and criminology, to prepare the future generations to be more discerning of information given to them.

This list is evidently not exhaustive, and further research will allow for investigation into the possible effectiveness of these options. What needs to be done here is a realisation on the part of the executive, and the judiciary that there is a high level of dissatisfaction on the part of the Australian community. This dissatisfaction amongst the community is important to address as it can translate to greater problems within society. Lack of faith in the effectiveness of the criminal justice system can in many ways reduce community unity, persuade victims to not report criminal activity and even increase the possibility of vigilante movements. By addressing this issue now, we can prepare future generations for a full and deep understanding of the world around them and a proper appreciation for the work done by government entities in the combat of crime.

**THE REPUBLIC OF WESTERN AUSTRALIA:
THE LEGAL POSSIBILITY OF WESTERN AUSTRALIA'S
SECESSION FROM THE AUSTRALIAN FEDERATION**

DANIEL HARROP*

To me, this has been Australia's quiet civil war, a war that continues today.

- Colin Barnett, Premier of Western Australia¹

Abstract

This paper assesses the legal possibility of Western Australian seceding from the Commonwealth. It begins by discussing the historical context, tracing Western Australia's initial reluctance to join the federal compact, early discontent with federation, the 1930's secession attempt and the 1974 Westralian Secession Movement. It then evaluates three possible avenues for achieving secession: amending the Imperial Act, internal amendments to the Constitution and unilateral secession. The author concludes that secession is legally possible but politically very unlikely to ever succeed.

I INTRODUCTION

Australian federalism has once again come under fire from the dissident West. The current resources boom in Western Australia is exposing the fault lines in the rules of federation, rules that need to be rewritten if the

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¹ Amanda O'Brien, 'Tempers Flare but no Tanks Across the Nullarbor – Yet', *Weekend Australian*, 8 May 2010.

federation is to survive into the distant future. The Western discontent with Canberra continues to grow as the Gillard government pushes for further centralisation and plans to implement a national resources tax. This is not the first time the idea of secession has raised its head in Western Australia, in fact, the State has a 'long history of flirting with the idea of becoming its own nation state'.² This paper will discuss the history of Western Australia's discontent with the Australian federation and trace the evolution of the secession movement. It will then address the issue of the legality of Western Australia's withdrawal from the federation, concluding that while secession is legally possible, the political likelihood of its occurrence in the foreseeable future is slim to none.

II HISTORY OF THE WESTERN AUSTRALIAN SECESSION MOVEMENT

A Federation and Initial Reluctance

At the time the federation was first conceived, Western Australia had no desire to become a member of the new Commonwealth.³ The reasons for the reluctance are logical. Firstly, Western Australia had only become a self-governing colony in 1890 and there was a reluctance to give up the autonomy only so recently attained from the Imperial Government.⁴ Secondly, Western Australia generated almost half of its revenue from

² Shane Wright, 'Welcome... to the Republic of Western Australia', *West Australian*, 24 April 2010.

³ Thomas Musgrave, 'The Western Australian Secessionist Movement' (2003) 3 *Macquarie Law Journal* 95, 95.

⁴ Christopher Besant, 'Two Nations, Two Destinies: A Reflection on the Significance of the Western Australian Secessionist Movement to Australia, Canada and the British Empire' (1990) 20 *University of Western Australia Law Review* 209, 226-7.

inter-colonial tariffs,⁵ which the *Constitution* would abolish as it intended to make trade, commerce and intercourse among the States ‘absolutely free’.⁶ Thirdly, Western Australia was geographically isolated and did not share a sense of unity with its eastern counterparts.⁷ New Zealand is situated geographically closer to the Eastern States than Western Australia and was given an opportunity to join the Commonwealth as an original State,⁸ but declined the offer.⁹

Despite this initial reluctance, Western Australia did join the Commonwealth as an original member following a referendum on 31 July 1900 in which a majority of Western Australians (44,800 to 19,691) voted in favour of federation.¹⁰ Western Australia declined to participate in the Constitutional Conventions of the 1890’s but agreed to join the federation ‘at the last gasp’.¹¹ The reasons were largely economic. The draft *Constitution* was amended to include a provision allowing Western Australia to maintain its inter-colonial tariff system for the first five years of federation.¹² There was also the promise of a railway linking Western Australia to the eastern States.¹³ Perhaps the largest inducement was the

⁵ Alan Shaw, *The Story of Australia* (Faber and Faber, 1961) 195.

⁶ *Australian Constitution* s 92.

⁷ Thomas Musgrave, ‘The Western Australian Secessionist Movement’ (2003) 3 *Macquarie Law Journal* 95, 97.

⁸ *Australian Constitution* s 6.

⁹ Helen Irving (ed.), *The Centenary Companion to Australian Federation* (Cambridge University Press, 1999) 405.

¹⁰ John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1976) 248-250.

¹¹ Augusto Zimmermann, ‘The Still Reluctant State: Western Australia and the Conceptual Foundations of Australian Federalism’, in N. Aroney, G. Appleby and T. John (eds.), *The Future of Australian Federalism: Comparative and Inter-Disciplinary Perspectives* (Cambridge University Press, 2011) – *forthcoming*, 2.

¹² *Australian Constitution* s 95.

¹³ Edward Watt, ‘Secession in Western Australia’ (1958) 3 *University Studies in Western Australian History* 43, 64.

pressure applied by the Eastern Goldfields Reform League.¹⁴ Residents in the goldfields had a strong desire for federation and were willing to separate from Western Australia to achieve this goal.¹⁵

It did not take long for Western Australia to become dissatisfied with the Commonwealth Government. Five years after federation, the Western Australian Legislative Assembly declared Federation had ‘proved detrimental to the interest’ of the State and called for a referendum seeking popular support for a withdrawal from the Commonwealth.¹⁶ The discontent emerged primarily in response to the State budget problems that arose after the five year exemption from free trade came to an end in 1905. Despite the Legislative Assembly resolution, Premier Moore took no action to withdraw Western Australia from the Commonwealth.¹⁷ The will to secede lost moment, at least for the time being.

B *The 1933 Secession Referendum*

When the Great Depression hit in the 1930’s, Western Australia’s participation in the Commonwealth was seriously threatened. Western Australia’s first serious secessionist movement, the Dominion League, was formed to advocate the secession of Western Australia from the

¹⁴ Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 32.

¹⁵ Christopher Besant, ‘Two Nations, Two Destinies: A Reflection on the Significance of the Western Australian Secessionist Movement to Australia, Canada and the British Empire’ (1990) 20 *University of Western Australia Law Review* 209, 226-7.

¹⁶ Parliament of Western Australia, Legislative Assembly 1906 *Debates* Volume 29, 1871.

¹⁷ Augusto Zimmermann, ‘The Still Reluctant State: Western Australia and the Conceptual Foundations of Australian Federalism’, in N. Aroney, G. Appleby and T. John (eds.), *The Future of Australian Federalism: Comparative and Inter-Disciplinary Perspectives* (Cambridge University Press, 2011) – *forthcoming*, 3.

Commonwealth.¹⁸ Pressure from the Dominion League led to the Western Australian Parliament passing the *Secession Referendum Act 1932* (WA), which provided for a referendum on secession to be held with the next State general election in 1933. The referendum was held on 8 April 1933 and the population voted overwhelmingly in favour of secession, with 68 percent (138,654 to 70,706) of voters voting in favour of withdrawing from the Commonwealth.¹⁹ The people had spoken and the Government promised to take ‘all steps necessary to give effect to the majority decision of the people’.²⁰

Given the majority support for secession, the newly elected Labor Government led by Premier Collier began the process of considering the possibility of withdrawing from the Commonwealth, despite the fact that the new Government did not support secession.²¹ The Government considered three possible options to effect the peoples’ wish for secession. First was the possibility of a unilateral secession without the support of either the Commonwealth or the Imperial Parliament.²² This option was not plausible because it was important to keep strong ties with the United

¹⁸ Thomas Musgrave, ‘The Western Australian Secessionist Movement’ (2003) 3 *Macquarie Law Journal* 95, 105.

¹⁹ Christopher Besant, ‘Two Nations, Two Destinies: A Reflection on the Significance of the Western Australian Secessionist Movement to Australia, Canada and the British Empire’ (1990) 20 *University of Western Australia Law Review* 209, 251.

²⁰ Edward Watt, ‘Secession in Western Australia’ (1958) 3 *University Studies in Western Australian History* 43, 55.

²¹ Augusto Zimmermann, ‘The Still Reluctant State: Western Australia and the Conceptual Foundations of Australian Federalism’, in N. Aroney, G. Appleby and T. John (eds.), *The Future of Australian Federalism: Comparative and Inter-Disciplinary Perspectives* (Cambridge University Press, 2011) – *forthcoming*, 6.

²² Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 46.

Kingdom from an economic point of view,²³ and also considering that the Dominion League had expressed its deep loyalty to the Crown.²⁴ Second was the possibility of internal amendment to the *Constitution* by using the section 128 amendment procedures. This was even more problematic, as it would require support from both houses of the Commonwealth Parliament and also a majority of voters in every State.²⁵ It was also problematic in that the section 128 amendment procedures apply only to the substantive clauses of the *Constitution*, and not to the preamble and covering clauses which Western Australia would need to alter to remove itself from the Federation.²⁶ The third option was to petition the Imperial Parliament to amend the *Constitution Act*²⁷ and enact new legislation to reconstitute Western Australia as a self-governing dominion of the British Empire.²⁸ This third option seemed the most realistic, and the State Government announced in 1934 that it planned to petition the Imperial Parliament.²⁹

Western Australia's petition to secede was presented to the Imperial Parliament in November 1934.³⁰ The Imperial Parliament refused to receive

²³ *Secession Act 1934* (WA), 25 Geo 5, Statutes of Western Australia, No 2, The Second Schedule, 17 (XXV).

²⁴ Christopher Besant, 'Two Nations, Two Destinies: A Reflection on the Significance of the Western Australian Secessionist Movement to Australia, Canada and the British Empire' (1990) 20 *University of Western Australia Law Review* 209, 236.

²⁵ Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 47.

²⁶ Thomas Musgrave, 'The Western Australian Secessionist Movement' (2003) 3 *Macquarie Law Journal* 95, 108.

²⁷ *Commonwealth of Australia Constitution Act* (1900) (Imp.).

²⁸ Thomas Musgrave, 'The Western Australian Secessionist Movement' (2003) 3 *Macquarie Law Journal* 95, 108.

²⁹ *Ibid.*

³⁰ W. A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book Co., 1976) 540.

the petition until it first determined whether it could properly be received.³¹ A Joint Select Committee was established by the Imperial Parliament to determine whether constitutional law and conventions allowed a petition to be received from a State within a dominion.³² The doctrine of parliamentary sovereignty gave the Imperial Parliament the power to enact legislation which could overrule legislation in the dominions.³³ The idea of parliamentary sovereignty was further expressed in the *Colonial Laws Validity Act*.³⁴ However, the passing of the *Statute of Westminster* in 1931 stopped Imperial Parliament legislation automatically applying in the dominions.³⁵ The *Statute of Westminster* was not adopted into Australian law until 1942, so there are questions as to whether it would have even applied. In any event, if it did not apply, the Imperial Parliament had a practice of not interfering with the internal affairs of its dominions unless specifically requested to do so.³⁶

The Committee heard oral arguments from counsel for the State of Western Australia and counsel for the Commonwealth in 1935 on the receivability of the petition. The Committee concluded that there was an ‘undoubted and ancient right of Parliament to receive whatever petitions it thinks fit’,³⁷ but

³¹ Thomas Musgrave, ‘The Western Australian Secessionist Movement’ (2003) 3 *Macquarie Law Journal* 95, 110.

³² Christopher Besant, ‘Two Nations, Two Destinies: A Reflection on the Significance of the Western Australian Secessionist Movement to Australia, Canada and the British Empire’ (1990) 20 *University of Western Australia Law Review* 209, 277-8.

³³ Kenneth Bailey, ‘The Statute of Westminster’ (1932) 5 *Australian Law Journal* 362, 399.

³⁴ *Colonial Laws Validity Act* 1865, 28 & 29 Vict, c 63.

³⁵ *Statute of Westminster*, Geo 5, c 55.

³⁶ Thomas Musgrave, ‘The Western Australian Secessionist Movement’ (2003) 3 *Macquarie Law Journal* 95, 114.

³⁷ *Report by the Joint Committee of the House of Lords and the House of Commons Appointed to Consider the Receivability of the Petition of the State of Western*

that the Parliament would only receive petitions made by the dominion ‘speaking with the voice that represents it as a whole and not merely at the request of a minority’.³⁸ A petition would only be received by a State government if the subject matter related only to states powers under the *Constitution*.³⁹ The Imperial Parliament refused to receive the petition on the advice of the Committee that it did not have the jurisdiction to ‘except upon the definite request of the Commonwealth of Australia conveying the clearly expressed wishes of the Australian people as a whole’.⁴⁰

The case for secession had failed, and support for the Dominion League in the Western Australian community dwindled.⁴¹ The Dominion League itself became disheartened by the failure and had faded into obscurity by 1938.⁴² The anti-secessionist Labor Government was, not surprisingly, happy to let the issue of secession drop off the political agenda. By the end of the 1930’s the issue of secession was little more than a vague memory, and three decades would pass before the issue was reignited.

Australia, Parliamentary Papers of the House of Commons (1934-35), Volume VI, No 88 (‘The Report’) para 2, vi.

³⁸ Ibid, para 7, viii.

³⁹ Ibid, para 9, ix.

⁴⁰ Ibid, para 13, x.

⁴¹ Augusto Zimmermann, ‘The Still Reluctant State: Western Australia and the Conceptual Foundations of Australian Federalism’, in N. Aroney, G. Appleby and T. John (eds.), *The Future of Australian Federalism: Comparative and Inter-Disciplinary Perspectives* (Cambridge University Press, 2011) – *forthcoming*, 8.

⁴² Christopher Besant, ‘Two Nations, Two Destinies: A Reflection on the Significance of the Western Australian Secessionist Movement to Australia, Canada and the British Empire’ (1990) 20 *University of Western Australia Law Review* 209, 229.

C *After the Failed 1933 Secession Attempt*

The push for secession never attained such prominence after the failed secession movement of the 1930's. As the economy picked up Western Australian's became complacent and forgot about the desire to secede. The secession debate was reignited briefly in 1974 by mining magnate Lang Hancock with the formation of the Westralian Secession Movement.⁴³ The movement was sparked in reaction to the centralist policy of the Whitlam Labor Government.⁴⁴ However, the movement failed to achieve prominence due to the strong economy at the time, and disappeared as quickly as it emerged.

III THE LEGAL POSSIBILITY OF SECESSION

As discussed above, the Collier Government decided there were three possible ways of effecting secession from the Commonwealth. An amendment to the Imperial Act, an amendment to the *Constitution*, and a unilateral secession. This section will explore the legal merit of each of these claims.

A *Amending the Imperial Act*

It would no longer be possible for Western Australia to secede from the Commonwealth by amending the Imperial Act. Since the enactment of the

⁴³ Augusto Zimmermann, 'The Still Reluctant State: Western Australia and the Conceptual Foundations of Australian Federalism', in N. Aroney, G. Appleby and T. John (eds.), *The Future of Australian Federalism: Comparative and Inter-Disciplinary Perspectives* (Cambridge University Press, 2011) – *forthcoming*, 8.

⁴⁴ Geoffrey Bolton, 'The Civil War We Never Had', the Third Conference of the Samuel Griffith Society, Fremantle, 5-6 November 1994, www.samuelgriffith.org.au/papers/html/volume3/v3chap5.htm.

Statute of Westminster, it would be impossible to effect secession through an amendment to the *Constitution Act*.⁴⁵ This impossibility was strengthened with the passage of the *Australia Act*,⁴⁶ which provides that 'no Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend... to the Commonwealth'.⁴⁷ These two acts give the Commonwealth the full autonomy to legislate for the people in the dominion without interference by the Parliament of the United Kingdom. It is also evident from Western Australia's 1930's secession attempt that, even if the Parliament of the United Kingdom could still change the *Constitution*, it would be extremely reluctant to do so.

B *Amending the Constitution*

Secession could be legally achieved by amending the *Constitution* using the provisions of section 128. However, amending the *Constitution* is not without its difficulties. Internal amendment to the *Constitution* first requires majority support from both houses of the Commonwealth Parliament. Given the rich resource wealth of Western Australia, the likelihood of any Commonwealth Government ever agreeing to the secession of Western Australia is dubious at best. Even supposing the Parliament supports secession, the second stage for amendment under section 128 of the *Constitution* is even more difficult to overcome:

If in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the

⁴⁵ *Commonwealth of Australia Constitution Act* (1900) (Imp.).

⁴⁶ *Australia Act* 1986 (Cth).

⁴⁷ *Ibid*, s 1.

proposed law, it shall be presented to the Governor-General for the Queen's assent.

History has shown that amending the *Constitution* is a difficult process. Of forty four proposals, only eight have been approved. The chances of the majority of citizens supporting Western Australia's secession, particularly in the eastern States, are slim to none.

Supposing a referendum to change the *Constitution* was successful, it would be necessary to amend covering Clause 3 of the *Constitution*, which provides:

It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

It would be necessary to omit the reference to Western Australia from the covering clause to legally validate the secession. As it currently stands, the clause compels Western Australia to be united in the Commonwealth as it stipulates that the states '*shall* be united in a Federal Commonwealth' (emphasis added).⁴⁸ When interpreting the *Constitution*, words should be given their ordinary meaning.⁴⁹ The use of the word 'shall' connotes a

⁴⁸ Ibid, covering clause 3.

⁴⁹ *Amalgamated Society of Engineers v Adelaide Steamship Co.* (1925) 28 CLR 128.

mandatory obligation to be united.⁵⁰ The mandatory obligation would not be binding on Western Australia if the reference to the State was removed from the clause, allowing it to withdraw from the Commonwealth constitutionally.

The Preamble of the *Constitution* could potentially pose an issue, declaring the Commonwealth to be ‘one indissoluble Federal Commonwealth’.⁵¹ However, the Preamble need not necessarily be altered for Western Australia to secede as it is not a binding provision and consequently cannot be relied upon to prohibit secession.⁵² The Preamble can be used as ‘a key to open the minds of the Makers of the Act, and the mischiefs which they intended to redress’.⁵³ The inclusion of the word ‘indissoluble’ reflects the founders’ intent to prohibit secession from the Commonwealth.⁵⁴ The founders all agreed that they intended the union to be ‘permanent and indestructible’.⁵⁵ However, they neglected to include a bar to secession in the substantive provisions of the *Constitution*. Although the preamble reflects the will of the founders in making the federation permanent, the preamble can only be used to assist in the interpretation of ambiguities in the main body of the legislation.⁵⁶ Given that there are no ambiguities in the main text of the *Constitution* with regards to the right of a State to

⁵⁰ John Quick, *The West Australian Discontent is Secession Possible?* (University of Sydney, 2001).

⁵¹ *Australian Constitution*, preamble.

⁵² Gregory Craven, ‘The Constitutionality of the Unilateral Secession of an Australian State’ (1985) 15 *Federal Law Review* 123, 127.

⁵³ *Stowel v Lord Zouch* (1569) 75 ER 536.

⁵⁴ Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 53.

⁵⁵ Josiah Symon, *Convention Debates*, Adelaide, 1897, 128.

⁵⁶ *Overseers v West Ham Iles* (1883) 8 App Cas 386.

secede, the preamble cannot be used of itself to bar Western Australia from seceding from the Commonwealth.

C *Unilateral Secession*

In theory it is possible for a State to claim its independence under the principle of self-determination. The United Nations has declared that the rights of minority groups and their desire for self-determination should be respected.⁵⁷ However, this must also be weighed up against the need for territorial integrity. The international law with respect to self-determination is complex, and it is not intended to set it out here in any comprehensive manner.⁵⁸ What is important to note in this context is that the right to self-determination is not absolute, and ‘any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations’.⁵⁹ Western Australia’s unilateral secession would threaten the territorial integrity of the Commonwealth of Australia, and consequently any attempt to secede unilaterally cannot be justified under the principle of self-determination.

The issue of unilateral secession has arisen in analogous circumstances with Quebec’s attempted secession from Canada. In *Reference re:*

⁵⁷ United Nations, General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Res 1514 (XV), 14 December 1960), para 6.

⁵⁸ For a more comprehensive discussion of the principle of self-determination see Hurst Hannum, ‘Rethinking Self-Determination’ (1993) 34 *Virginia Journal of International Law* 1.

⁵⁹ United Nations, General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Res 1514 (XV), 14 December 1960), para 6.

Secession of Quebec,⁶⁰ the Canadian Supreme Court held unanimously that ‘there is no right, under the *Canadian Constitution* or at international law, to unilaterally secede’.⁶¹ At international law, the rights of minority groups and their desire for self-determination should be respected.⁶² However, this principle does not extend to unilateral secession that threatens territorial integrity.⁶³ Although there is no constitutional right to unilaterally secede, a State’s aspiration to secede ‘would place a duty on the other provinces to enter into negotiations regarding the constitutional future of the federation’.⁶⁴ Western Australia’s desire to secede should be acknowledged and considered by the Commonwealth, but there is no right in the *Constitution* or at international law to unilaterally secede.

IV A NEW SECESSION THREAT?

Given that secession is - at least in theory - possible, the question then arises: is there a new secession threat? Just recently Western Australian Premier Colin Barnett declared that relations between the Commonwealth Government and the Western Australian Government had degenerated into an ‘unsavoury and unfriendly environment’.⁶⁵ Whilst Premier Barnett himself is not an advocate for secession,⁶⁶ he is more than happy to ‘fuel the fire’ so to speak, telling a business lunch last year that he ‘felt under

⁶⁰ *Reference re: Secession of Quebec* [1998] 2 SCR 217.

⁶¹ *Ibid* at 449.

⁶² United Nations, General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Res 1514 (XV), 14 December 1960), para 6.

⁶³ *Ibid*.

⁶⁴ Johan D Van Der Vyer, ‘Self-determination of the Peoples of Quebec Under International Law’, 10 *Journal of Transnational Law and Policy* 1, 3.

⁶⁵ Andrew Burrell, ‘WA Shuns Canberra, eyes China’, *Weekend Australian*, 28 May 2011.

⁶⁶ Paul Kelly, ‘Canberra Doesn’t Understand the West’, *Weekend Australian*, 4 December 2010.

siege from Canberra’ and declared that the State’s future ‘lay over the horizon and not over the Nullarbor’.⁶⁷ Despite the Premier’s lack of enthusiasm for pushing secession, other Cabinet Ministers are more vocal, notably Norman Moore, the Minister for Mining and Petroleum. Last year he made the following comments:

I’d like to see it [the case for secession] thoroughly analysed because what’s increasingly happening is that decisions about the affairs of Western Australia are being made in Canberra... Everywhere you look in respect to what the state government does there is pressure coming for uniformity, for common laws, for the commonwealth to be involved in all sorts of things. The national curriculum, the hospital system; they’re now wanting a resource rent tax that looks after the eastern states and penalises Western Australia. All these things suggest that, increasingly, we’re losing control of our own affairs.⁶⁸

The secession movement also has a level of popular support, with the local and national newspaper open letter pages featuring secession arguments from disgruntled citizens. The driving force behind popular sentiment is the shift of federal balance, with Canberra becoming ever more powerful. If the federal balance was appropriately restored, giving power back to the States, the likely reality is that the talk of secession will fade once more.⁶⁹

⁶⁷ Amanda O’Brien, ‘Tempers Flare but No Tanks Across the Nullarbor – Yet’, *Weekend Australian*, 8 May 2010.

⁶⁸ Ibid.

⁶⁹ Augusto Zimmermann, ‘The Still Reluctant State: Western Australia and the Conceptual Foundations of Australian Federalism’, in N. Aroney, G. Appleby and T. John (eds.), *The Future of Australian Federalism: Comparative and Inter-Disciplinary Perspectives* (Cambridge University Press, 2011) – *forthcoming*, 13.

The likelihood of Western Australia actually attempting to secede from the Commonwealth in the foreseeable future is practically non-existent. When threats of secession are taunted at Canberra, the remarks are really nothing more than empty threats.⁷⁰ The nation's leading expert on secession, Gregory Craven, recently stated: 'I think at the end of the day when Western Australia threatens to secede, it's just a bargaining position. If you ever tried to take it any further the consequences are so horrific to contemplate that either side would ever actually do it.'⁷¹ Although secession may be possible, we are unlikely to see a Republic of Western Australia any time in the foreseeable future.

V CONCLUSION

Western Australia was reluctant to join the Commonwealth from the very beginning, and has remained reluctant to remain in the Commonwealth ever since. However, despite this longstanding reluctance, there has only ever been one real attempt to withdraw from the Commonwealth in the 1930's. Although secession is legally possible through amendment to the *Constitution*, the political reality is that the chances of Western Australia withdrawing from the Commonwealth are remarkably low. The costs associated with secession would be enormous, and the new sovereign nation would need to raise its own defence force, tackle immigration problems, deal with trade barriers with its eastern counterparts and so on.⁷² The current revitalisation of the secession debate in reality has less to do

⁷⁰ Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 8.

⁷¹ Amanda O'Brien, 'Tempers Flare but No Tanks Across the Nullarbor – Yet', *Weekend Australian*, 8 May 2010.

⁷² See Shane Wright, 'Welcome... To the Republic of Western Australia', *West Australian*, 24 April 2010.

with the genuine wish to secede and more to do with discontent at the federal imbalance. The idea of secession will continue to raise its head until Canberra pays more attention to the needs and wants of the resource rich Western Australia. Until the federal balance is fixed, the threat of secession will continue to linger. As Premier Barnett has said, ‘this has been Australia’s quiet civil war, a war that continues today’.⁷³

⁷³ Amanda O’Brien, ‘Tempers Flare but No Tanks Across the Nullarbor – Yet’, *Weekend Australian*, 8 May 2010.

SHORT ESSAYS

THE DEATH AND RESURRECTION OF NATURAL LAW

DANIEL MIRABELLA

I INTRODUCTION

One of the central discussions that have preoccupied legal theorists throughout the centuries is whether the law must conform to higher standards of justice and morality. The natural law tradition or elements of it date far back to the time of Socrates and the Stoics.¹ Natural Law theorists, affirmatively responding to the above discussion, contend that the validity of state positive law relies on its adherence to unwritten higher principles of justice and morality². However, with time, Natural Law Theory (NLT) came under attack, as a growing number of legal theorists argued that positive law has no moral component and that morality and the law ought to be kept separate. This growing body of criticism developed into a new theory of law known as Legal Positivism as it concerned itself with what is posited. That is, law as it is, rather than law as it should be. In this essay, I purport that it was the rise of Legal Positivism and the scientific and empirical spirit characterising the period which led to the demise of NLT in the nineteenth century. Further, I will submit that NLT experienced its resurgence in the twentieth century, merely as a result of the horrific atrocities of World War II.

¹ Costas Douzinas and Adman Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing, 2005) 79.

² Mark C. Murphy, *Philosophy of Law: the fundamentals* (Blackwell Publishing, 2007) 36.

II NATURAL LAW THEORY

Before we proceed any further, it is first necessary to explore the tradition of NLT. NLT is thought to have first been introduced by the Ancient Greek thinkers, Socrates, Plato and Aristotle purporting that the law existed for the purpose of facilitating the pursuit of the good life, by members of the community.³ For Aristotle, the law could only be fully understood in terms of its purpose.⁴ The Roman Orator, Cicero (106-43 BC), contended that positive law ought to be assessed against the ‘true law’ which can be accessed through ‘right reason’ as this law is in ‘agreement with nature’ and the eternal law of God⁵. But it was not until St. Thomas Aquinas (1224-74) that NLT took on its most solid form.⁶ The highly influential Aquinas identified four types of law, with ‘natural law’ being the ‘eternal law’ discoverable by humans through reason. Thus ‘natural law’ was separate and superior to ‘human law’ which was regarded as providing the working details which ‘natural law’ leaves indeterminate.⁷ Finally, it was the contributions of Francisco Suarez (1548-1617) and Hugo Grotius (1583-1645) which laid the foundations for the secularisation of natural law.⁸ Towards the end of the eighteenth century, natural law began to fall out of favour and would eventually disappear altogether throughout the nineteenth century, which we turn to now.

³ Douzinas and Gearey, above n 1, 84.

⁴ Ibid.

⁵ Brian H Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 5th ed, 2009) 68.

⁶ Ibid 69.

⁷ Ibid.

⁸ Brian H Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 3rd ed, 2003) 71.

III THE NINETEENTH CENTURY

The nineteenth century opened with the French revolution and was a century which saw vast economic and technological changes, with capitalist enterprise aggressively expanding as a dominant feature of the century⁹. It was the century that saw the rise of the nation state and unrestrained empire building, but most importantly it witnessed the virtual institutionalisation of the previous ‘Age of Reason’ that had characterized the eighteenth century¹⁰. This century saw the birth of the social sciences such as the introduction of Sociology, Economics and Political Science. It was believed that all intellectual endeavors could be pursued from a scientific basis and ideas and human behavior, investigated with a scalpel and microscope. Increasingly, science was viewed as the fundamental tool of progress. It was believed all elements of society could be objectively studied, and as result provide an accurate basis for large scale social engineering.¹¹ Natural law, based on morality and incapable of being subjected to objective analysis, would fade away as it failed to stand up to scientific rigor and the challenge from Legal Positivism.

⁹ J M Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 303.

¹⁰ The 19th Century, *Encyclopedia Britannica* (5 April 2011) <<http://www.britannica.com/EBchecked/topic/551385/social-science/38918/The-19th-century>>.

¹¹ Chris Roederer and Darrel Moellendorf, *Jurisprudence* (Juta and Company Ltd, 2007) 45.

IV THE DECLINE OF NATURAL LAW AND RISE OF POSITIVISM

Legal Positivist Hans Kelsen (1881–1973), acknowledged in his *Pure Theory of Law* (1934), ‘the changeover of [mainstream] legal science from natural law to positivism went hand in hand with the progress of empirical natural sciences and with a critical analysis of religious ideology.’¹² It was indeed, David Hume (1711–76) in his work *Treatise of Human Nature*, who first attacked the idea that right reason could lead to objective moral truth; that we cannot objectively know what is right or wrong through moral reasoning¹³. What has become known as ‘Hume’s Law’, basically claims that we can never validly deduce an ‘ought’ from an ‘is’.¹⁴ Therefore for Hume, law ‘must be regarded as separate from morals’.¹⁵ Following the same empirical spirit, Legal Positivism was born with Jeremy Bentham (1748–1832) and John Austin (1790–1859) as its most prominent pioneers. Jeremy Bentham’s view of natural law was expressed in his vicious attack on the natural law ideas of Blackstone’s *Commentaries* (1765), where he viewed natural law as a ‘formidable non-entity’ and natural law reasoning as a ‘labyrinth of confusion’ based on moral prejudices.¹⁶ Bentham was most disturbed by the mysticism and complexity that surrounded the law of the British Common Law System. Bentham sought to reform a system where the law was retroactive, incomprehensible to the layman, and concealing what were sometimes considered the corrupt interests of

¹² Augusto Zimmermann, ‘Evolutionary Legal Theories— The Impact of Darwinism on Western Conceptions of Law’ (2010) 24(2) *Journal of Creation* 103, 106.

¹³ Raymond Wacks, *Understanding Jurisprudence* (Oxford University Press, 2005) 25.

¹⁴ Moral Cognitivism vs. Non-Cognitivism, *Stanford Encyclopaedia of Philosophy* (5 April 2011) < <http://plato.stanford.edu/entries/moral-cognitivism/>>.

¹⁵ M DA Freeman, *Lloyd’s Introduction to Jurisprudence* (Sweet & Maxwell, 8th ed, 2008) 117.

¹⁶ Roger B M. Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (University of Pennsylvania Press, 1992) 122.

judges.¹⁷ In critiquing the theory underpinning the common law system, Bentham disapproved of any appeal to the law of nature which he expressed as nothing more than ‘private opinion in disguise’.¹⁸

Bentham’s critique of natural law was influential and inspired the important work of John Austin’s the *Province of Jurisprudence Determined* (1832).¹⁹ Austin, commonly considered the founder of contemporary Legal Positivism, believed, as did Bentham and Hume, that questions of what the law is, is separate from, and ought to be kept separate from questions of what the law should be. This position is best expressed by Austin:

The existence of law is one thing; its merit or demerit is another. Whether it be or not be is one enquiry; whether it be or not be conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it.²⁰

Austin indeed pioneered the ‘analytical form’ of jurisprudence purporting the presentation of legal systems as structures of ‘laws properly so called’ without regard to their moral quality.²¹ The ideas of Bentham and Austin spread widely throughout the nineteenth century and indeed NLT could scarcely be found anywhere outside of Catholic circles.

¹⁷ Raymond Wacks, *Understanding Jurisprudence* (Oxford University Press, 2005) 47.

¹⁸ Ibid 48.

¹⁹ Marett Leiboff and Mark Thomas, *Legal Theories: Contexts and PractiCes* (Lawbook Co, 2009) 262.

²⁰ Brian H Bix, ‘Legal Positivism’ in Martin P Golding and Willam A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing Ltd, 2005) 29-30.

²¹ Kelly, above n 9, 315.

V THE TWENTIETH CENTURY RESURGENCE OF NATURAL LAW

The twentieth century saw two world wars, the proliferation of weapons of mass destruction and the invention of the word ‘genocide’. While Legal Positivism remained the dominant legal theory up until mid-century, it would soon attract criticism after its failure to protect against the grave abuse of power granted by the protection of national sovereignty in the Second World War. WWII was one of the most catastrophic events the world had seen and truly shook the established world order leading to the revival of natural law. I submit that the two major reasons for this revival can be attributed to the impact of the Nuremburg Trials and the post-war human rights phenomenon, both consequences of WWII.

The Nuremburg trials (1945-46), were a series of trials held in Nuremburg which tried the former leaders of the Nazi regime for war crimes committed during WWII.²² Positive Law, as mentioned above, was the default legal theory of the period. This meant that law which had a legitimate source, that is, had been properly enacted by the state, were not to be rendered invalid as a result of their immorality.²³ The prosecutors at the Nuremburg Trails could not fault the actions of the Nazi leaders since they were following the legitimately enacted laws of the State. Therefore, to be successful, they had to look past Legal Positivism and appeal to natural law. The Chief-Prosecutor, Robert H. Jackson (1892-1954), in fear

²² *Encyclopedia Britannica*, above n 10.

²³ Augusto Zimmermann, ‘Legislating Evil: The Philosophical Foundations of the Nazi Legal System’ (2010) 13 *International Trade and Business Law Review* 221, 231.

of failure, avoided appealing directly to natural law, but instead appealed to universal criminal jurisdiction ‘by locating a deep normative core in the existing practices of civilized nations’.²⁴ The decision in the Nuremburg Trials resulted in the birth of the ‘Nuremburg Principle’, which basically imposes an obligation upon individuals to disobey laws which are clearly recognisable as violating higher moral principles.²⁵ So while the judgment never referred to natural law directly, in essence it was the deciding factor.

After WWII, there was a desire to establish a new world order governed by International law. It was hoped the newborn United Nations, pioneered by President Franklin D. Roosevelt, would live up to the task of protecting the world from another global war.²⁶ The UN Charter (1945) drew heavily from natural law principles in entrenching an objective set of natural fundamental rights that would apply across all nations irrespective of positive state law which applied to every person merely for being human.²⁷ These basic human rights, while mentioned in the preamble and article one of the UN Charter, were actually listed in the Universal Declaration of Human Rights (1948).²⁸ This document inspired the invention of numerous declarations and other conventions around the world such as the European

²⁴ Lawrence Douglas, ‘The Shrunken Head of Buchenwald: Icons of Atrocity at Nuremberg’ (1998) 63 *Representations* 39, 46.

²⁵ Gabriel A Moens, ‘The German Border Guard Cases: Natural Law and the Duty to Disobey Immoral Laws’ in Suri Ratnapala and Gabriel A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 271.

²⁶ Jussi M Hanhimäki, *The United Nations: A Very Short Introduction* (Oxford University Press, 2008) 11.

²⁷ Rodger D Citron, ‘The Nuremberg Trials and American Jurisprudence: the Decline of Legal Realism, the Revival of Natural Law, and the Development of Legal Process Theory’ (2006) *Michigan State Law Review* 385, 398.

²⁸ Robert Maddex, *International Encyclopaedia of Human Rights: Freedom, Abuses, and Remedies* (CQ Press, 2000) 347.

Convention on Human Rights²⁹. These rights were not meant to act as a higher law that would invalidate state laws or be enforced by international police, but rather as a benchmark which nation states could measure their positive state laws against.³⁰ America in particular, drew strongly from the human rights tradition, especially drawing upon rights guaranteed in their constitution, which saw civil disobedience take hold as a part of the civil rights movement against racial discrimination and other social movements of the 1960's.³¹

The events of WWII also sparked renewed interest in NLT in jurisprudence academic circles. Starting with Gustav Rabruch, previously a positivist, expressed in his *Rechtsphilosophie* (1945) that Nazi laws did not 'partake of the character of law at all; they were not just wrong law, but were not law of any kind'³². Further the Nuremberg Trials and the 'Grudge Cases' sparked a famous debate between legal theorist Lon Fuller (1902-78) and H L A Hart (1907-92), which would get to the heart of the tension between law and morality. Fuller contended that the Nazi laws were invalid because internal morality was absent from their legal system. On the other hand, Hart argued that immorality should not invalidate laws but rather, retrospective laws should be enacted to fix problems of bad law.³³

Spanning across centuries NLT has indeed proved resilient. With the rise of positivism and the empirical spirit of the period, natural law was not to be found during the nineteenth century through to the mid twentieth century.

²⁹ Ibid 130.

³⁰ Ibid 169.

³¹ Kelly, above n 9, 426.

³² Ibid 419.

³³ Leiboff and Thomas, above n 19, 159.

However, the events and atrocities of WWII were so shocking that they forced a re-emergence of natural law under the guise of human rights and sparked new debates and a sustained academic interest in natural law which still thrives till this day.

KEEPING PACE WITH THE MARCH OF PROGRESS: THE RELEVANCE OF NATURAL LAW FROM THE VICTORIAN ERA TO TODAY

CHRISTOPHER H JAMES

I INTRODUCTION

Before the 19th Century, natural law was the prevalent theory of jurisprudence. In short, natural law proposes that certain universal moral principles transcend man-made laws. From a Judo-Christian perspective such principles might be perceived as ‘laws set by God to men.’¹ Natural law theorists, from St Thomas Aquinas onward, believe that ‘...a human law which conflicts with [natural law] is no law, but a corruption of law’²

As major developments in science, industrialisation and enlightenment profoundly impacted economics, politics and society itself; the application of neo-scientific, empirical methods to address social issues became popular amongst academics. Numerous competing legal theories arose, which despite not sharing a common conception of jurisprudence, discredited natural law.

¹ John Austin, *The Province of Jurisprudence Determined* (Burt Franklin, 2nd ed, 1970) 1.

² Thomas Aquinas, 1-11, q 95 a 2, quoted in JM Kelly *A Short History of Western Legal Theory* (Oxford University Press, 1992) 144.

However, as the Allied forces sought to justify the prosecution of senior Nazi commanders at the conclusion of the Second World War, natural law theory was alluded to in order to overcome the defendants insistence that they were bound to obey domestic laws without questioning their validity. Natural law was later invoked during civil rights movements and was revived as a discussion topic amongst academics.

This essay shall summarize how major upheavals of the Victorian era and early twentieth century necessitated a revaluation of natural law precepts, and how they were later revived to condemn discriminatory laws and totalitarian rule.

II BENTHAM AND AUSTIN: SOCIAL REFORM IN THE VICTORIAN ERA

During this period of social transformation, many competing theories emerged discrediting the principles of natural law. Characterizing natural law as ‘nonsense on stilts’, social reformer Jeremy Bentham believed that jurisprudence based on religious dogma had contributed to an inconsistent legal system.³ Bentham’s concerns are best understood when one considers the barbaric nature of the criminal justice system he sought to reform, where public executions and torture were routine, and which favoured those of rank and wealth.⁴

³ Rob White and Fiona Haines, *Crime and Criminology* (Oxford University Press, 4th ed, 2008) 26.

⁴ Ibid 25.

In place of natural law, Bentham developed a utilitarian approach, where appropriate responses could be determined by quantitatively weighing the anticipated pleasure or pain of an outcome. Protection from serious crimes was not justified by abstract ‘...natural rights to life, liberty and property’, but because a lawful society would be one of greater ‘security’ and ‘happiness.’⁵

As empirical natural sciences gained credibility in the Victorian era, a changeover from natural law to positivism occurred.⁶ Positivists contest that any law which in procedural terms can be properly enacted by the state must not be rendered invalid on account of its intrinsic injustice or immorality.⁷ John Austin distinguished between laws created by authoritative figures that ordinary citizens were compelled to obey and legal theory based on subjective interpretations of the Scriptures. As Kelly explains, Austin conceived the legal system as a structure of positive laws which retain their validity regardless of their moral worth.⁸

Whilst Bentham and Austin did not share a common ideology, they were, according to HLA Hart, ‘...the vanguard of a movement which labored with passionate intensity and much success to bring about a better society

⁵JM Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 287.

⁶Hans Kelsen, *Pure Theory of Law* (Max Knight trans, Berkeley, 2nd ed, 1967) 50.

⁷Robert Hughes, ‘Australian Legal Institutions Principles Structure and Organisation’ (2003) cited in Augusto Zimmermann. ‘Legislating Evil: The Philosophical Foundations of the Nazi Legal System’ (2010) 13 *International Trade and Business Law Review* 221.

⁸JM Kelly *A Short History of Western Legal Theory* (Oxford University Press, 1992) 315.

and better laws’⁹, a goal they strove for by introducing new rhetoric to supersede natural law principles.

III KANT, DARWINISM, REALISM AND HISTORICISM: THE PROGRESSIVE EROSION OF NATURAL LAW

Immanuel Kant, whilst seeking to expose weaknesses in the doctrines championed by Bentham, Austin and other British positivists such as Hume, struck at one of the presumptive pillars of natural law, by substituting divine or God-given wisdom with the categorical imperative; a universal¹⁰, objective moral standard which does not require the input of a deity. Whilst this subjective, maxim based philosophy may be viewed as a methodical step in a concept of morality, rather than a concept of legality;¹¹ it made possible a philosophical model of man without natural rights.

Charles Darwin’s theory of natural selection inspired progressive reformers to petition for change. Darwin’s findings implied the non-existence of God and consequently of God-given law and rights.¹² Even in the United States, a nation founded on natural law principles,¹³ Darwin influenced many leading jurists, notably the school of legal analysts, which separated law

⁹ HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 596. Cited in Brian Z. Tamanaha, 'The Contemporary Relevance of Legal Positivism' (2007) 32 *Australian Journal of Legal Philosophy* 1, 8.

¹⁰ The true universality of this standard may be questioned, as in line with the typical European beliefs of racial superiority of his era, Kant prophesied that aside from Caucasians, '... all races will be extinguished' by virtue of their innate inferiority (Immanuel Kant *Reflexionen zur Anthropologie* (de Gruyter, 1968) 878, cited in John Roth (ed) *Genocide and Human Rights* (Palgrave Macmillan, 2005) 142).

¹¹ Geoffrey C Hazard Jr, 'Humanity and the Law' *Yale Journal of Law & the Humanities* (2004) 16(1) 79, 79.

¹² Augusto Zimmermann, 'Evolutionary Legal Theories: The Impact of Darwinism on Western Conceptions of Law' (2010) 24(2) *Journal of Creation* 103, 105.

¹³ *Ibid*, 106.

from morality and dismissed any metaphysical considerations.¹⁴ The esteemed jurist Oliver Wendell Holmes proposed that law is a ‘...science of coercion’, whereby ‘[l]aws are flexible and responsive to changing social and economic climates.’¹⁵ He viewed natural rights as a ‘conceptual mistake.’¹⁶

Opposing the analytical school were the American legal historicists, who interpreted law in terms of an evolutionary process that manifests itself through the customs of a people,¹⁷ ‘...tracing the history of legal doctrines’ and ‘...inferring legal principles that lay behind them.’¹⁸ Both factions repudiated natural law.

Holmes’ view that the nature of law is not fixed but amendable according to the social and political environment, was developed by influential positivist Hans Kelsen, who claimed that ‘no law was assumed to contain absolute or universal value.’¹⁹ As a positivist, he determined that all laws are a temporally and spatially conditioned phenomenon subject to historical change,²⁰ a belief antithetical to the immutable character of natural law.

¹⁴ Ibid.

¹⁵ Lisa Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (1991), cited in Augusto Zimmermann, ‘Evolutionary Legal Theories: The Impact of Darwinism on Western Conceptions of Law’ (2010) 24(2) *Journal of Creation* 103, 107.

¹⁶ Augusto Zimmermann, ‘Evolutionary Legal Theories: The Impact of Darwinism on Western Conceptions of Law’ (2010) 24(2) *Journal of Creation* 103, 107.

¹⁷ Ibid, 106.

¹⁸ Ibid.

¹⁹ Hans Kelsen, *Pure Theory of Law* (Max Knight trans, Berkeley, 2nd ed, 1967) 517.

²⁰ Ibid.

IV MARXISM AND COMMUNISM

Karl Marx savaged not only natural law, but law itself, denouncing it as a 'bourgeois prejudice.'²¹ He portrayed the law as an '...ideological mechanism through which [the bourgeois] is able to eventually justify its grip on the means of production and the sources of wealth.'²² He was critical of human rights, expressing that they were '...nothing but the rights of egoistic man', conceived to enforce the values of capitalism.²³

Communist states, founded on Marx's ideology, retained his contempt for law, perceiving it merely as a 'theoretically inconvenient fact.'²⁴ Christian conceptions of law and morality would be extinguished when the Communist revolution reached its final stage according to theorist Evgeny Pashukanis.²⁵

In the West, the marginalisation of natural law was such that even as the natural rights of Soviet citizens and German Jews were erased, no politician or academic publicly spoke or wrote in defence of international human rights, a phenomenon Geoffrey Robertson attributes to Marx and

²¹ Karl Marx and Friedrich Engels, *The Communist Manifesto*, Marxists Internet Archive <<http://www.marxists.org/archive/marx/works/1848/communist-manifesto/>>.

²² Augusto Zimmermann, 'Marxism, Law and Evolution: Marxist Law in both Theory and Practice' (2009) 23(3) *Journal of Creation* 90, 92.

²³ Karl Marx. *On the Jewish Question* (1844), cited in Augusto Zimmermann, 'Marxism, Law and Evolution: Marxist Law in both Theory and Practice' (2009) 23(3) *Journal of Creation* 90, 94.

²⁴ Igor Grazin, 'The Role of Ideas in Political Change' in Suri Ratnapala and GA Moens (eds) *Jurisprudence of Liberty* (Butterworths, 1996) 247, 249.

²⁵ Evgeny Pashukanis, *Law and Marxism* (1924), cited in JM Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 357.

Bentham's demolition of natural rights.²⁶ Global events and radical social paradigms had consigned natural law theory into a state of hibernation.

V NAZI JURISPRUDENCE

Basing his rhetoric on Darwin's theory of natural selection, and echoing Greek philosopher Thrasymachus' view that 'justice is the advantage of the stronger',²⁷ Adolf Hitler declared that individuals and entire races' 'right to exist' would be determined through survival of the fittest.²⁸ Hitler was supported by a sycophantic judiciary, whose eager legal activism facilitated his fascist policies. Senior law professors '...denied the existence of any individual rights against the absolute 'right' of the totalitarian state.'²⁹

In place of the metaphysical authority championed by natural law theorists, the Nazis promoted Hitler. Nazi leader Hans Frank stated that, '[t]he basis of interpretation of all legal sources is the National Socialist ideology, particularly as expressed in the party programme and the *Fuhrer's* statements'³⁰, an ideology embodied in the concept of *Fuhrerprinzip*,

²⁶ Geoffrey Robertson, *Crimes Against Humanity* (Penguin, 1999) 21-22.

²⁷ Arlene W Saxonhouse, 'The Moral Sense: Ancient and Modern' (1994) 13(2) *Criminal Justice Ethics* 39, 39.

²⁸ Adolf Hitler, *Hitler's Table Talk 1941-1944* (1988), cited in Augusto Zimmermann, 'Legislating Evil: The Philosophical Foundations of the Nazi Legal System' (2010) 13 *International Trade and Business Law Review* 221, 225.

²⁹ Martin Broszat, *The Hitler State* (1981), cited in Augusto Zimmermann, 'Legislating Evil: The Philosophical Foundations of the Nazi Legal System' (2010) 13 *International Trade and Business Law Review* 221, 231.

³⁰ Hans Frank, *Reichsgesetzblan* (1933), cited in Augusto Zimmermann, 'Legislating Evil: The Philosophical Foundations of the Nazi Legal System' (2010) 13 *International Trade and Business Law Review* 221, 239.

which stipulated that judges must adhere to the *Führer's* principles and programs.³¹

VI THE NUREMBERG TRIALS

At trial of the major war criminals in Nuremberg, accused Nazi leaders relied on the doctrine of superior orders; that they were merely following laws they were compelled to obey.³² In response, Chief prosecutor Robert H. Jackson revived the precepts of natural law, submitting that the 'natural moral law' was adequate justification to try the Nazi leaders.³³ The tribunal rejected the doctrine of superior orders, both as a defence and as mitigation of punishment, reasoning that '...crimes so shocking and extensive had been committed consciously, ruthlessly and without military excuse or justification.'³⁴ This inferred a concept of universal jurisdiction, whereby some crimes are so heinous that '...the accused could be tried anywhere without any jurisdictional connection between the trial court and situs of the crime because they were crimes against all humanity'.³⁵ This implied view that individuals have '...a duty to disobey laws which are clearly

³¹ Matthew Lippman, 'White Rose, Judges and Justice in the Third Reich' (2000) 15(1-2) *Connecticut Journal of International Law* 95, 114.

³² Stuart E Hendin, 'Command Responsibility and Superior Orders in the Twentieth Century – A Century of Evolution' *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v10n1/hendin101.html>> 11.

³³ Kurt Kauffmann, 'Translation the Nuremberg Trials in Retrospect' (1987) 9(3) *Whitter Law Review* 537, 552.

³⁴ Stuart E Hendin, 'Command Responsibility and Superior Orders in the Twentieth Century – A Century of Evolution' *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v10n1/hendin101.html>> 12.

³⁵ Henry T King Jr, 'Without Nuremberg – What?' (2007) 6(3) *Washington University Global Studies Law Review* 653, 658.

recognisable as violating higher moral principles',³⁶ upholds the precepts of natural law.

Following the Second World War, Gustav Radbruch argued from a natural law perspective, that Nazi laws were not law of any kind as they '...contravened the basic principles of morality.'³⁷ The tragedy of the Holocaust inspired him to write '...the people owe them no obedience, and lawyers too, must find the courage to deny them the character of the law.'³⁸

VII THE POST-WAR DEBATE

Hart contended this synthesis of law and morality. He sought to avoid the 'muddle' inherent in conflating law with a '...transcendent standard of rightness, implanted in human nature by God, and accessible to man through his reason.'³⁹ Envisaging a separation between law and morality, he nonetheless found that laws must be submitted to 'moral scrutiny.'⁴⁰ In his view, there was nothing to be gained by '...allowing our moral repugnance to subvert our analytic perception.'⁴¹ Hart proposed that natural law was not a universal standard, but merely an explanation as to why one

³⁶ Gabriël A Moens, 'The German Border Guard Cases: Natural Law and the Duty to Disobey Immoral Laws' in Suri Ratnapala and GA Moens (eds) *Jurisprudence of Liberty* (Butterworths, 2nd ed, 2011) 271, 271.

³⁷ Ibid 278.

³⁸ Gustav Radbruch, *Rechtsphilosophie* (4th ed, 1950), cited in Barend van Niekerk, 'Warning Voice from Heidelberg – The Life and Thought of Gustav Radbruch' (1973) 90(3) *South African Law Journal* 234, 248.

³⁹ JM Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 413.

⁴⁰ Brian Z Tamanaha, 'The Contemporary Relevance of Legal Positivism' (2007) 32 *Australian Journal of Legal Philosophy* 1, 8.

⁴¹ JM Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 413.

‘...can expect to find certain types of rule in every human society.’⁴² Dismantling Austin’s command theory but advancing the rhetoric of positivism against natural law, he posited that in democratic societies the sovereign can be seen as the citizen who both, to different degrees, dictate and obey the law.⁴³

However, the principles of natural law were embodied in the civil rights movements of the late twentieth century, and used to justify why protesters engaging in non-violent civil disobedience should respect some laws but break others. Martin Luther King advocated non-compliance with ‘unjust law[s]... not rooted in eternal law and natural law.’⁴⁴ He urged that such laws were ‘...no law at all’⁴⁵, and that ‘...one has a moral responsibility to disobey [them].’⁴⁶

Lon L Fuller contended Hart’s position, by proposing a radical variant of natural law. Based on the supposition that law’s authority is derived from ‘...the moral attitudes of the community’, he argued that law and morality cannot be divided.⁴⁷ Other academics such as John Finnis have sought to reaffirm the relevance of natural law by removing religious or moralistic rationale, instead proposing that natural law is a ‘...set of principles of

⁴² Ibid, 414.

⁴³ Ibid, 407.

⁴⁴ Martin Luther King Jr, Letter from a Birmingham Jail, 16 April 1963, cited in Brian Z Tamanaha, ‘The Contemporary Relevance of Legal Positivism’ (2007) 32 *Australian Journal of Legal Philosophy* 1, 9.

⁴⁵ Ibid.

⁴⁶ Brian Z Tamanaha, ‘The Contemporary Relevance of Legal Positivism’ (2007) 32 *Australian Journal of Legal Philosophy* 1, 9.

⁴⁷ Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009) 167.

practical reasonableness in ordering human life and the human community.’⁴⁸

However, the post war advance of human rights, and in tandem international recognition of universal moral standards, can be most readily identified with the Universal Declaration of Human Rights, the preamble of which recognises the ‘...inherent dignity and... the equal and inalienable rights of all members of the human family’ as the foundation for, amongst other things, justice.⁴⁹ The cosmopolitan make-up of the drafting committee enabled an inclusively worded document, which could apply to the broader human community. Whilst Eleanor Roosevelt, the chairman of the drafting committee, was renowned as a devout Christian, notable contributions were made by the Chinese delegate Peng-chun Chan who explicitly referred to Confucius.⁵⁰ Accordingly, the Declaration simulates natural law by inferring that ‘...fundamental rights are recognized, not conferred’,⁵¹ or that ‘...rights are not legal constructs’,⁵² but are necessarily intrinsic to the human condition.

⁴⁸ John Finnis, *Natural Law and Natural Rights* (1980), cited in Michael Freeman, *Introduction to Jurisprudence* (Sweet and Maxwell, 8th ed, 2008) 127.

⁴⁹ *Universal Declaration of Human Rights* Preamble para 1.

⁵⁰ Ngaire Naffine *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009) 103.

⁵¹ Mary Ann Glendon A *World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001) 176, quoted in Ngaire Naffine *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009) 104.

⁵² Ngaire Naffine *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009) 104.

VIII CONCLUSION

Reappraised and reawakened after a century of denouncement, natural law played a pivotal role in the Nuremberg Trials, American civil rights movement and the foundation of modern human rights through the Universal Declaration of Human Rights. However, natural law no longer dominates jurisprudence as it did before the Victorian era. A pluralistic debate has emerged where no unifying theory can claim consensus amongst jurists and academics.

BOOK

REVIEWS

BOOK REVIEW: JURISPRUDENCE OF LIBERTY

JONATHON HORNE*

From the title *Jurisprudence of Liberty* it is apparent that the editors of this work, Suri Ratnapala and Gabriël A Moens, intend to explore the connection between law and liberty. However, they go beyond merely recognising the interplay between the two concepts and instead attempt to demonstrate how ‘the abstract concept of law that prevails in a society may have a profound bearing on liberty in that society’.¹ Therefore it is unsurprising that two major themes of this work are constitutionalism and natural law. These two themes are also complemented by a brief but thorough examination of the merits of Hayek and Dworkin’s works.

M Sellers examines how the roots of republican liberty can be traced back to the period of the Roman republic. He views the notion of liberty in Italy, England, America and France as a ‘series of variations’² upon the ancient model with all sharing a commitment to popular sovereignty, pursuit of the common good and the rule of law. These, he argues, can only be achieved

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¹ Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 1.

² M N S Sellers, ‘Republican Liberty’ in Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 19, 51.

through a constitution aimed at ‘balancing the power of private avarice and ambition’, at safeguarding liberty.³

The issue of balance continues in Suri Ratnapala’s clear account of the doctrine of separation of powers as the ‘cornerstone of liberty’.⁴ By splitting the doctrine into two components, methodological and diffusion, Ratnapala explores the influence of these ideas with particular emphasis on the Ancient Constitution of England. Lastly he examines the issue of a new constitutional equilibrium under parliamentary government, within Australia. Unfortunately Ratnapala fails to address exactly what is required to ensure the enshrinement of the methodological thesis and not just its ‘practical survival’.⁵

The consequences for liberty of failure to adhere to a belief in constitutionalism, rule of law or even legal culture itself is highlighted by the works of Geoffrey Walker, Lael Daniel Weinberger, Augusto Zimmermann and Lorraine Finlay. Of these I found the last three most interesting because of their assessment of topical issues. Lael Weinberger examines what an increase in Bill of Rights litigation means for liberty and for the federalist structure of America. Augusto Zimmermann addresses the rule of law and legal culture in Latin America by identifying obstacles to the rule of law in the region and showing their impact in Brazil and Cuba, highlighting the need to recreate a culture of legality in which the rule of law flourishes.

³ Ibid 52.

⁴ Suri Ratnapala, ‘Separation of Powers: The Cornerstone of Liberty under Law’ in Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 53.

⁵ Ibid 81.

Similarly Lorraine Finlay's chapter explains the need to create a culture of respecting and valuing the rights of private property within Australia.⁶ She persuasively argues this is required because of erosion by judicial decisions, especially of the High Court of Australia, numerous statutes across different jurisdictions and the failure of constitutional protections.

The second major theme on natural law and liberty is dealt with in chapters by Nicholas Aroney and Bradley Miller, Gabriël Moens, William Wagner and James Allan.

Aroney and Miller analyse Finnis's conception of liberty by breaking it down into existential, moral, legal and political dimensions. They see Finnis's notion of liberty as an individual having the freedom to choose among ascertainable goods provided the options are morally permissible.⁷ The authors also briefly comment on the rule of law and its role in securing the dignity of autonomy for an individual. Although this chapter is accessible, because of the helpful but necessarily brief overviews provided, a prior acquaintance with Finnis's work by the reader would aid in interpreting Aroney and Miller's conclusion.

The other chapters dealing with natural law are well explained and convincing. Gabriël Moens examines the German Border Guard cases to illustrate how societal cost must be assessed before obeying a precept of

⁶ Lorraine Finlay, 'The Erosion of Property Rights and its Effect on Individual Liberty' in Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 465, 493.

⁷ Nicholas Aroney and Bradley Miller, 'Finnis on Liberty' in Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 247, 268.

natural law, as in these cases ‘legal certainty and the legitimate expectations of the border guards’ were eroded. William Wagner’s work explores the interplay between alienable and unalienable world views in American jurisprudence and concludes that ultimately a choice must be made between natural law and liberty and the tyranny of legal positivism as embodied in the alienable world view. Although I agree with Professor Wagner’s view that morality and natural law are indispensable to both society and liberty, his framing of the issue paints it as either black or white. Regardless of this, his contribution is certainly thought provoking and intriguing.

Lastly, James Allan’s defence of liberty critiques natural law and proposes that utilitarianism would protect liberty with greater success. It provides a refreshing counterpoint to the majority of other works in the book as he himself acknowledges⁸ and succeeds in casting aside possible misperceptions about utilitarianism and its impact upon liberty.

The last major theme of Hayek and Dworkin was identified by Jeffrey Goldsworthy in his review of the first edition.⁹ Like Professor Goldsworthy I found Ratnapala’s chapter on law as a knowledge process enjoyable for its criticism of postmodernism, found Alan Fogg’s comparison of Hayek, Dworkin and others difficult in parts and appreciated Neil MacCormick’s criticism of the methods used by some to return to Hayek’s spontaneous order.

⁸ James Allan, ‘Utilitarianism and Liberty’ in Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 331, 332.

⁹ Jeffrey Goldsworthy, ‘Jurisprudence of Liberty’ (1996) 18 *Adelaide Law Review* 337.

The remaining chapters were of a high quality especially the work by Kamenka and Tay on contemporary radicalism in legal theory, and Mark de Vos's article on the financial meltdown and its impact on financial liberty.

Overall the second edition of *Jurisprudence of Liberty* provides a more diverse range of chapters from different aspects of jurisprudence. It goes beyond merely detailing a relationship between law and liberty and poses questions about how and why we need to safeguard liberty in the twenty first century. As such it provides a well rounded introduction to the essential topic of liberty.