

# THE WESTERN AUSTRALIAN JURIST

Volume 3

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## The Western Australian Legal Theory Association

The Western Australian Legal Theory Association ('WALTA') is a learned society established by Dr Augusto Zimmermann in October 2010 at Murdoch University, Australia. Dr Zimmermann is also a Vice President of the Australian Society of Legal Philosophy ('ASLP').

## About the Association

The Western Australian Legal Theory Association is constituted by a small group of academically interested lawyers, legal scholars, and law students. The aim of the Association is to promote high-level scholarly discussion on subjects related to legal theory through debates, academic publications, and conferences. Further details about membership can be found on the WALTA website at <http://www.law.murdoch.edu.au/walta/>

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## Contributions

The Western Australian Jurist is a double blind peer-reviewed journal. It welcomes contributions in the form of articles, short essays, and book reviews. Contributions should be emailed as an attachment to the Editor in an editable format (eg .doc, .docx, .odt, .rtf). The Editor prefers articles that have been written and formatted in compliance with the Australian Guide to Legal Citation, 3<sup>rd</sup> ed. The fourth volume of The Western Australian Jurist is due to be published in September 2013. Contributions should be submitted on or before 1 July 2013.

The Editor can be contacted at A.Zimmermann@murdoch.edu.au.

# ARTICLES

## PROTECTION OF THE PURCHASER'S RELIANCE IN 16<sup>TH</sup>–18<sup>TH</sup> CENTURY ENGLAND AND EUROPE

LAURA VAGNI\*

### Abstract

This essay is focused on the protection of purchaser's reliance during the 16<sup>th</sup>–18<sup>th</sup> centuries, with the aim of tracing how this problem was approached on both sides of the Channel. The issue involves the doctrine of equitable estoppel, with particular regards to proprietary estoppel, which is commonly considered a genuine common law doctrine, without a civil law counterpart. The author claims that common law and civil law shared a common rule of protection of the purchaser's reliance up to the 19<sup>th</sup> century. She concludes that the equitable doctrine of estoppel has its early source in the *Jus commune* developed in Europe.

### I INTRODUCTION

The existence of a link between English law and continental law up to the 19<sup>th</sup> century has been widely demonstrated by comparative legal studies.<sup>1</sup> Canon law and the canonical process were the main vehicles through which

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<sup>1</sup> See generally R Zimmermann, 'Der Europäische Charakter des englischen Rechts' (1993) 4 *Zeitschrift für Europäisches Privatrecht* 9.

roman-canon law and the medieval jurisprudence were spread across the Channel from the early 13<sup>th</sup> century.<sup>2</sup>

Common lawyers knew both *Justinian's Digest* and canon law sources. Both the *Justinian* materials and the *Decretum Gratiani* were housed in Bracton's library. The *Summa* of Azo was Bracton's principal model in writing *De Legibus and Consuetudinibus Regni Angliae*. Maitland showed that Bracton incorporated part of Azo's commentary in his own work and how many passages from Bracton refer the readers to Azo's writings.<sup>3</sup>

Additionally, the Court of Chancery played an important role as a bridge between common law and roman-canon law in the following centuries. The Chancellor was traditionally a member of the clergy until the appointment of Thomas More in 1529, and a civil lawyer was usually appointed Master of the Rolls. The procedure of the Court was inspired by canonical procedure.<sup>4</sup> After the Reformation, when the ecclesiastical jurisdiction was in decline, continental ideas nevertheless filtered through the interpretation of the Court into principles of equity and justice.<sup>5</sup>

On the Continent, investigations of both the jurisprudence and decisions by the Roman *Rota* and other tribunals of developing nation-states suggested

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<sup>2</sup> See generally R H Helmholz, *The Canon Law and the Ecclesiastical Jurisdiction from 597 to the 1640s*, in *The Oxford History of the Laws of England* (Oxford University Press, 2004) vol 1, 311.

<sup>3</sup> See the introduction in F W Maitland (ed), *Select Passages from the Works of Bracton and Azo* (Bernard Quaritch, 1895) XVIII.

<sup>4</sup> G Gilbert, *The History and Practice of the High Court of Chancery* (H Lintot, 1857) 20-28; W J Jones, *The Elizabethan Court of Chancery* (Clarendon Press, 1967) 177-336;

<sup>5</sup> W S Holdsworth, *A History of English Law*, (Methuen, first published 1925, 1936 ed) vol 4, 276-77; W T Barbour, 'The History of Contract in the Early English Equity', in P Vinogradoff (ed), *Oxford Studies in Social and Legal History* (Clarendon Press, 1914) 9, 150-168.

the presence of a dialogue between common lawyers and civil lawyers from the 16<sup>th</sup> through the 18<sup>th</sup> century.<sup>6</sup> Although partially ignored in the first half of the 20<sup>th</sup> century, these researches later led to a revisiting of the comparison between common law and civil law. Thus, the idea of an autonomous and independent development of English law from continental law has been partially abandoned by civil lawyers.<sup>7</sup>

Following the path of the mentioned studies, the present work focus on the protection of purchaser's reliance during the 16<sup>th</sup>–18<sup>th</sup> centuries, with the aim of tracing how the problem was approached on both sides of the Channel. The issue involves the doctrine of equitable estoppel, with particular regards to proprietary estoppel, which is commonly considered a genuine common law doctrine, without a civil law counterpart. A right generated by proprietary estoppel is capable of binding successors in title,<sup>8</sup> whereas in civil law expectation or reliance does not give rise to proprietary rights. So, while proprietary estoppel can be used in common law systems to remedy the defects of a void transfer of land, as a general rule a void transfer of land cannot be validated in civil law systems.

The origins of proprietary estoppel are still partially unknown. The modern formulation of the doctrine traces back to the half of 19<sup>th</sup> century, but estoppels have more ancient foundations: 'there are but few older principles or rules of law that had been handed down from generation to

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<sup>6</sup> On the issue see the studies drawn by Gino Gorla on the so-called 'Great Tribunals', now collected in the volume G Gorla, *Diritto Comparato e Diritto Comune Europeo* (Giuffr , 1981).

<sup>7</sup> G Gorla and L Moccia, 'A "Revisiting" of the Comparison between "Continental Law" and "English Law" (16<sup>th</sup> to 19<sup>th</sup> Century)' (1981) 2 *Journal of Legal History* 143.

<sup>8</sup> M Dixon, 'Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: a Theory of Unconscionability' in E Cooke (ed), *Modern Studies in Property Law* (Hurt Publishing, 2003) vol 2, 165.



generation, from the earliest days of the Roman law to the present time, than that of estoppel'.<sup>9</sup>

Sir Coke explained that the word estoppel derived from the French *estoupe*: 'Estoppe commeth of the French word *estoupe*, from whence the English word stopped: and it is called an estoppel or conclusion, because a man's owne act or acceptance stoppeth or closed up his mouth to allegae or plead the truth ...'.<sup>10</sup>

In the *Justinian's Digest* the same definition was expressed in the maxim *allegans contraria non est audiendus*.<sup>11</sup> The maxim prevented anyone from alleging something before the trial, which contradicted his previous allegation. It constituted an application of a wide principle, which prevented anyone from contradicting his own act. During the *Jus commune*, this principle was expressed in the maxim *venire contra factum proprium nemo potest*. Thus, despite the common belief, the common law doctrine seems to be linked to Continental law and to the *venire contra factum* maxim, from which we need to start our investigation into the protection of the purchaser's reliance.

## II THE MAXIM *VENIRE CONTRA FACTUM PROPRIUM* AND CUJAS' THEORY

The maxim *venire contra factum proprium nemo potest* was formulated by the glossators, who interpreted the passages of *Corpus Iuris Civilis* on the

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<sup>9</sup> H R Herman, *The Law of Estoppel* (Law Booksellers, 1871) 1.

<sup>10</sup> Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or, a Commentary upon Littleton* (Clarke, Pheney and Brooke, 18<sup>th</sup> revised ed 1823) vol 2, 667 [352a].

<sup>11</sup> See Zimmermann, above n 1.

*exceptio doli generalis*.<sup>12</sup> The exception was used in the Roman formulary process to stop the action of a plaintiff when it was fraudulent. This happened, for example, when a purchase was void because the vendor was not the true owner of the land. If a vendor sold land which did not belong to him, and he delivered it to the purchaser by *traditio*, then if the vendor later acquired the land he could not exercise the *vindicatio* to recover the land from the purchaser to whom he had earlier sold the land. His legal action was unfair and the defendant could stop it. In the same way, if a creditor concluded with the debtor a *pactum de non petendum*, he could not recover his debt from the debtor he had earlier promised not to sue. By the age of Justinian, the *exceptio doli* subsumed the previous exceptions *in factum* and it was used as a general remedy to protect anyone from a fraudulent action: ‘dolo facit, quicumque id, quod quaqua exceptione elidi potest petit’.<sup>13</sup>

Azo was one of the first Glossators who used the maxim.<sup>14</sup> Following the method of distinctions, he evidenced the meaning of the maxim by giving examples of when one could contradict himself and when he could not.

In his *Brocardica*,<sup>15</sup> Azo distinguished between lawful actions and unlawful actions. Among the unlawful actions he made further distinctions, depending upon whether the commission of an action was expressly

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<sup>12</sup> W W Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge University Press, 3<sup>rd</sup> revised ed, 1966) 654.

<sup>13</sup> Ulpian, D 44 4 2 5; see, eg, A. Burdese, ‘L’eccezione di dolo generale in rapporto alle altre eccezioni’ in L. Garofalo (ed), *L’eccezione di dolo generale. Diritto romano e tradizione romanistica* (Cedam, 2006) 461.

<sup>14</sup> See L Diez-Picazo Ponce de León, *La doctrina de los propios actos* (Bosch, 1963) 46.

<sup>15</sup> Azonis Bononiensis, *Brocardica* (Eusebium Episcopium et Nicolai Episcopij haeredes, 1567) 121.

prohibited by enacted law or not. If the action was prohibited by enacted law, it was not binding and its author could always act contrary to it. Otherwise, if the action was unlawful because some of the legal requirements of such an action had not been satisfied, the author could not contradict his action. This happened, for example, when someone concluded an agreement without the formalities required by law or, when the consent of either party was lacking at the time the agreement was concluded. Azo mentioned the passage of the *Digest* D 1 7 25 for the first case and the passage D 8 3 11 for the second.

In D 1 7 25, Ulpian wrote that a father could invalidate the will of his emancipated daughter, alleging the invalidity of the emancipation because it lacked the formality required by law; but when that father had acted for a long time in a manner conforming to the emancipation, he could not unexpectedly change, thereby frustrating the reliance of the heirs.<sup>16</sup>

The second passage, from Celsius, concerns an alienation of an easement. In Roman law, a valid alienation needed the consent of both co-owners of the servient land. If only one of the co-owners gave his consent, the alienation was void, but the vendor could not contradict his action and he was prevented from prohibiting use of the easement by the dominant tenant.<sup>17</sup>

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<sup>16</sup> Ibid 123; D. 1 7 25: 'Post mortem filiae suae, ut mater familias quasi iure emancipata vixerat et testamento scriptis suis heredibus decessit, adversus factum suum, quasi non iure eam nec praesentibus testibus emancipasset, pater movere controversiam prohibetur'.

<sup>17</sup> Azonis Bononiensis, above n 15; D 8 3 11: 'Per fundum, qui plurium est, ius mihi esse eundi agendi potest separatim cedi. Ergo subtili ratione non aliter meum fiet ius, quam si omnes cedant: et novissima demum cessione superiores omnes confirmabuntur. Benigni tamen dicetur, et antequam novissimus cesserit, eos, qui antea cessere, vetari uti cesso iure non posse'.

Azo turned to the issue in his *Summa*,<sup>18</sup> where he considered the vendor and purchaser of land. In the title *De Agricolis, et Censitis et Colonis*, he explained when the vendor could contradict himself and recover the possession of the land from the purchaser. Azo insisted on the distinction between actions prohibited by enacted law and actions not prohibited. The vendor could contradict himself and exercise the *vindicatio* only when the purchase was prohibited by enacted law. On the contrary, he could not if the purchase lacked the formality or the expression of consent necessary to be binding. So, the *Lex Iulia* prevented a husband from alienating his wife's dowry, without the consent of the wife. The alienation of the dowry by the husband was void, when lacking the consent of the wife. However, the husband could not revoke his consent and his action to recover the dowry could be opposed by the *exceptio doli generalis* by the purchaser.

Accursius used the same examples as Azo,<sup>19</sup> describing the application of the Latin maxim. The first commentators, such as Bartolus of Saxoferrato,<sup>20</sup> followed the theory developed by the glossators, too.

The ratio of the maxim was a matter of considerable debate among the jurists during the late Middle Ages. Although they agreed on the meaning of the maxim and on its areas of application, they developed a wide range of arguments about its legal basis. Accursius and Bartolus mentioned the

<sup>18</sup> Azonis Bononiensis, *Summa* (G Bindonum, 1583) 9–10, *annotatio De Agricolis et Censis et Colonis*.

<sup>19</sup> See especially *Digestum Vetus seu Pandectarum Iuris Civilis*, (Aquilae renouantis, 1606) vol 1, 74, the comment to the fragment *post mortem* and the comment to the fragment *per fundum* ‘... Alioquin si unus concedit mihi, alii possunt me prohibere, sed ille, qui concessit mihi, non potest me prohibere, et non valet concessio ab uno facta nisi alii cedant: unde ista cessione priores cessiones confirmantur’: at 1139.

<sup>20</sup> Bartoli a Saxoferrato, *In Primam Digestis Veteris Partem* (D Zenarum, 1603) vol 1, 29, 185.

debate among the jurists in their works and evidenced the lacking of a *communis opinio* among them. According to one argument the maxim was based on a presumption which prevented the vendor from alleging the truth; a second argument was that a tacit renunciation by the vendor of his right to sue could be deduced from the behaviour of the vendor, who for a long time had acted in a manner conforming to his act; another argument found the ratio of the maxim in a fiction based on *aequitas*, according to which the realisation of the elements necessary for a binding contract, after the conclusion of the contract, confirmed the contract from the time of the agreement.<sup>21</sup>

The debate on the ratio of the maxim continued up into the 15<sup>th</sup> century and beyond. However, medieval jurists never recognised a proprietary right in the purchaser, deriving from the application of *venire contra factum* maxim. This development of the doctrine originated with Cujas, in the 16<sup>th</sup> century.<sup>22</sup> Cujas discussed the case of a purchaser who used the *exceptio doli generalis* to oppose the *vindicatio* brought by a vendor of land who was not the owner at the time of sale, but acquired ownership later. Cujas was the first to affirm that the purchaser indirectly acquired a good title. The title of the purchaser was founded on *aequitas* and took effect from the *traditio*. In his comment on *Papiniani Opera*, Cujas wrote that the doctrine, which prohibits the confirmation of void contracts, was corrected *ex aequo and bono* and explained<sup>23</sup> the rule through the examples previously used by glossators, such as the sale of the dowry by the

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<sup>21</sup> Ibid.

<sup>22</sup> See F Ranieri, *Alienatio convalescit: contributo alla storia e alla dottrina della convalida nel diritto dell'Europa continentale* (Giuffr , 1974) 26–7.

<sup>23</sup> J Cuiacii, *Praestantissimi Tomus Quartus vel Primus Operum Postumorum, Commentaria Accuratissima in Libros Quaestionum Summi inter Veteres Iuriconsulti Aemilii Papiniani, Opus postumum* (M A Mutio, 1722) part 1, 96.

husband, without the consent of the wife; the purchase from the non-owner; the creation of a pledge by the non-owner. In these cases the contract was void, but it could not be invalidated by the vendor who eventually acquired a good title after the purchase.

By opposing the *exceptio doli*, the purchaser stopped the action of the vendor for the recovering of the possession of the good and he indirectly acquired a good title from the conclusion of the agreement. The doctrine followed the maxim *venire contra factum proprium nemo potest* and it prevented the vendor taking advantage of his fraud. Cujas explained:

... According to the Catonian rule, the void alienation could not be confirmed. This rule is applied both to succession law and to agreements. However, one needs to add to the rule that those agreements, which could not be directly confirmed by enacted law could nevertheless be confirmed indirectly *ex aequo et bono*, through the remedy of retention and *exceptio doli mali* ... [For example], a pledge created by the non –owner is void, but it is confirmed if the debtor, after the creation of the pledge, acquires a good title on the good put in pledge. This happens when the debtor inherits the good from the true owner. In this case the pledge, although it is void, is confirmed ... by retention ... and *exceptio doli mali*. The remedies are given because the debtor, who wanted to recover the good put in pledge, had a fraudulent intent. Then the action and the *exceptio doli mali* prevent fraud.<sup>24</sup>

<sup>24</sup> Ibid: ‘... Obiicitur primum regula Catoniana: *quae ab initio non valent, ex post facto non conualescunt*: quae plerumque valet, non solum in legatis, et substitutionibus, sed etiam in contractibus. Sed ita respond. *non conualescunt ipso iure*, fateor, directo, sed remedio retentionis, remedio exceptionis doli mali ex aequitate, quod ita demonstro. Rei alienae pignus non valet, conualescit tamen acquisitione dominii, si is, qui domino pignus posuit, domino heres extiterit, et conualescit, non directo, non ipso iure ... sed per retentionem ut ... per exceptionem doli mali, quod scilicet debitor velit auferre rem creditori, quam ei pignora vit, quod sit mendax. Nam actioni et exceptioni doli mali insunt mendacia’[author’s trans].

Cujas' theory was accepted by civil lawyers in the 17<sup>th</sup> century, when the rule of the confirmation of void agreements *ex aequo et bono* was well established. In the late 17<sup>th</sup> century the German lawyer Samuel Stryk dedicated a monograph to the matter, entitled *De Impugnatione Facti Proprii*.<sup>25</sup> He collected the developments of the debate among the civil lawyers in the previous centuries, showing that the ideas of Cujas were kept during the *Jus commune*. Stryk claimed that the rule was inspired by natural law and it had its ratio in the protection of the purchaser's reliance. In fact, the plaintiff was not allowed to sue contrary to his previous act when his action realised a breach of faith of the defendant.<sup>26</sup> One of the main examples of the application of the maxim *venire contra factum proprium* concerned agreements: the promisor could not revoke his promise to the detriment of the promisee who had acted in reliance of it.

The same argument had been sustained by the later Spanish scholastic lawyers, such as Molina and Gomez, who shared the opinion according to which no one can contradict himself with the fraudulent aim to take an unjust profit to the detriment of another. These lawyers traced the rule from a principle of natural law and used the same examples as glossators and commentators to describe it.<sup>27</sup>

The rule survived even in the 18<sup>th</sup> century, although the lawyers interpreted it as an application of the warranty against eviction, which was implied in all contracts of sale. The French lawyer Domat, in his *Les Lois Civiles Dans Leur Ordre Naturel*, wrote that the plaintiff was barred from

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<sup>25</sup> S Stryk, *Disputatio Iuridica, De Impugnatione Facti Proprii* (Coepselius, 1688).

<sup>26</sup> Ibid [15].

<sup>27</sup> L Molina, *De Primogeniorum Hispanorum Origine, ac Natura* (Arnaud and Borde, 1672) Book I, ch 1, [17]; D A Gomez, *Ad Leges Tauri Commentarium Absolutissimum* (Regiae Societatis, 1794) 640.

recovering the possession of the land whenever he was obliged to provide the possessor with a warranty against eviction.<sup>28</sup> He quoted the *Digest* and the remedy of the *exceptio doli generalis*. Domat underlined that the French doctrine constituted an application of the Latin maxim *venire contra factum proprium nemo potest*. The same doctrine was accepted by Voet<sup>29</sup> and later by Pothier.<sup>30</sup>

Up to the 19<sup>th</sup> century, the civil law tradition accepted a doctrine which prevented the vendor from invalidating a void purchase to the detriment of the purchaser's reliance. The doctrine was developed by civil law jurisprudence from a principle of *aequitas*, according to which the void agreement could be confirmed *ex aequo et bono* to stop a fraudulent claim. This doctrine, both in its procedural origin and in its equitable aim, presents a high degree of similarity with the doctrine of equitable estoppel, developed by English law. Following the path of the protection of purchaser's reliance, our attention is now to be focused on English law, in order to outline some comparative remarks on the law developed on both sides of the Channel during the same centuries.

### III THE MEDIEVAL COMMON LAW ESTOPPEL VS EQUITABLE ESTOPPEL

By the 14<sup>th</sup> century, common law courts had been using the word estoppel to indicate the defendant stopping the plaintiff from alleging something before the jury, which contradicted the plaintiff's own previous act. These

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<sup>28</sup> J Domat, *Les Loix Civiles dans leur Ordre Naturel* (Cavelier, 1771) vol 1, supplement, part VIII, 8, *De l'Eviction et des Autres Meubles*.

<sup>29</sup> J Voet, *Commentarius ad Pandectas* (Frates Cramer, 1757) vol 1, part XI, title III, 758 [2].

<sup>30</sup> R J Pothier, *Treaté du Contrat de Vente* (Letellier, 1806) 100.



kinds of estoppels were called estoppels by matter *in pais* and they developed the principle that it was the estopped person's own act which prevented him from alleging a different state of fact.<sup>31</sup>

Estoppels *in pais* applied in connection to land law and barred the plaintiff from recovering possession of land when the recovery contrasted with a previous positive act of the same plaintiff. One of the main examples of this kind of estoppels concerned the *cui in vita*. It was a writ of entry through which the wife, after the husband's death, could recover the possession of freehold land alienated by the husband during his life.<sup>32</sup>

In a case of 1343 at the Cambridge Assizes,<sup>33</sup> a wife sued a *cui in vita* to recover her dower. Dower was land which belonged to a husband, but which a wife was entitled to enjoy after his death. In this case the husband had leased that land, preventing his widow from enjoying the land after his death. After the death of the husband, the lessee had assigned a third part of the land to the wife by parol agreement and he had retained the other two parts. The wife wanted to recover these two parts of the land. Normally a widow could use the writ *cui in vita* to recover such land, except in the case she had accepted the lease by deed or by fine. The court stated that she may enter into the two parts of the land, as the acceptance of dower here was not by fine or deed and so shall not conclude her. The wife's acceptance by parol was not an estoppel to her. Even if the wife were estopped, because of her acceptance, this bar would not affect anyone claiming the land other than the wife (such as her heir) because they had

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<sup>31</sup> See W S Holdsworth, above n 5, vol 9, 159.

<sup>32</sup> See *ibid*, 22.

<sup>33</sup> 17 Edw 3 49a; see also the paraphrase of the report compiled by D J Seipp, *An Index and Paraphrase of Printed Years Books Reports, 1268–1535* (10 May 2012) <<http://www.bu.edu/phpbin/lawyearbooks/search.php>>.

not acted in such a way to be estopped. The Court added: ‘... if the disseised [the wife] took homage of the disseisor [the purchaser] for her life she would be barred of the Assize but her heir not barred to a writ of entry sur disseisin of the same disseisin made to his ancestor’.<sup>34</sup> Only those who were privy to the agreement were bound by it and were prevented from recovering the land.

A century later, in a very similar case in the Common Pleas,<sup>35</sup> a widow sued a *cui in vita* to recover her dower from a certain Mr Thomas. The defendant alleged that the widow and her husband had given the land to him for life and he had paid the widow the rent, which she had accepted. But the plaintiff replied that the acceptance of the rent was in the country and it did not have the same value as an agreement in a court of record, therefore the acceptance did not bar the action. Then, the court dealt with the question if the widow was privy to the agreement between the husband and Thomas. The answer depended on the value of her acceptance of the rent after her husband’s death. Newton CJ affirmed that while previously a wife could maintain a writ of entry on a lease made by her and her husband, now the law had changed. So the widow was privy to the agreement: her acceptance of rent worked as an estoppel.

A line of cases on the same matter is reported by Fitzherbert and Brooke under the titles *cui in vita* and *estoppel*.<sup>36</sup> In these cases the force of the bar was the quid pro quo that the plaintiff had accepted, such as a fine for alienation, a rent, homage, or an exchange. As a result, the presence of an

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<sup>34</sup> D J Seipp, above n 33, commentary and paraphrase.

<sup>35</sup> 21 Hen 6 24b–26a.

<sup>36</sup> Sir A Fitzherbert, *Graunde Abridgement* (In aedibus Richardi Tottelli, 1516) vol 2, 103, title *estoppel*; Sir R Brooke, *Le Graunde Abridgement* (In aedibus Richardi Tottelli, 1586) 198–9, title *cui in vita*.

agreement barred the action by those who were privy to it. The heirs of the plaintiff, for example, were not privy to the void alienation of the father and they could recover possession of the land after the father's death, except in cases of their confirmation of the father's alienation. The confirmation of the void alienation made them privy to the agreement and estopped them from suing the purchaser.

This doctrine had been recognized by Bracton as part of English law in the 13<sup>th</sup> century.<sup>37</sup> In *De Legibus et Consuetudinibus Regni Angliae* the author wrote that if the wife, after her husband's death, agreed and ratified the gift of her inheritance, that her husband had made during his life, she was prevented from recovering the gift.<sup>38</sup> Similarly, the true owner was prevented from recovering land from the possessor, when he had previously confirmed the title of the possessor. The confirmation of the title could be express or through conduct.<sup>39</sup> The confirmation of the heir, when the right had descended to him, made an originally invalid grant valid. Thus the heir, who confirmed the void grant, was prevented from suing for the recovery of land. Bracton wrote: 'quod ab initio invalidum fuit quia imperfetum, per confirmationem validum fecit et perfectum quia confirmatio supplevit defectum'.<sup>40</sup>

The common law estoppel and the doctrine of confirmation of void alienations seems to resemble the medieval jurisprudence on *exceptio doli generalis*, developed on the Continent. It is possible that the basic idea of

<sup>37</sup> The exact date of Henry de Bracton's work is an issue of debate among jurists. On this theme see P Brand, 'The Date and Authorship of Bracton: a Response' (2010) 31(3) *Journal of Legal History* 217.

<sup>38</sup> Henry de Bracton, *Bracton on the Laws and Customs of England* (Harvard University Press, 1968) vol 4, 31 [trans of S. E Thorne].

<sup>39</sup> Ibid vol 2, 173.

<sup>40</sup> Ibid vol 3, 292.

common law estoppel was borrowed by Bracton from the civil law jurisprudence, and it was developed by English courts in different details. However, it is very difficult to prove any clear link between common law and civil law doctrines and the issue is beyond the scope of the present work.<sup>41</sup>

The previous discussions show that common law estoppel was based on a positive act of the plaintiff, by which he was bound. It may be an agreement by deed or before the jury, or something received by the plaintiff from the defendant before the jury, such as homage, rent or the fealty from a tenant or a lessee. As far as the effects of common law estoppel, they were confined to procedure, such as the *exceptio doli* was, without recognising a real title of the defendant. These features, together with the language used by the common law courts, make a difference between common law estoppel and the doctrine of estoppel, which developed in the Court of Chancery, even if a reciprocal influence appears feasible.

The equitable doctrine was formulated to prevent fraud and was based on good conscience and *aequitas*: equity protected the defendant against the fraudulent action of the plaintiff, who wanted to take an unjust profit from the defendant's reliance. The aim of the doctrine was to relieve against the bad faith of the plaintiff, who had induced the defendant to expend his money on the faith of some promise or representation, which he afterward violated.<sup>42</sup>

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<sup>41</sup> R T Macnair, *The Law of Proof in Early Modern Equity, Comparative Studies in Continental and Anglo-American Legal History* (Duncker & Humblot, 1999) 131; J H Wigmore, *Treatise on Evidence in Trials at Common Law* (Little, Brown, 3<sup>rd</sup> revised ed, 1940) [1117] and [2426].

<sup>42</sup> *Thornton v Ramsden* (1864) 4 Giff 566.

The Court gave an equitable title to the defendant to protect his reasonable confidence that his possession would not be disturbed.<sup>43</sup> The aim of the doctrine was to prevent the landlord from acting fraudly and profiting from the expectation of the possessor.

One of the foundational authorities of the doctrine, as applied to property law, is found in the dissenting opinion given by Lord Kingsdown in *Ramsden v. Dyson*,<sup>44</sup> decided by the House of Lords in 1866:

The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.<sup>45</sup>

The doctrine developed by Equity law is usually presented as a quite modern one, traced back to the 19<sup>th</sup> century. However, a series of cases, decided by the Court of Chancery between the 16<sup>th</sup> and the 18<sup>th</sup> century demonstrate that the protection of a purchaser's reasonable confidence and the basic idea of equitable estoppel were known by the Court of Chancery even in those centuries, although the Court did not use the word estoppel to identify the doctrine. The main matter of these cases was the protection of a purchaser against a fraudulent act of a seller, on which we shall now focus our attention.

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<sup>43</sup> Ibid 571.

<sup>44</sup> See Edward Coke, *The Modern Law of Estoppel* (Oxford University Press, 2000) 45.

<sup>45</sup> *Ramsden v Dyson and Thornton* (1866) LR 1 HL 173.

#### IV THE PROTECTION OF THE PURCHASER AGAINST THE FRAUDULENT ACTION OF THE SELLER

In a line of cases, between the 16<sup>th</sup> and the 18<sup>th</sup> century, the Court of Chancery was asked to protect a good faith purchaser against a seller. The central issue of these cases was to establish if the seller may be barred from exercising a common law right when his purpose was fraudulent. The main example concerned void grants and conveyances: the purchase of the land was void but the seller let the purchaser enter in possession of the land and induced the purchaser to think he had a good title. Some years later, for various reasons, the seller rethought and sued an action of ejectment to recover the land. According to the common law, the seller had the right to sue, as purchase was void and the purchaser's possession of land was based only on a bare promise or representation. Common law estoppel needed the agreement to be accepted by the vendor by deed or before the jury.

In the same centuries, civil lawyers were confronted with very similar cases: the seller was not the true owner, but he acquired the ownership after the purchase and he sued to recover the possession from the purchaser; the non-owner created a pledge and after he had acquired the ownership of the good he sued to void the pledge; the father sold the land of his son but, after his death, the heir sued to recover the possession of the land alleging the contract was void; the husband sold the dower of his wife, but after the purchase he rethought and he wanted to invalidate the purchase.<sup>46</sup>

These cases brought out the difficult relationship between law and *aequitas*: the seller had the right to void the purchase but the exercise of his

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<sup>46</sup> D Tuschi, *Praticarum Conclusionum Iuris* (Borde, Arnaud, Rigaud, 1661) vol 3, 168 [368]; M A Sabelli, *Summa Diversorum Tractatum, in Quibus Quamplurimae Universi Iuris* (Balleoniana, 1748) vol 2, 390.

right led to a fraud against the purchaser. This happened when the seller contradicted his previous own act, which the purchaser had relied on.

The civil law jurisprudence investigated if it was right and just to follow law even when the result was contrary to *aequitas* and it concluded that the legal action of the plaintiff could be barred by the defendant when it was fraudulent and contrary to *aequitas*. As mentioned above, by the end of the sixteenth century, the rule that the void purchase was to be confirmed when the vendor had induced the purchaser to rely on it was well established on the Continent. The confirmation of the title was a remedy, founded on *aequitas*, to prevent the plaintiff from exercising a right to the detriment of the purchaser's reasonable confidence. The result was that the non-owner could not contradict his previous act, but was forced to confirm the act and its legal effects.

During the same period, the Court of Chancery was ruling on similar cases, which were very close to the continental doctrine. In a case of 1492, the Court of Chancery protected the plaintiff against the defendant, who wanted to profit from his own fraudulent act to the expense of the first one. The plaintiff was creditor of a sum of money and he had obtained a judgment against the debtor, to be executed over the debtor's land. Before the debt was paid, the debtor granted his land to a certain Mr Capel. At the time of purchase the purchaser did not know the land was under execution. When the purchaser discovered that the land was subject to the judgment for execution, he offered the creditor a sum of money smaller than the value of debt, but the creditor refused to accept this. Then, the purchaser brought a writ of right against the plaintiff and entered the land. According to the *Statute of Gloucester* of 1278, the creditor could falsify the recovery of land by the purchaser, but as he had not falsified the recovery he had lost his right. The Court of Chancery had to address the question if the creditor

could sue a writ of subpoena against the purchaser even when he had no common law right.

The majority of judges stated that even if there was no remedy in common law, the plaintiff should be restored of his possession:

... it seems expressly good conscience to restore him to the possession if there is no remedy by common law for him, because this recovery was by fraud and recovery by fraud is abhorred in our law, and nothing is more abhorred than fraud; because if one recover on a true title by fraud in our law, it will be defeated because this recovery was by fraud.<sup>47</sup>

The case was compared with the case of a widow who sued for the recovery of her dower. Huse CJKB and Bryan CJCP affirmed:

... as in case it seems as if a widow cause one enter on dead husband or disseised her husband's heir against whom she recovered her dower, this will be defeated, and so here in our law fraud is always expelled; so it appears here express fraud, because Sir W. Capel has no right to the land except by fraud, because he knew at the time of recovery of the recognisee's title, and so this was no recovery by title, but by fraud and no title, for which cause it is good reason and conscience that the plaintiff will be restored ...<sup>48</sup>

The same example was the issue of another case at the end of 15<sup>th</sup> century.<sup>49</sup> A husband made a lease on the wife's land, the lessee being in good faith and he built upon the land. After the death of the husband, the wife sued the possessor to recover the land, but the Court of Chancery compelled her to provide recompense for the improvements from which she benefited. The *ratio* was that the owner was prevented from unjust

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<sup>47</sup> 7 Hen 7 10b-13b, paraphrased by D J Seipp, above n 31.

<sup>48</sup> Ibid.

<sup>49</sup> *Peterson v Hickman* (1458) 34 H 6.



profiting to the detriment of the possessor. The remedy was personal, forcing the owner to give the possessor a recompense for the improvements. But in the following century the Court started to bar the owner from recovering the land and, eventually, to confirm the void title of the possessor.

The *Earl of Oxford's Case* followed the path of these previous decisions. The matter of controversy was a void lease, based on a conveyance prohibited by a statute of 1571. The lessee had occupied the land for many years and had spent a great deal of money in improvements, relying on the fact that his possession was based on a good title. Magdalene College, the lessor, decided to void the lease and recover the land. The action of ejectment brought by the plaintiff was founded on a good title, but it would have had the result of giving the plaintiff an unjust profit to the detriment of the lessee. One of the main issues of the case was if a void lease could produce any effects in order to avoid a result contrary to conscience.<sup>50</sup> The Court stated that the presence of a void lease did not prevent the plaintiff obtaining relief in Chancery: '... Equity and good conscience speak for the plaintiff ... Nor does the law of the land speak against him. But that and Equity ought to join hand in hand, in moderating and refraining all extremities and hardship.'<sup>51</sup>

The report refers to some decisions of the 16<sup>th</sup> century, where the plaintiff had a remedy in equity against the defendant, notwithstanding the

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<sup>50</sup> See D J Ibbetson, 'The Earls of Oxford's Case (1615)', C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart, 2012) 1–32, where the author affirms: '... the decision in favour of the Earl reflected two important points. First was that Common Law did not have a monopoly over the determination of rights of real property, second that — in modern terms — the Court of Chancery had the power to manipulate property rights based on the working of what we would see as a broad principle of estoppel': at 28.

<sup>51</sup> *The Earls of Oxford's Case* (1615) 1 Chan Rep 1.

defendant had a good title at common law. Most of the examples are taken from the law of obligations. Along this line the Court quoted a case of 1599 and stated: ‘So if one neglect to enroll his deed of bargain and sale, being his only assurance, and the bargainor brings an ejection against him and has judgment, the bargainee may resort to Chancery, and there be relieved, if not for the land, yet for the money paid’.<sup>52</sup>

In the 16<sup>th</sup> century the Court of Chancery protected the good faith purchaser of the land through a personal remedy, a century later the Court began to give a real remedy to him.<sup>53</sup> In the case of *Hunt v Carew*, decided by the Court of Chancery in 1649, a purchaser’s reliance on the validity of the title was the basis for recognising his right to possession of the land.<sup>54</sup> A father had a piece of land for life, remainder in tail to his son. The plaintiff, thinking the father had the inheritance, asked the son for his assistance in procuring a lease from his father. The son helped the plaintiff and he also received a sum of money from him. After the purchase, the plaintiff discovered that the father was only a tenant for life and the lease was void. Then he sued the Court of Chancery to have the lease confirmed by the father and the son.

### The Court ordered

... since the plaintiff was not acquainted that the father had exceeded his power, and he relying on the affirmation of the son (who had most of the

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<sup>52</sup> Ibid 6.

<sup>53</sup> The sixteenth century cases mainly concerned questions about leases, which were initially not seen as proprietary rights. Leases gradually developed into proprietary rights, protected by proprietary remedies; on this issue see generally W Plucknett, *A Concise History of the Common Law* (OUP, 5<sup>th</sup> ed, 1956) 570–4; H Baker, *An Introduction to English Legal History* (Butterworths, 4<sup>th</sup> ed, 2002) 298–308; R Megarry and H W R Wade, *The Law of Real Property*, (Sweet & Maxweel, 7<sup>th</sup> ed, 2008) 729.

<sup>54</sup> *Hunt v Carew* (1649) 21 ER 786.

money), that the lease would be good without his joining, by which he was deceived; that therefore both should join at their own costs to make an assurance, and confirm the lease to the plaintiff during the estate thereby granted.<sup>55</sup>

The affirmation of the son, reassuring the purchaser about the validity of the lease, worked as an estoppel against him and let the purchaser go to the Court of Chancery and obtain the confirmation of his title.

In the same way, in a case of 1689, a purchaser, who relied on the validity of the vendor's title, had a cause of action against the true owner, who encouraged him to proceed to the purchase.<sup>56</sup> Sir George Norton's young brother had an annuity, charged on land by his father's will. Mr Hobbs, who wanted to purchase the annuity, went to Sir George and asked for assurance about his brother's title. Sir George answered that his father had the inheritance of the land when he made the will and his brother had a good title. He added that he heard there had been a settlement made by his father before the will, but he did not know the content, so he encouraged Mr Hobbs to purchase the land. Actually the father had sold the land to a certain Mr Baldwin. Therefore, the purchase of the annuity by Mr Hobbs was void, because the father was not the true owner of the land and Sir George's brother did not have a good title. Afterwards, Sir George acquired the land and wanted to void the annuity. Mr Hobbs went to the Court to have his annuity decreed. The Lord Chancellor

... decreed the payment of the annuity, purely on the encouragement Sir George gave Hobbs to proceed in his purchase, and that it was a negligent thing to him not to inform himself of his own title, that thereby he might

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<sup>55</sup> Ibid.

<sup>56</sup> *Hobbs v Norton* (1689) 1 Vern 137.

have informed the purchaser of it, when it came to enquire of him: and therefore decreed Sir George to confirm the annuity to Hobbs.<sup>57</sup>

Similarly, in a case decided by the Court of Chancery in 1711,<sup>58</sup> the son, remainder in tail, was barred from avoiding the lease granted by the father, during his life. The son had never acquainted the plaintiff with the power of the father, but he had let him make improvements with the design to reap the whole benefit. The Court decreed the son to confirm the lease.

Bacon<sup>59</sup> and Viners<sup>60</sup> collected these decisions under the title *Fraud*, underlining that the Court faced the question of fraud by construction: the contract between the parties was not made by fraud, but the action for the recovery of possession had a fraudulent aim. The Court found fraudulent the behaviour of the vendor, who contradicted himself, and protected the reliance of the purchaser by confirming his title from the beginning. The void title of the purchaser was made good *ex aequo et bono*. The purchaser could oppose his title both to the seller and his heirs and third parties who had notice of the purchase.

The use of the title fraud is revealing of the ratio of these decisions and it also suggests the likelihood of a link between them and the continental jurisprudence developed on *exceptio doli*. Fraud in England, as *dolus* in Europe, is the central issue of the cases mentioned above. The Court of Chancery states that the vendor who contradicts his previous promise or representation commits fraud and it opposes his fraudulent act obliging him

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<sup>57</sup> Ibid; see also *The East India Company v Vincent* (1740) 2 Atkin 82; *Stiles v Cooper* (1748) 3 Atkin 692; *Dann v Spurrier* (1802) 7 Ves 230.

<sup>58</sup> *Huning v Ferrers* (1711) 25 Eng Rep 59.

<sup>59</sup> M Bacon, *A New Abridgement of the Law*, London (H Lintott, 1736) vol 1, 597.

<sup>60</sup> C Viner, *General Abridgement of Law and Equity* (G G J and J Robinson, 2<sup>nd</sup> ed, 1791) vol 13, 535.

to give effects to his promise or representation. This interpretation may also help to explain why the Court of Chancery did not use the word estoppel (even if it was known by the Court) to describe these situations. While the word estoppel was used by the Court to indicate the common law remedy, in these cases the words fraud and confirmation were mainly used echoing the words *dolus* and *confirmatio* of Continental origins. This makes the word estoppel misleading to follow the path of the development of equitable estoppel from the 16<sup>th</sup> to the 18<sup>th</sup> century. On the contrary, the cases mentioned above seem to be the direct precedents of the doctrine as they are referred to *Thornton v Ramsden*, later reversed by the House of Lords in *Ramsden v Dyson*, one of the foundational authorities for the formulation of the idea of proprietary estoppel.<sup>61</sup>

## V CONCLUSION

In the 16<sup>th</sup>–18<sup>th</sup> century England and Europe seem to share a common solution to the problem of protection of the purchaser's reliance. The protection of the purchaser, who relied on a promise or representation by the vendor, later frustrated, finds an early source in the *exceptio doli generalis* of Roman Law and in the maxim *venire contra factum proprium nemo potest*, later formulated by glossators. During the *Jus commune*, the interpretation of the *exceptio doli generalis* developed in a doctrine according to which a void purchase could be confirmed *ex aequo et bono* to stop a claim from the vendor in contrast with his previous act. The doctrine was inspired by natural law and obliged the seller to confirm the void purchase when his action to void the contract would be realised a *laesio*

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<sup>61</sup> *Thornton v Ramsden* (1864) 4 Giff 566, 564: 'One of the earliest cases laying down the principle on which this Court acts was The Earl of Oxford's Case [...] which in the material facts very much resembles the present one'; see especially E Coke, above n 44, 42.

*fidei* of the defendant. The civil law doctrine seems to have an English counterpart in a series of cases decided by the Court of Chancery from the 16<sup>th</sup> to the 18<sup>th</sup> century. These cases concerned void purchases or conveyances. The Court of Chancery protected the purchaser of the land against the vendor, who wanted to take an unjust profit from the void contract to the expense of the purchaser. As on the Continent, in these cases the vendor was decreed to confirm the void purchase and let the purchaser peacefully enjoy his possession. The remedy was inspired by good conscience and the *ratio* was to prevent fraud. Although it is difficult to demonstrate a borrowing of the Continental doctrine by the Court of Chancery, the language used by the Court and the identification of the cases as examples of fraud strengthen the theory that the Continental doctrine was a probable source of inspiration for the Court of Chancery. In this case, the equitable doctrine of estoppel would be more ancient than the 19<sup>th</sup> century, having its early source in the *Jus commune* developed in Europe.

## RELIGIOUS LIBERTY IN THE EARLY AMERICAN REPUBLIC

STEVEN ALAN SAMSON<sup>\*</sup>

### Abstract

The early nineteenth century in America was a period in which the idea of religious liberty came to be worked out in practice in a setting of growing diversity. The immediate effect of the dissolution of state religious establishments was to strengthen the vitality and prestige of the churches themselves. Before the end of the century, the church historian Philip Schaff could regard as normal ‘a free church in a free state, or a self-supporting and self-governing Christianity in independent but friendly relation to the civil government.’

### I INTRODUCTION

The representation of the Constitution of the United States as ‘the supreme law of the land’, which echoes the phrase ‘law of the land’ in the *Magna Carta*, refers to more than the document itself.<sup>1</sup> It is unnecessary to speculate about the exact intent of the founders when the very language of the Constitution attests to its continuity with and even incorporation of common law or higher law concepts. Indeed, this understanding was

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<sup>1</sup> This article is largely drawn from the fifth and sixth chapters, “The American Commonwealth” and “Early Constitutional Issues,” of the author’s doctoral dissertation. Steven Alan Samson, *Crossed Swords: Entanglements Between Church and State in America*. Ph.D. dissertation, University of Oregon, 1984.

affirmed by the founders themselves and has been periodically reaffirmed by members of the judiciary.<sup>2</sup> As Edward S. Corwin contended:

The attribution of supremacy to the Constitution on the ground solely of its rootage in popular will represents, however, a comparatively late outgrowth of American constitutional theory. Earlier the supremacy accorded to constitutions was ascribed less to their putative source than to their supposed content, to their embodiment of an essential and unchanging justice. ... There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, all together regardless of the attitude of those who wield the physical resources of the community.<sup>3</sup>

The principles of higher law jurisprudence may be traced to the earliest period of modern western law. In the twelfth century, for example, Gratian

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<sup>2</sup> Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Cornell University Press, 1955) 89. See R. Kemp Morton, *God in the Constitution* (Cokesbury Press, 1933) 110-116. See also H. E. Bradford, 'And God Defend the Right: The American Revolution and the Limits of Christian Obedience' (1983) *Christianity and Civilization* 239: "According to the Old Whig view of the English Constitution, it was not a contract but a source of identity—with no author but the nation and its history, with God an implicit party to the process. As covenant qua law it grew out of the interaction of people and princes living out of the nation's genius, with God's blessing its confirmation. These assumptions undergird most of the early American political documents." Henry Steele Commager, 'Constitutional History and the Higher Law' in Conyers Read (ed), *The Constitution Reconsidered* (Harper Torchbooks, revised ed, 1968) 225–226, cited several affirmations of this sort as expressions of an early higher law tradition in early American jurisprudence. While Commager, who wrote this essay in 1938, claimed that the tradition's underlying philosophy had been repudiated three-quarters of a century earlier, he did acknowledge its importance in constitutional history: 'Americans, having discovered the usefulness of natural law, elaborated it, and having justified its application by success, protected that success by transforming natural into constitutional law: the state and federal constitutions. And in so far as natural law had found refuge in written law, there was little reason to invoke it; it was automatically invoked whenever the constitution was invoked, and this was the logic of Marshall in the Marbury case.' Ibid 228.

<sup>3</sup> Ibid 4.



wrote: 'Enactments (*constitutiones*), whether ecclesiastical or secular, if they are proved to be contrary to natural law, must be totally excluded.'<sup>4</sup>

The new federal union was, in effect, given the authority to coordinate the political system but not to dominate it. Its overall success assumes the continued good health of the various social institutions, such as families and churches, that also exercise powers of a governmental nature. The safeguards built into the constitutional system ultimately depend on the consensus and self-restraint of its component parts. This is a key to properly understanding the relationship between church and state as it was originally envisioned. As James Madison remarked during the ratification debates in Virginia: "There is not a shadow of a right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation."<sup>5</sup>

Like the Declaration, the Constitution is based on the premise that the primary purpose of civil government is essentially negative rather than positive: that is, protective, prohibitory, and punitive. Since its power is coercive by nature rather than simply persuasive, the founders believed that civil authority must be constitutionally restrained. James Madison declared that an accumulation of powers in the same hands "may justly be pronounced the very definition of tyranny."<sup>6</sup> Alexander Hamilton similarly urged that the original grant of powers to Congress was a limited one:

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<sup>4</sup> Harold J. Berman, 'The Origins of Western Legal Science' (1977) 90 *Harvard Law Review* 925.

<sup>5</sup> Jonathan Elliot, *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787* (J. B. Lippincott & Co., 2<sup>nd</sup> ed, 1863) vol 1, p. 330.

<sup>6</sup> Alexander Hamilton, John Jay, and James Madison, *The Federalist: A Commentary on the Constitution of the United States*, ed. Edward Mead Earle (New York: Modern Library) 313. Quoting Federalist, no. 47. See also Abraham

The plan of the convention declares that the power of Congress, or, in other words, of the national legislature, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended.<sup>7</sup>

Likewise, in his Farewell Address, George Washington cautioned against the tendency of governments to usurp power:

If, in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the constitution designates. —But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.—The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.— Of all the dispositions and habits, which lead to political prosperity, Religion, and Morality are indispensable supports.—In vain would that man claim the tribute of Patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens.<sup>8</sup>

But this warning has been largely ignored because the focus of American politics is more generally on the means rather than on commonly conceded ends. Chief Justice John Marshall helped set the stage—and the tone—for many subsequent controversies by adopting a sweeping view of proper constitutional means in *McCulloch v Maryland*, 4 Wheat 316, 421 (1819):

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Kuyper, *Lectures on Calvinism* (Wm. B. Eerdmans Publishing Company, 1978) 9699, on the practical implications of sphere sovereignty.

<sup>7</sup> Ibid 541, quoting Federalist, no. 83.

<sup>8</sup> Charles W Eliot (ed), *The Harvard Classics: American Historical Documents 1000-1904* (Collier & Son, 1910) vol 3, 260.

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

One of the great challenges to constitutional liberty has come through a gradual shift of emphasis from prohibition to regulation, from a protective to a beneficent or philanthropic conception of civil power.<sup>9</sup> What Alexis de Tocqueville subsequently wrote about the regulation of manufacturing associations might be applied with equal validity to the regulation of religious activity:

If once the sovereign had a general right of authorizing associations of all kinds upon certain conditions, he would not be long without claiming the right of superintending and managing them, in order to prevent them from departing from the rules laid down by himself. In this manner the state, after having reduced all who are desirous of forming associations into dependence, would proceed to reduce into the same condition all who belong to associations already formed; that is to say, almost all the men who are now in existence.<sup>10</sup>

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<sup>9</sup> See Frederick Bastiat, *The Law* (Dean Russell trans, The Foundation for Economic Education, Inc., 1950) 21–29; H L Richardson, *What Makes You Think We Read the Bills?* (Caroline House Books, 1978) 79–89; T. Robert Ingram, *The Two Powers* (St Thomas Press, 1959) 15.

<sup>10</sup> Alexis de Tocqueville, *Democracy in America* (Henry Reeve trans, Phillips Bradley (ed), Vintage Books, 1945) vol 2, 33031. Walter Lippmann regarded it as ‘an extraordinary paradox’ that the intellectual leaders of the 1930's believed such detailed regulation to be necessary. As an illustration, he cited Lewis Mumford: “As industry advances in mechanization, a greater weight of political authority must develop outside than was necessary in the past.” Lewis Mumford, *Technics and Civilization* (Harcourt, Brace & World, 1934; Harbinger, 1963) 420. Regarding this kind of other-directedness, Lippmann commented: “Is it not truly extraordinary that in the latest phase of the machine technic we are advised that we must return to the political technic—that is, to the sumptuary laws and the forced labour which were the universal practice in the earlier phases of the machine technic? I realise that Mr Mumford hopes and believes that the omnipotent sovereign power will now be as rational in its purposes and its

The success of the struggle for political liberty was soon followed by a growth of religious liberty and the collapse of denominational establishments. For a time, centralizing tendencies were held in check.

## II THE IDEA OF A CHRISTIAN REPUBLIC

The idea of religious liberty is best understood in the context of a prolonged practical experiment. Many of the colonies, particularly Plymouth Plantation (1620), Massachusetts Bay (1630), Maryland (1634), Rhode Island and Providence Plantations (1636), Connecticut (1636), New Haven (1640), and Pennsylvania (1681), were settled by religious dissenters who wished to be free to practice their faith unmolested. Religious liberty was born in the crucible of conflicting European religious practices which spilled over into a distant land. Denominational traditions were put to the test under frontier conditions characterized by slow communication, fluid migration, and the intermingling and fusion of various religious and political ideas. As Alexis de Tocqueville later observed of the result: "Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions; for if it does not impart a taste for freedom, it facilitates the use of it. ..." <sup>11</sup>

A century after the Constitution was ratified, church historian Philip Schaff reviewed the development of religious liberty in America and detected a close connection between the American political and religious consensus.

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measures as are the physicists and chemists who have invented alloys and harnessed electricity. But the fact remains that he believes the beneficent promise of modern science can be realized only through the political technology of the pre-scientific ages." Walter Lippmann, *The Good Society* (Grosset & Dunlop, 1936) 89.

<sup>11</sup> Ibid vol 1, 316.

If we speak of a Christian nation we must take the word in the qualified sense of the prevailing religious sentiment and profession; for in any nation and under any relation of church and state, there are multitudes of unbelievers, misbelievers, and hypocrites. ... With this understanding, we may boldly assert that the American nation is as religious and as Christian as any nation on earth, and in some respects even more so, for the very reason that the profession and support of religion are left entirely free. State-churchism is apt to breed hypocrisy and infidelity, while free-churchism favors the growth of religion.<sup>12</sup>

Schaff regarded as distinctively American the easy cooperation between religious and civil institutions, characterized by "a free church in a free state, or a self-supporting and self-governing Christianity in independent but friendly relation to the civil government."<sup>13</sup> He concluded that the American system of law could not have originated from any other religious soil, adding that "we may say that our laws are all the more Christian because they protect the Jew and the infidel, as well as the Christian of whatever creed, in the enjoyment of the common rights of men and citizens."<sup>14</sup>

The nature of the difference between the state church and free church viewpoints may be seen in the different versions of the Westminster Confession of Faith, the most influential of Protestant doctrinal statements used in America. Originally, the twenty-third chapter of the Confession—entitled "Of the Civil Magistrate"—reflected the "national church" concept accepted in England and Scotland, where—even in 1647—it was somewhat

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<sup>12</sup> Philip Schaff, 'Church and State in the United States: or The American Idea of Religious Liberty and Its Practical Effects' in *Papers of the American Historical Association* (G. P. Putnam's Sons, 1888) vol 2, no 4, 5455.

<sup>13</sup> Ibid 9.

<sup>14</sup> Ibid 62.

at variance with the congregational establishments of New England. The third section of the original chapter reads:

The civil magistrate may not assume to himself the administration of the word and sacraments, or the power of the keys of the kingdom of heaven: yet he hath authority, and it is his duty, to take order, that unity and peace be preserved in the church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof, he hath power to call synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God.<sup>15</sup>

Despite a marked break with the pure Erastian view that the church is subject to the state, the assumption of a national establishment that underlay the Confession did not square with either the decentralized establishments of seventeenth century New England or the later voluntary church concept.<sup>16</sup> As early as 1729, the Presbyterian synod of Philadelphia adopted the Westminster standards with modifications. The wording in three of the chapters was formally changed in 1788. The commonly accepted American revision of chapter 23, section three, reflects a conception of religious liberty which strongly resembles that of the First Amendment, even though it predated the Amendment by a year:

Civil magistrates may not assume to themselves the administration of the word and sacraments; or the power of the keys of the kingdom of heaven;

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<sup>15</sup> Ibid 50.

<sup>16</sup> An attempt by Robert Child and others to petition Parliament to support a Presbyterian establishment in New England and appoint a governor-general was successfully averted in 1647 by the General Court. John Fiske, *The Beginnings of New England, or the Puritan Theocracy in Its Relations to Civil and Religious Liberty* (Houghton Mifflin Company, 1930) 18891; Samuel Eliot Morison, *Builders of the Bay Colony* (Houghton Mifflin Company, revised ed, 1958) 244-68.

or, in the least, interfere in matters of faith. Yet, as nursing fathers, it is the duty of civil magistrates to protect the church of our common Lord, without giving the preference to any denomination of Christians above the rest, in such a manner that all ecclesiastical persons whatever shall enjoy the full, free, and unquestioned liberty of discharging every part of their sacred functions, without violence or danger. And, as Jesus Christ hath appointed a regular government and discipline in his church, no law of any commonwealth should interfere with, let, or hinder, the due exercise thereof, among the voluntary members of any denomination of Christians, according to their own profession and belief. It is the duty of civil magistrates to protect the person and good name of all their people, in such an effectual manner as that no person be suffered, either upon pretense of religion or infidelity, to offer any indignity, violence, abuse, or injury to any other person whatsoever: and to take order, that all religious and ecclesiastical assemblies be held without molestation or disturbance.<sup>17</sup>

But the problems of jurisdiction and sovereignty are not suddenly resolved by the simple expedient of substituting a "neutral state" for a "confessional state."<sup>18</sup> In fact, this concept of neutrality or disinterestedness has--by its lack of definition--introduced a genuine ambiguity into the relationship between church and state that very likely encouraged not only the proliferation of antagonistic sects but also the creation of public agencies that have duplicated—and sometimes replaced—various church ministries.

For the most part, the Christian character of the social order was taken for granted. But it may not have been simply the blithe indifference of churches to the hazards of Erastianism that led them to support a greater role by the state in public education and welfare. Robert Handy explains

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<sup>17</sup> Schaff, above n 12, 50. For an example of the new attitude, see Gardiner Spring, *Obligations of the World to the Bible: A Series of Lectures to Young Men* (Taylor & Dodd, 1839) 14549.

<sup>18</sup> The terms "neutrality of the state" and "state confessionalism" are used in E. R. Norman, *The Conscience of the State in North America* (University Press, 1968).

that "the overtones of religious establishment implicit in much of what they did then was not clear to them, because as they developed new ways they did not realize how much of the old patterns they carried over the wall of separation into their new vision of Christian civilization."<sup>19</sup> Well into the twentieth century, historian Edward Humphrey could still write:

The American conception allows for national characteristics that are independent of the state. So we are a Christian nation even though Christianity is not a feature of the American state. The adoption of the American concept of the limited state resulted in the ideal of a free church in a free nation, the present American ideal of religious freedom. As a corollary to this we have the ideal of a state freed from ecclesiastical control.<sup>20</sup>

These words echo the sentiments of earlier and even later commentators, including judges and legal scholars like James Kent, Joseph Story, Thomas Cooley, David Brewer, and William O. Douglas.<sup>21</sup> Yet the general respect

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<sup>19</sup> Robert T. Handy, *A Christian America: Protestant Hopes and Historical Realities* (Oxford University Press, 1971) 40.

<sup>20</sup> Edward Frank Humphrey, *Nationalism and Religion in America, 1774-1789* (Chipman Law Publishing Company, 1924) 2.

<sup>21</sup> See James Kent, *Commentaries on American Law*, ed. O. W. Holmes, Jr. (Little, Brown, and Company, 12 ed, 1873) vol 2, 3435 (45); Joseph Story, *Commentaries on the Constitution of the United States; With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution* (Hilliard, Gray, and Company, 1833; reprinted Da Capo Press, 1970) vol. 3, 72627; Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America*, ed. Andrew C. McLaughlin, (Little, Brown, and Company, 3<sup>rd</sup> ed, 1898) 22425. The definitive judicial statement regarding the Christian character of the American constitutional system is probably the lengthy obiter dictum by Justice David Brewer in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). Justice William O. Douglas appears to have made special reference to the long series of polygamy cases, particularly *Davis v. Beason*, 133 U.S. 333 (1890), when he wrote: "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." William O. Douglas, *An Almanac of Liberty* (Doubleday and Company, 1954) 304.



for Christianity did little to prevent the now commonly accepted compartmentalization of spiritual and temporal concerns. The divorce of religion from practical life appears to be the result of a dualistic attitude that regards the state as "worldly" and the church as "otherworldly," diminishing the reputation of both. In this, it resembles the tendency of innumerable church heresies throughout history.<sup>22</sup> Thus religion as a private concern of individuals is separated from politics as the public concern of communities.<sup>23</sup>

The struggle for religious liberty during the last half of the eighteenth century succeeded in discrediting any remaining pretense that the kingdom of God could be established through coercion rather than conversion. John Locke's view that a church "is a free and voluntary Society" soon prevailed.<sup>24</sup> But with public opinion divided on the nature and extent of this new religious liberty, any consideration of the positive responsibilities of the state with respect to religion was obliged to take a back seat to the fight for disestablishment. As a result, important issues were not fully addressed. If, according to the Westminster standards, civil magistrates are

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<sup>22</sup> Some of the antecedents of this dualism are examined in a chapter entitled "The Socialism of the Heresies" in Igor Shafarevich, *The Socialist Phenomenon* (William Tjalsma trans, Harper-Row, 1980) 1879.

<sup>23</sup> See Richard E. Morgan, *The Politics of Religious Conflict: Church and State in America* (Pegasus, 1968) 22, who quoted Roger Williams to the effect that the church should be regarded as just another private association: "... [L]ike unto a Body or College of Physicians in a City; like unto a Corporation, Society or Company of East-Indie or Turkie-Merchants, or any other Society or Company in London; Which Companies may hold their Courts, keep their Records; hold disputations; and in matters concerning their Society, may dissent, divide, break into Schisms and Factions, sue and implead each other at the Law, yea, wholly break up into pieces and nothing."

<sup>24</sup> Verna M. Hall, *The Christian History of the Constitution of the United States of America: Self-Government with Union. American Revolution Bicentennial Edition*, ed. Joseph Allan Montgomery (Foundation for American Christian Education, 1979) 48, quoting Locke's "A Letter Concerning Toleration."

to be regarded as "nursing fathers" (Isa. 49:22-23), in what way are they obliged to promote the welfare of the church? In what sense is the magistrate "the minister of God" (Rom. 13:4)? Who is responsible to set and uphold the moral standards of the community? Even if the prophetic calling of the church to proclaim the word of God or the ministerial calling of the magistrate to enforce it were not at issue, some manner of involvement by civil officers in religious affairs and by church leaders in civil affairs would be unavoidable. The church does not operate in a political vacuum. Neither does the state operate in a religious vacuum. Indeed, it is a basic premise of Christianity—despite periodic neglect of this principle—that both church and state are ministries under the direct authority of God and must govern their affairs within the framework of God's revealed word, the Bible. The practical issue is, as it always has been, to harmonize their respective activities.

### III LIBERTY OF CONSCIENCE

The historical norm in the relationship between church and state is some kind of union or accommodation. The concept of a strict separation may be no older than the country that first gave it substance. But its origin is religious rather than secular. The religious dissident, Roger Williams, coined the phrase "wall of separation" long before Thomas Jefferson penned his famous letter to the Danbury Baptist Association or Justice Hugo Black equated it with the First Amendment guarantees. In a letter to John Cotton written in 1644, several years after Williams had been banished from Massachusetts, he criticized the establishment concept, citing as proof against it

... [T]he faithful labors of many witnesses of Jesus Christ, extant to the world, abundantly proving that the church of the Jews under the Old

Testament in the type, and the church of the Christians under the New Testament in the antitype, were both separate from the World; and that when they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day. And that therefore if He will ever please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world; and that all that shall be saved out of the world are to be transplanted out of the wilderness of the world, and added unto his church or garden.<sup>25</sup>

The image of a wall of separation (Ezek. 42:20) is comparable to the motif of a hedge protecting the church from the wilderness (Ps. 80:12; Isa. 5:1-9; Ezek. 22:30), which was common to Puritan thought. The difference is that Williams believed a strict separation was necessary to preserve the purity of the church, while Cotton—probably with the example of Nehemiah in mind—believed that the erection and maintenance of the wall was the work of the Christian magistrate. For the leaders of Bay Colony, church and state were properly enclosed within the wall rather than separated by it.<sup>26</sup>

This disagreement involved—and continues to involve—a basic difference of theology. A century later, Isaac Backus, a Baptist leader who fought the church establishment of Massachusetts during the War for Independence, endorsed Williams as a herald of religious liberty and portrayed him as a victim of religious persecution. Although this view prevails in the standard

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<sup>25</sup> Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (The University of Chicago Press, 1965) 56, quoting Perry Miller, *Roger Williams: His Contribution to the American Tradition* (Atheneum, 1966) 98.

<sup>26</sup> Peter N. Carroll, *Puritanism and the Wilderness: The Intellectual Significance of the New England Frontier, 1629-1700* (Columbia University Press, 1969) 8790, 10914. The "wall" is variously used as a metaphor for the Christian magistrate or the state itself.

histories, it appears to be based on a doubtful correlation of this incident and the "Antinomian controversy." Indeed, Williams himself denied that religious persecution was a factor in his banishment.<sup>27</sup>

It is Thomas Jefferson's use of the phrase "wall of separation," however, that has received the most attention. In his 1802 letter to the Baptists of Danbury, Connecticut, President Jefferson wrote:

Believing with you that religion is a matter which lies solely between Man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.<sup>28</sup>

Edward S. Corwin's comment on the phrase and its use by Justice Black in *Everson v Board of Education*, 330 US 1 (1947), sheds some light on the political considerations—Jefferson's as well as the Court's—that have affected its interpretation.

The eager crusaders on the Court make too much of Jefferson's Danbury letter, which was not improbably motivated by an impish desire to heave a

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<sup>27</sup> Regarding the banishment of Roger Williams, Henry Martyn Dexter, the foremost nineteenth century Congregationalist historian, wrote that "the weight of the evidence is conclusive to the point that this exclusion from the colony took place for reasons purely political, and having no relation to his notions upon toleration, or upon any subject other than those, which, in their bearing upon the common rights of property, upon the sanctions of the Oath, and upon due subordination to the powers that be in the State, made him a subverter of the very foundations of their government, and—with all his worthiness of character, and general soundness of doctrine—a nuisance which it seemed they had no alternative but to abate, in some way safe to them, and kindest to him!" Henry Martyn Dexter, *As To Roger Williams, and His 'Banishment' from the Massachusetts Plantation* (Congregational Publishing Society, 1876) 7980.

<sup>28</sup> Americans United for Separation of Church and State, *Basic Documents Relating to the Religious Clauses of the First Amendment* (Americans United, 1965) 19.

brick at the Congregationalist-Federalist hierarchy of Connecticut, whose leading members had denounced him two years before as an "infidel" and "atheist." A more deliberate, more carefully considered evaluation by Jefferson of the religion clauses of the First Amendment is that which occurs in his Second Inaugural: "In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general government." In short, the principal importance of the amendment lay in the separation which it effected between the respective jurisdictions of state and nation regarding religion, rather than in its bearing on the question of the separation of church and state.<sup>29</sup>

It is ironic that this letter is taken as an expression of the intent of the framers of the Constitution and the Bill of Rights. At the time of the Constitutional Convention and the first session of Congress, Jefferson was serving as minister to France. He returned only after the Bill of Rights had been sent to the states for ratification late in 1789. Instead, it was James Madison who drafted the amendments and successfully steered them through Congress, even though he did so with some reluctance because he believed "the rights in question are reserved by the manner in which the federal powers are granted."<sup>30</sup> While Madison conceded that a "properly executed" bill of rights might guard against ambitious rulers, he warned that

... [T]here is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public

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<sup>29</sup> Edward S. Corwin, *American Constitutional History: Essays*, eds. Alpheus Mason and Gerald Garvey (Harper and Row, 1964) 20405.

<sup>30</sup> Alpheus Thomas Mason, *Free Government in the Making: Readings in American Political Thought* (Oxford University Press, 3<sup>rd</sup> ed, 1965) 320, quoting a letter of Madison to Jefferson dated 17 October 1788. See Irving Brant, *The Bill of Rights: Its Origin and Meaning* (New American Library, 1965) 5157.

definition would be narrowed much more than they are likely ever to be by an assumed power.<sup>31</sup>

Madison's reservations about specifying these rights found practical expression in the provisions against a narrow construction of these rights in the Ninth Amendment and against a broad construction of the granted powers in the Tenth Amendment. In any event, the religion clauses that were added to Article VI and the First Amendment, like Jefferson's later comments, do not indicate a climate of opinion hostile to cooperation between church and state so much as they reflect the lengthy, often bitter struggle for disestablishment that had only recently been waged in Virginia and was continuing in other states. They were understood as precautions against a national establishment of religion—however "tolerant" it might be—rather than as a disavowal of the fundamentally biblical, and largely Christian, principles on which the constitutional system was based. Yet the Supreme Court has resisted this understanding, as Mark DeWolfe Howe observed:

A frank acknowledgment that, in making the wall of separation a constitutional barrier, the faith of Roger Williams played a more important part than the doubts of Jefferson probably seemed to the present Court to carry unhappy implications. Such an acknowledgment might suggest that the First Amendment was designed not merely to codify a political principle but to implant a somewhat special principle of theology in the Constitution—a principle, by no means uncontested, which asserts that a church dependent on governmental favor cannot be true to its better self. . . . It is hard for the present generation of emancipated Americans to conceive the possibility that the framers of the Constitution were willing to incorporate some theological presuppositions in the framework of federal government. I find it impossible to deny that such presuppositions did find

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<sup>31</sup> Ibid 320.

their way into the Constitution. To make that admission does not seem to me to necessitate the concession which others seem to think it entails—the concession that the government created by that Constitution can properly become embroiled in religious turmoil.<sup>32</sup>

Indeed, this ‘somewhat special principle of theology’ may have involved not only Roger Williams’ wall of separation against political corruption of the church but also John Cotton’s hedge of protection against religious corruption of the Christian polity. Although the restriction of suffrage to church members had disappeared by then, similar precautions—such as the use of religious tests—were still common. It was only with the assurance—however unrealistic—that religious liberty was compatible with this principle that such restrictions were abandoned.

#### IV DISESTABLISHMENT

Religious liberty was seen by some of the founders as a means of strengthening Christianity through sectarian competition while still promoting an essentially biblical standard of law and justice. Even the most latitudinarian of the founders were unwilling to disavow ethical standards that the Bible makes binding on all times and all nations. A century or more was to pass before religious liberalism began to successfully challenge traditional Christianity in regard to law and morality.

##### A *Virginia*

Prior to 1776, attempts to obtain toleration for religious dissenters in Virginia had largely failed. A number of Baptist preachers were beaten and

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<sup>32</sup> Howe, see above n 25, 78.

jailed. James Madison was prominent among those who protested against these persecutions in the name of "liberty of conscience." Following the Declaration of Independence, a state convention was held to organize a new government and draft a constitution. Petitions from dissenting churches called for freedom of worship, exemption from religious assessments, and disestablishment of the Church of England. George Mason submitted a bill of rights that included a provision for religious toleration written by Patrick Henry. Madison objected to the word 'toleration' because of its implication that liberty is a matter of grace, not right. He proposed that the wording be changed to guarantee "the full and free exercise of religion, according to the dictates of conscience," although he added a restraining clause: "unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered."<sup>33</sup>

It took time to work out politically the practical implications of religious liberty. Among the first concessions were the admission of dissenting chaplains to the army and the suspension of church rates. While general assessments were ended in 1779, the establishment remained. The following year, the validity of marriages performed by dissenting ministers was recognized and responsibility for overseeing the poor passed from the church vestries to a state office.<sup>34</sup>

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<sup>33</sup> Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* (The Macmillan Company, 1902; Burt Franklin, 1970) 492. Elsewhere, Madison wrote that "Conscience is the most sacred of all property. . . ." Verna M. Hall, comp. *The Christian History of the Constitution of the United States of America: Christian Self-Government, American Revolution Bicentennial Edition*, Joseph Allan Montgomery (ed) (Foundation for American Christian Education, 1975) 35.

<sup>34</sup> Ibid 492; See Humphrey, above n 20, 380-4.



Meanwhile, churches of all denominations were being devastated by the war. Numerous church buildings were destroyed and congregations were deprived of their clergy.<sup>35</sup> In response to this situation, the legislature, which was still predominantly Episcopalian in its sympathies, passed an act to incorporate the Protestant Episcopal Church, then quickly repealed it. The repeal was soon followed by an act annulling all laws favoring the Church and dissolving its ties with the state. But Patrick Henry sponsored a "Bill Establishing a Provision for Teachers of the Christian Religion" which won the support of George Washington, Richard Henry Lee, and John Marshall. It appeared close to passage when Madison motioned for a postponement of the final vote until the next session so that public opinion could be registered. During the interim he wrote his famous "Memorial and Remonstrance against Religious Assessments" in which he observed:

The same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease, any particular sect of Christians in exclusion of all other sects, and the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.<sup>36</sup>

"Establishment", for Madison, clearly meant direct tax support for churches. Madison's campaign succeeded. The assessment bill was defeated the following autumn and Jefferson's Bill for Establishing Religious Freedom, first introduced in 1779, was passed in January 1789.

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<sup>35</sup> Robert Baird, *Religion in the United States of America* (Blackie and Son, 1844; reprint ed, Arno Press, 1969) 248.

<sup>36</sup> Leo Pfeffer, *Church, State, and Freedom* (Beacon Press, revised ed., 1967) 112,

The last vestige of the old establishment—the glebe lands which supported the clergy—did not finally pass away until 1840.<sup>37</sup>

## B *Massachusetts*

Much the same pattern of disestablishment was followed in other states, although at a slower pace. In Massachusetts, Isaac Backus argued for religious liberty as early as 1774 on the same principle of "no taxation without representation" that his fellow patriots used in arguing for political liberty, claiming that the legislators

... [N]ever were empowered to lay any taxes but what were of a civil and worldly nature; and to impose religious taxes is as much out of their jurisdiction, as it can be for Britain to tax America. ... That which has made the greatest noise, is a tax of three pence a pound upon tea; but your law of last June laid a tax of the same sum every year upon the Baptists in each parish, as they would expect to defend themselves against a greater one. And only because the Baptists in Middleboro have refused to pay that little tax, we hear that the first parish in said town have this fall voted to lay a greater tax upon us. All America are alarmed at the tea tax; though, if they please, they can avoid it by not buying the tea; but we have no such liberty. We must either pay the little tax, or else your people appear even in this time of extremity, determined to lay the great one upon us. But these lines are to let you know, that we are determined not to pay either of them; not only upon your principle of not being taxed where we are not represented, but also because we dare not render that homage to any earthly power, which I and my brethren are fully convinced belongs only to God. We cannot give in the certificates you require, without implicitly allowing to men that authority which we believe in our consciences belongs only to God. Here, therefore, we claim charter rights, liberty of conscience. And if

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<sup>37</sup> Ibid 113-14; See Cobb, above n 33, 36.

any still deny it to us, they must answer to Him who has said, 'With what measure ye mete, it shall be measured to you again.'<sup>38</sup>

Backus's plea to the Massachusetts legislature in December 1774 was unavailing, as was his earlier appeal to the Continental Congress in October. Legal oppression of dissenters had long been forbidden by law and, although the form of an establishment remained, dissenters could direct their church rates to the churches of their choice. Still, this law gave opportunity for harassment and was greatly resented. Backus continued his campaign, first proposing a bill of rights for Massachusetts in 1783 and later approving the prohibition of religious tests in the U.S. Constitution.<sup>39</sup> But the establishment held out until 1833.

### C    *The Dedham Case*

Changes began with the Massachusetts Constitutional Convention of 1820 and the Dedham Case of 1818–1821. An effort to dissolve the establishment had failed but concessions were made at the Convention. But it was a court ruling in favor of a political takeover of the First Church of Dedham that finally laid the axe to the root of the Congregationalist establishment. After the pastor of the church left in 1818 to assume the presidency of a college, a faction of Unitarians obtained the support of a majority of voters in the parish to elect a recent graduate of Harvard

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<sup>38</sup> Edwin S. Gaustad (ed), *A Documentary History of Religion in America: To the Civil War* (William B. Eerdmans Publishing Company, 1982) 25556.

<sup>39</sup> William G. McLoughlin, *Isaac Backus and the American Pietist Tradition, The Library of American Biography* (Boston: Little, Brown and Company, 1967) 231–33, contrasts the motives of Jefferson and Backus: rationalism and evangelicalism; See also Pfeffer, above n 36, 100; Ibid 26870, reprints Backus's bill of rights proposal.

Divinity School. The school had been Unitarian since the board of Harvard had been taken over in 1805.

A majority of the church members refused to accept the new pastor and, after the parish—which included non-members—installed him anyway, complained to officials about the takeover. A committee dominated by Unitarians was called to investigate and decided in favor of the parish, claiming that the veto power by the church majority was established in custom rather than law. The Trinitarian majority then bolted the church and took the records, communion service, and trust deeds with them. The Unitarian faction retaliated by excommunicating them for "disorderly walking and schism," then sued them for return of the property. The case eventually went to the Massachusetts Supreme Court. Chief Justice Isaac Parker, who wrote the unanimous opinion in *Baker v Fales*, 16 Mass 487 (1820), was a leader of the Federalist-Unitarians. William McLoughlin believes he was motivated by a belief that only a broad Erastian policy that allowed majority rule within the parishes could preserve the old establishment. But the effect of the ruling was to put Trinitarian Congregationalists into the position of a dissenting minority.<sup>40</sup>

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<sup>40</sup> William G. McLoughlin, *New England Dissent, 1630-1883: The Baptists and the Separation of Church and State* (Harvard University Press, 1971) vol. 2, 118995. See Raymond B. Culver, *Horace Mann and Religion in the Massachusetts Public Schools* (Yale University Press, 1929) 17: "The results of the decision were far-reaching. Parish after parish throughout the eastern part of the state called Liberal ministers, and one after another there began to appear 'second churches' founded by the Orthodox groups whose loyalty to their faith led them to secede ... Dr. Joseph S. Clark, writing in 1858, stated that by 1836 eighty-one churches had been divided, and 3,900 evangelical members had withdrawn, leaving property valued at \$608,958 to be used by the 1,282 Unitarian members who remained ... In 1840 the total number of Unitarian churches was one hundred and thirty-five, of which twenty-four had been founded by Unitarian enterprise; the Orthodox Congregational churches numbered four hundred and nine." Meanwhile, liberal ministers and laymen who had been disfellowshipped by the orthodox organized as a sect, adopted the name Unitarian at the urging of William Ellery Channing, and founded the American Unitarian Association in 1825. See also Charles Beecher

What struck the Trinitarian majority in Dedham even harder was the court's claim that once they had seceded from the parish they ceased to exist, at least in the eyes of the law (a view consistent with the old view that unincorporated religious congregations had no legal standing). Starting from the assumption that "Churches as such, have no power but that . . . of divine worship and church order and discipline" in any parish, the court went on to declare "The authority of the church" is "invisible" and "as all to civil purposes, the secession of a whole church from the parish would be an extinction of the church; and it is competent of the members of the parish to institute a new church or to engraft one upon the old stock if any of it should remain; and this new church would succeed to all the rights of the old, in relation to the parish." Somehow the Congregational churches had become nothing but the creatures of the majority of qualified voters in the parish. This would have shocked the founders of the Bay Colony.<sup>41</sup>

In the end, disestablishment in Massachusetts came about, as it did in Virginia half a century earlier, because of the intrusion of public policy considerations into church affairs to a degree that even offended many members of the establishment itself. The Standing Orders of Massachusetts were suspended by constitutional amendment in 1833. E. R. Norman concluded:

Even this victory would not have been so easily accomplished had not many of the Congregational meeting-houses passed into the hands of Unitarian pastors and so offended orthodox Trinitarians that they would rather have the churches disestablished than countenance the propagation of error out of public funds.<sup>42</sup>

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(ed), *Autobiography, Correspondence, Etc., of Lyman Beecher, D.D.* (Harper & Brothers, 1865) vol. 2, 10912; Anson Phelps Stokes, *Church and State in the United States* (Harper & Brothers, 1950) vol. 1, 76364.

<sup>41</sup> Ibid 1193. For a contemporary comment, see *Spirit of The Pilgrims* (1829) 37073.

<sup>42</sup> Norman, above n 18, 45.

The establishment principle was not yet dead in Massachusetts, however: only dormant. Four years later the Unitarian-dominated legislature, led by Senate president Horace Mann, established a state Board of Education along the lines of the Prussian state school system. Mann then resigned from the legislature and became the Board's first secretary in order to promote, to use his own words, "faith in the improvability of the race,-- in their accelerating improvability."<sup>43</sup> In his study of the origins of the early American public school movement, Samuel Blumenfeld comments:

If the American public school movement took on the tone of a religious crusade after Mann became Secretary of the Board of Education, it was because Mann himself saw it as a religious mission. He accepted the position of Secretary not only because of what it would demand of him, but because it would help fulfill the spiritual hopes of his friends. They had faith that Mann could deliver the secular miracle that would vindicate their view of human nature and justify their repudiation of Calvinism.<sup>44</sup>

This new establishment was by far a more subtle one but still noticeably religious in character. It came complete with a system of secular seminaries called normal schools and was later reinforced by compulsory attendance laws. The expressly "non-sectarian" religious purpose of the schools helps account for the opposition from many orthodox pastors and school masters as well as the controversy among various religious traditions—both pro and con—it generated throughout the remainder of the

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<sup>43</sup> Samuel L. Blumenfeld, *Is Public Education Necessary?* (The Devin-Adair Company, 1981) 188, quoting Mary Tyler Peabody Mann, *Life of Horace Mann* (Lee and Shepherd, 1891) 80.

<sup>44</sup> *Ibid* 185.

century.<sup>45</sup> If the practice of intruding politics into religion was simply a matter of habit, it was certainly proving to be a difficult one to break.

## V INFLUENCE OF BIBLICAL THEISM

In a manner of speaking, the habit of intruding politics into religion—or religion into politics—is not only a difficult one to break but impossible. A religiously or politically neutral—or purely objective—standard of law and government is as unimaginable as it is impracticable. This is not to say that, by itself, any particular system of belief legally qualifies as a religion or even plays the role of one. For example, the Supreme Court has wrestled for years with the problem of defining religion so as to include some non-theistic systems of belief while not wishing at the same time to give credence to every pretense, prejudice, or preference that calls itself a religion. The Court conceives religion at once too broadly and too narrowly. The point is that any belief assumes a complete cultural or ideological ensemble of which it is only one artefact. It is this ensemble that represents the kind of "ultimate concern" that Paul Tillich identified as religious. "Every law order is an establishment of religion," as R. J. Rushdoony repeatedly emphasizes.<sup>46</sup> "The point is this: all law is enacted morality and presupposes a moral system, a moral law, and all morality presupposes a religion as its foundation."<sup>47</sup>

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<sup>45</sup> Ibid 23347. See generally, Rousas John Rushdoony, *The Messianic Character of American Education: Studies in the History-of the Philosophy of Education* (The Craig Press, 1963); Zach Montgomery, *Poison Drops in the Federal Senate: The School Question From a Parental and Non-Sectarian Stand-Point* (Gibson Bros., 1886).

<sup>46</sup> Rousas John Rushdoony, 'The Freedom of the Church' in *Chalcedon Position Paper No. 16* (Chalcedon, 1980).

<sup>47</sup> Rousas John Rushdoony, *Law and Liberty* (Thoburn Press, 1977) 2.

The maintenance of some kind of standard is unavoidable. Religion is not the end of all rational inquiry—the convenient *deus ex machina* designed to squelch further argument by appealing to a higher court—but the beginning of it. One religious viewpoint or another will set the terms of debate. Greg Bahnsen believes, for example, that the epistemologically self-conscious Christian—what Bahnsen here refers to as a "presuppositionalist"—"must challenge the would-be autonomous man with the fact that only upon the presupposition of God and His revelation can intelligibility be preserved in his effort to understand and interpret the world."<sup>48</sup> Accordingly, the effort to understand and interpret the world is fundamentally religious. The practical consequence is simply this: any system of law or morality will tend to either reinforce or contradict a given religion. In America, the religion in question is predominantly Christian.

Assuming that law is an establishment of religion, it is proper to ask: what set of religious presuppositions is embodied in the Constitution or--even more fundamentally--in western culture? M. Stanton Evans restates what is often obvious only to outside observers and adherents of other religions: it is biblical theism that underlies the constitutional tradition.

Even on a brief recapitulation, it should be evident that we have derived a host of political and social values from our religious heritage: Personal freedom and individualism, limited government-constitutionalism and the order-keeping state, the balance and division of powers, separation of church and state, federalism and local autonomy, government by consent and representative institutions, bills of rights and privileges. Add to these the development of Western science, the notion of progress over linear time, egalitarianism and the like, and it is apparent that the array of ideas and

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<sup>48</sup> Greg L. Bahnsen, 'Socrates or Christ: The Reformation of Christian Apologetics' in Gary North (ed), *Foundations of Christian Scholarship: Essays in the Van Til Perspective* (Ross House Books, 1976) 234.



attitudes that we think of as characteristically secular and liberal are actually by-products of our religion. It may be said, indeed, that the characteristic feature of liberalism, broadly defined—classical as well as modern—has been an attempt to take these by-products, sever them from their theological origins, and make them independent and self-validating. On the whole, it has not been a successful experiment.<sup>49</sup>

Biblical theism desacralizes—or secularizes---the natural order. Some religions begin with a multitude of fickle deities that man must propitiate or attempt to control through iconic or symbolic magic. The Bible begins with one transcendent God who creates the world and places man within it as his steward. Liberty is possible because all creation is governed by God's law. Otherwise, there is no security short of total control and politics becomes a matter of conquest rather than consensus.

While the assumptions behind American constitutional law are secular in their expression, many—if not most—of their guiding principles are derived primarily or secondarily from biblical religion. The absence of an express statement of religious purpose or even an acknowledgment of divine blessings has been the subject of controversy over whether the Constitution is a "secular" or "godless" document.<sup>50</sup> While the religious references it does contain are too oblique to satisfy critics who lament its "political atheism,"<sup>51</sup> other critics are equally offended by any expression of public religiosity, regarding it as "religious treason" or as "an establishment

<sup>49</sup> M. Stanton Evans, 'Toward a New Intellectual History' (1981) 25 *Modern Age* 36468.

<sup>50</sup> Sidney E. Mead, "The Nation with the Soul of a Church," in Russell Richey and Donald Jones (eds), *American Civil Religion* (Harper & Row, 1974) 55. See E. R. Craven, 'Religious Defect in the Constitution of the United States' (n.d) 25 *Studies in Christian Citizenship* 116, originally given as an address to the National Reform Convention in New York, February 26-27, 1873.

<sup>51</sup> See Schaff, above n 12, 38-43, a section entitled 'The Charge of Political Atheism'; Baird, above n 35, 25962.

of religion."<sup>52</sup> But the earlier colonial charters and state constitutions were similarly guided by practical considerations and were likewise sparing in their religious references. The customary invocation of divine favor or acknowledgment of God's blessings, usually found in the preambles of state constitutions, is generally a later development inspired by the New England covenants.

But the argument from silence is not a very satisfactory approach to the question. The Articles of Confederation and the Constitution are also silent about the question of sovereignty.<sup>53</sup> The issues which prompted the calling of the Philadelphia Convention related to the strengthening of an already existing "perpetual Union" rather than the creation of an altogether new political system. The assumption that the founders radically departed from earlier principles and precedents is unnecessary, particularly considering the attention they paid to the rule of law and the limitation of power. It is more logical to assume a continuity of purpose.

With the exception of an incidental mention of religion and a brief reference to "the Great Governor of the world," the Articles were similarly silent on the subject of religion. Yet the retention by the states of "every power, jurisdiction and right" not "expressly delegated to the United States" did not prevent Congress from exercising its customary religious functions. Congress issued proclamations of fast days and thanksgivings. It employed chaplains, directed the importation of Bibles from Europe in 1777, and endorsed the publication of the first American edition of the Bible in

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<sup>52</sup> See, for example, Franklin Steiner, *Religious Treason in the American Republic* (The American Rationalist Association, n.d.). This was published circa 1926.

<sup>53</sup> See the discussion by Alexander Hamilton in *Federalist*, no. 83, in Hamilton, Jay, and Madison, above n 6, 539.

1782.<sup>54</sup> If, as Leo Pfeffer maintains, the political leaders of this period worked from an assumed consensus of opinion in support of Christianity, there is little reason to suppose this assumption suddenly changed in 1787. In fact, Robert Cord has challenged Pfeffer's separationist hypothesis regarding the religion clauses of the Constitution, claiming that the facts "prove beyond reasonable doubt that no 'high and impregnable' wall between Church and State was in historical fact erected by the First Amendment nor was one intended by the Framers of that Amendment."<sup>55</sup> Cord notes that the new Congress continued to employ chaplains and even provided direct aid to religion, sometimes in fulfilment of treaty obligations. The first four Presidents except Jefferson proclaimed days of public thanksgiving and prayer. Sunday continued to be observed as a day of rest.<sup>56</sup>

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<sup>54</sup> 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* (George W. Childs, 1864) 20626; Baird, above n 35, 26267.

<sup>55</sup> Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (Lambeth Press, 1982) xiv.

<sup>56</sup> Ibid 51-82. Sabbath or Sunday laws were enacted in some federal territories, although not in all, and Sunday restrictions were observed generally: R. C. Wylie, *Sabbath Laws in the United States* (The National Reform Association, 1905) 175-86. During the John Adams Administration, Fast and Thanksgiving Day sermons began to display a political bias that limited their national appeal and weakened the authority of the federalist clergy of New England: W. DeLoss Love, Jr., *The Fast and Thanksgiving Days of New England* (Houghton, Mifflin and Company, 1895) 37379.

## VI A RELEASE OF ENERGY<sup>57</sup>

The historian Richard Cornuelle maintains that a spirit of cooperation and local self-government grew among the early colonists out of "an unusual sense of interdependence, powerfully reinforced by the terrors of the Atlantic crossing."<sup>58</sup> These early Americans pioneered "the democratization of community service." Immigrants would establish voluntary associations—with names like the Scots Charitable Society (1657) in Boston and the Norden Aid Society in Hudson, Wisconsin—to help them adjust to life in America.

Although the motives for reform during this period varied, they generally fell into two broad categories: expressly Christian evangelism and missionary work, and broadly non-sectarian humanitarian programs.<sup>59</sup> These motives operated side by side and were often almost indistinguishable. With a few exceptions, what they shared was a strong

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<sup>57</sup> The phrase "release of energy" was introduced by the legal historian James Willard Hurst: "The most important nineteenth-century uses of law in relation to social problems involved the control of the general environment. So far as concerns the simple release of individual energy in social affairs, law had its principal influence in the tolerance, protection, sometimes fostering, of associations of all kinds. Legally assured freedom of religious association was in the background of one of the most dynamic elements of the first half of the century: the evangelical Protestant movement in the rural areas, especially on the frontier, whose credo of individual dignity generated much of the emotional fervor of agrarian politics." James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (University of Wisconsin Press, 1956) 30.

<sup>58</sup> Richard Cornuelle, 'A Brief Interpretive History of America's Voluntary Sector' (1977) *United Way of America Annual Report*.

<sup>59</sup> Horace Mann's "nonsectarianism" in the common schools was criticized as a means of smuggling Unitarianism into the curriculum. David Tyack, 'The Kingdom of God and the Common School' (1966) 36 *Harvard Educational Review*, 449.

emphasis on voluntary cooperation through private benevolent associations, as opposed to relying on direct government intervention.

The objects of all this moral energy ranged from poor relief to legal reform to preservation of the Sabbath to the salvation of seamen to vegetarianism and the water cure, including temperance (“jumping on the bandwagon” and “falling off the wagon”), the peace movement, the abolition of dueling, public education, prison reform, various communal experiments, asylums for the handicapped, health fads, feminism, the abolitionist movement, and the literary movement that in many respects embodied or embraced so many of them: Transcendentalism.<sup>60</sup>

It was the proliferation of such voluntary associations that so impressed Alexis de Tocqueville on his visit to America in 1831. But Eugen Rosenstock-Huessy had an even larger view of the critical importance of what he called the “freedom of endowment,” which provides a practical foundation and expression for freedom of conscience:

The Truce of God, the free choice of a profession, the liberty to make a will, the copyright of ideas—these institutions are like letters in the alphabet which we call Western civilization. ... They have emancipated the various elements of our social existence from previous bondage. Each time one of these institutions came into being, it had a stiffening effect on one type of human activity. Each time it enabled man to direct his energies towards ends that hitherto transcended his potentialities. Less and less did he remain bound by the unchangeable traditions of his environment. A police force means nothing less than the emancipation of the civilian within myself; for without it, I should be forced to cultivate the rugged virtues of a vigilant

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<sup>60</sup> See, generally, Alice Felt Tyler, *Freedom's Ferment: Phases of American Social History to 1860* (University of Minnesota Press, 1944) 40102; Van Wyck Brooks, *The Flowering of New England, 1815-1865* (Houghton Mifflin Company, 1981) 7388.

man. To free the courts from the whims of a changing government exalts my will and testament to a kind of immortality: something will endure when I have passed away. And so each of these institutions was hailed as a deliverance. Not one of them came into existence without the shedding of streams of blood. Each of these institutions was accorded the greatest sacrifices. The paradoxical truth about progress, then, is that it wholly depends on the survival of massive institutions which prevent a relapse from a stage which has once been reached.<sup>61</sup>

By the time Rosenstock-Huessy wrote in 1938, however, these institutions and the liberties they upheld had been put at risk. Due to poor stewardship, they are still at risk today. To drive his point home, Rosenstock-Huessy cited Daniel Webster's successful argument before the U.S. Supreme Court on behalf of Dartmouth College, which had been chartered by the Crown, against a takeover by the State of New Hampshire.<sup>62</sup> Webster famously concluded his argument: "It is, Sir, as I have said, a small college. And yet there are those who love it."

## VII CONCLUSION

The American experiment in ordered liberty shows that nothing should be considered so small as to fall below constitutional notice or protection. As Webster himself put it in a speech, "The Spirit of Liberty:"

The spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is jealous of encroachment, jealous of power, jealous of man. It demands checks; it seeks for guards; it insists on securities; it entrenches itself behind strong defences, and fortifies itself with all possible

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<sup>61</sup> Eugen Rosenstock-Huessy, *Out of Revolution: Autobiography of Western Man* (William Morrow and Company, 1938) 3031. Earlier, Francis Lieber contributed the concept of institutional liberty to the political science literature.

<sup>62</sup> *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

care against the assaults of ambition and passion. It does not trust the amiable weaknesses of human nature, and therefore it will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic purpose come along with it. Neither does it satisfy itself with flashy and temporary resistance to its legal authority. Far otherwise. It seeks for duration and permanence. It looks before and after; and, building on the experience of ages which are past, it labors diligently for the benefit of ages to come. This is the nature of constitutional liberty; and this is *our* liberty, if we will rightly understand and preserve it.<sup>63</sup>

Webster's "Spirit of Liberty" reflects an understanding that both enabled and accompanied the rise of religious liberty in America. Many of the early commentators on the voluntary principle in religion took pains to emphasize that no slight to religion was intended by dissolving the state religious establishments. The idea of loosening churches from dependence on the state treasury was as novel as the penitentiary system that drew interested European visitors like Alexis de Tocqueville, and it drew similar wonderment and comment. Francis Grund, who emigrated to America from Bohemia, wrote that

Americans look upon religion as a promoter of civil and political liberty; and have, therefore, transferred to it a large portion of the affection which they cherish from the institutions of their country. In other countries, where religion has become the instrument of oppression, it has been the policy of the liberal party to diminish its influence; but in America its promotion is essential to the Constitution.<sup>64</sup>

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<sup>63</sup> Francis Lieber, *On Civil Liberty and Self-Government* (J. B. Lippincott, 3<sup>rd</sup> ed, revised ed, 1877) 154.

<sup>64</sup> Francis J. Grund, 'Religious Habits of the American' in George E. Probst (ed), *The Happy Republic: A Reader in Tocqueville's America*, (Harper Torchbooks, 1962) 243.

If the institutional separation of church and state had developed purely for reasons of state, the character of the American religious tradition might have followed a very different line of development.<sup>65</sup> For example, the disestablishment of the Roman Catholic Church in France, when it finally came during the French Revolution, was accompanied by violent anticlericalism and was followed by the creation of a highly syncretistic civil religion. Although there were strong fears of similar Jacobin violence in America during this period, the disestablishment of churches proceeded rather peacefully. The immediate effect of disestablishment, as Lyman Beecher and others saw it, was to strengthen the character and prestige of the churches themselves.<sup>66</sup>

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<sup>65</sup> For instance, the Spanish colonies were governed by a union of church and state. Clergymen were licensed and the government was authorized to elect bishops and other ecclesiastics. Thus lay investiture persisted. William Torpey notes that secular control was similarly dominant in the French colonies "and religious freedom strikingly lacking." William George Torpey, *Judicial Doctrines of Religious Rights in America* (University of North Carolina Press, 1948) 8.

<sup>66</sup> Sidney E. Mead, *The Old Religion in the Brave New World: Reflections on the Relation Between Christendom and the Republic* (University of California Press, 1977) 113.



## **KIRK'S NEW MISSION: UPHOLDING THE RULE OF LAW AT THE STATE LEVEL**

EDWARD FEARIS<sup>\*</sup>

### **Abstract**

In *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, the High Court held that the supervisory review jurisdiction of State Supreme Courts is constitutionally entrenched. Although this decision was widely lauded, the High Court's reasoning has been criticised. This article engages with these two differing reactions to the decision. Firstly, it explains that *Kirk* is laudable because it upholds the rule of law at the State level. Secondly, it argues that *Kirk* can be re-positioned to fit within the *Kable* doctrine—a manifestation of the rule of law—thus providing a more coherent reasoning basis for its ultimate conclusion.

### **I INTRODUCTION**

The jurisdiction of a superior court to engage in supervisory review<sup>1</sup> is considered an essential feature of a common law legal system. However, in Australia the role of the courts in supervising the exercise of power by the executive and legislature has attracted heightened attention and controversy. At the State level, the number of challenges to administrative

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<sup>1</sup> Hereafter, when I refer to 'supervisory review', 'supervisory jurisdiction' or 'judicial review', I will be referring to review by superior courts of the decisions and actions of executive decision-makers and inferior courts, not review of the constitutionality of legislation.

decisions continues to grow, particularly in areas concerned with planning, the environment and industrial relations. In response, State Parliaments have sought to limit or confine judicial review of these decisions. The High Court's decision in *Kirk v Industrial Court of NSW*<sup>2</sup> has placed a constitutional handbrake on these efforts.

In *Kirk*, the High Court held that the supervisory jurisdiction of State Supreme Courts—one of their 'defining characteristics'—are constitutionally entrenched by s 73(ii) of the *Commonwealth Constitution*.<sup>3 4</sup> That is, the result of *Kirk* is that there is now a minimum provision of judicial review at the State level<sup>5</sup> with respect to a decision of an inferior court or tribunal,<sup>6</sup> or 'the executive government of the State, its Ministers or authorities'.<sup>7</sup> In this sense, a parallel may now be drawn with s 75(v) of the *Constitution*, which entrenches the High Court's jurisdiction

<sup>2</sup> (2010) 239 CLR 531. The name of the Industrial Relations Commission in Court Session was changed to the Industrial Court of NSW in 2005: *Industrial Relations Act 1996* (NSW) s 151A. In conformity with the High Court's judgment, I will refer to the relevant adjudicative body as the Industrial Court.

<sup>3</sup> *Commonwealth of Australia Constitution Act 1900* (Imp) 63 and 64 Vict, c 12, s 9. Hereafter, when I refer to the '*Constitution*' I will be referring to this instrument.

<sup>4</sup> *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 578–81 [91]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 585 [113] (Heydon J).

<sup>5</sup> See also Wendy Lacey, '*Kirk v Industrial Court of NSW*: Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641, 667; Mark Aronson, 'Commentary on "The entrenched minimum provision of judicial review and the rule of law" by Leighton McDonald' (2010) 21 *Public Law Review* 35, 39; J J Spigelman, 'The centrality of jurisdictional error' (2010) 21 *Public Law Review* 77, 81.

<sup>6</sup> *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>7</sup> *South Australia v Totani* (2010) 242 CLR 1, 27 [26] (French CJ).

where a writ of mandamus or prohibition, or an injunction, is sought against an ‘officer of the Commonwealth’.<sup>8</sup>

### A Kirk: *Proceedings*

The appellants in *Kirk* were Mr Kirk and the company of which he was a director, Kirk Group Holdings Pty Ltd. Following the death of an employee of Kirk Group Holdings, Mr Kirk<sup>9</sup> and his company were charged with offences under ss 15(1)<sup>10</sup> and 16(1)<sup>11</sup> of the *Occupational Health and Safety Act 1983* (NSW). They were convicted in the Industrial Court of NSW<sup>12</sup> and financial penalties were imposed.<sup>13</sup> Following a series of unsuccessful appeals and judicial review applications,<sup>14</sup> the case reached the High Court.

<sup>8</sup> See generally *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

<sup>9</sup> Section 50(1) of the *Occupational Health and Safety Act 1983* (NSW) provides that where a corporation contravenes any provision of the Act, each director or manager is deemed to have contravened the same provision unless he/she satisfies the Industrial Court that he/she was not in a position to influence the conduct of the corporation in relation to the contravention, or satisfies the Court that he/she used all due diligence to prevent the contravention.

<sup>10</sup> ‘Every employer shall ensure the health, safety and welfare at work of all the employer’s employees.’

<sup>11</sup> ‘Every employer shall ensure that persons not in the employer’s employment are not exposed to risks to their health or safety arising from the conduct of the employer’s undertaking while they are at the employer’s place of work.’

<sup>12</sup> *WorkCover Authority of NSW v Kirk Group Holdings Pty Ltd* (2004) 135 IR 166.

<sup>13</sup> *WorkCover Authority of NSW v Kirk Group Holdings Pty Ltd* (2005) 137 IR 462. Mr Kirk was fined a total of \$11,000 and the Kirk company a total of \$110,000.

<sup>14</sup> *Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW* (2006) 66 NSWLR 151 (appeal and judicial review application in the NSW Court of Appeal); *Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW* (Inspector Childs) (2006) 158 IR 281 (successful application for leave to appeal the convictions to the Full Bench of the Industrial Court); *Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW* (2006) 164 IR 146 (appeal to the Full Bench of the Industrial Court); *Kirk v Industrial Relations Commission of NSW* (2008)

The High Court<sup>15</sup> held that Mr Kirk's and Kirk Group Holdings' convictions were invalid, and that orders in the nature of certiorari quashing their convictions should have been issued. The joint judgment held that the convictions in the Industrial Court were invalid for two reasons. Firstly, the Industrial Court had convicted Mr Kirk and his company without giving proper particulars of the breach of the *Occupational Health and Safety Act 1983* (NSW). Secondly, Mr Kirk had, contrary to a fundamental rule of evidence, been called as a witness in his own prosecution.<sup>16</sup> These errors by the Industrial Court were held to be jurisdictional errors and also errors of law on the face of the record.<sup>17</sup>

However, s 179(1) of the *Industrial Relations Act 1996* (NSW) provides that a decision of the Industrial Court 'is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal'.<sup>18</sup> Therefore, prima facie it appeared as though this privative clause prevented the issue of orders in the nature of certiorari. Yet it had been held in a previous case,<sup>19</sup> and was accepted by both parties, that s 179

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173 IR 465 (application to the Court of Appeal seeking an order in the nature of certiorari). Mr Kirk and Kirk Group Holdings Pty Ltd also sought an inquiry into their convictions pursuant to s 474D of the *Crimes Act 1900* (NSW) (since repealed).

<sup>15</sup> French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ delivered a joint judgment. Heydon J delivered a dissent on the issue of costs, but essentially agreed on all other points.

<sup>16</sup> *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 566 [54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>17</sup> Ibid 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>18</sup> However, it does not apply to the exercise of a right of appeal to a Full Bench of the Industrial Court: *Industrial Relations Act 1996* (NSW) s 179(6).

<sup>19</sup> *Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW* (2006) 66 NSWLR 151, 158 [31], 160 [36] (Spigelman CJ), 162 [52] (Beazley JA), 169–70 [83] (Basten JA), cited in *Kirk v Industrial Relations Commission of NSW* (2008) 173 IR 465, 471 [21] (Spigelman CJ; Hodgson Handley JJA agreeing).

does not protect decisions of the Industrial Court from review for jurisdictional error. As such, it was unnecessary for the High Court to address the issue of whether State legislatures can preclude judicial review via privative clauses. (Indeed, it is arguable that the Court should have declined to answer this unnecessary constitutional question.<sup>20</sup>) Notwithstanding, the joint judgment picked up on submissions advanced by the Commonwealth and addressed the issue of whether a statute could exclude the supervisory review jurisdiction of a State Supreme Court.

### B *High Court's Reasoning*

The joint judgment began by noting that Chapter III of the *Constitution* requires that there be a body fitting the description of 'the Supreme Court of a State'.<sup>21</sup> Their Honours also noted the constitutional corollary that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description'.<sup>22</sup> The joint judgment then held that the supervisory jurisdiction of the Supreme Courts was (at Federation) and remains a 'defining characteristic' of these Courts.<sup>23</sup> Furthermore, as s 73(ii) of the *Constitution* gives the High Court appellate jurisdiction to hear appeals from the Supreme Court, the exercise of this supervisory jurisdiction is

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<sup>20</sup> See, eg, *Wurridjal v Commonwealth* (2009) 237 CLR 309, 437 [355] (Crennan J) (and the authorities cited therein); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 199 [141] (Hayne, Kiefel and Bell JJ) (and the authorities cited therein).

<sup>21</sup> *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>22</sup> *Ibid*, quoting *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ).

<sup>23</sup> *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

ultimately subject to the superintendence of the High Court.<sup>24</sup> This being the case, '[t]o deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power ... would be to create islands of power immune from supervision and restraint', as well as to 'remove ... one of its defining characteristics.'<sup>25</sup> (It has been contended that these arguments are alternative bases for the ultimate decision.<sup>26</sup>) The joint judgment viewed the distinction between jurisdictional and non-jurisdictional error—an important distinction in the Australian constitutional context—as marking the relevant limit on State legislative power.<sup>27</sup> Therefore, while legislation which removes the power of a Supreme Court to grant relief on account of non-jurisdictional error is *prima facie* constitutionally valid, legislation which removes the power to grant relief on account of jurisdictional error is not.<sup>28</sup>

### C *Significance of the Decision*

*Kirk* overturns over 100 years of generally accepted legal thought. For example, in *Darling Casino Ltd v NSW Casino Control Authority*,<sup>29</sup> Gaudron and Gummow JJ observed that the *Constitution* does not provide for an equivalent to s 75(v) in the State context. This omission, their Honours argued, suggests that it was not intended that State Parliaments be

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>26</sup> Joshua P Knackstedt, 'Judicial review after *Kirk v Industrial Court (NSW)*' (2011) 18 *Australian Journal of Administrative Law* 203, 206.

<sup>27</sup> *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>28</sup> Ibid.

<sup>29</sup> (1997) 191 CLR 602.

prevented from legislating to restrict the right to judicial review.<sup>30</sup> Moreover, in *Mitchforce Pty Ltd v Industrial Relations Commission of NSW*,<sup>31</sup> Handley JA explicitly stated that ‘s 179 [of the *Industrial Relations Act 1996* (NSW)] is not invalid in so far as it restricts the inherent jurisdiction of [the Supreme Court] to judicially review decisions of the [Industrial Relations] Commission.’<sup>32</sup> As such, prior to *Kirk*, it was accepted that provided the statutory intention is clear, and subject to various presumptions<sup>33</sup> and statutory interpretation rules<sup>34</sup> (including the ‘*Hickman* principles’<sup>35</sup>), State legislatures could validly preclude judicial review for errors of any kind.<sup>36</sup>

<sup>30</sup> Ibid 633–4 (Gaudron and Gummow JJ).

<sup>31</sup> (2003) 57 NSWLR 212.

<sup>32</sup> Ibid 255 [220] (Handley JA).

<sup>33</sup> For example, the presumption that legislatures do ‘not intend to deprive the citizen of access to the courts, other than to the extent expressly Stated or necessary to be implied’: *Public Service Association of SA v Federated Clerks’ Union* (1991) 173 CLR 132, 160 (Dawson and Gaudron JJ) (citations omitted). Further, in *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180, 194 [33], Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ raised as a presumption ‘that a State parliament does not intend to cut down the jurisdiction of the Supreme Court of that State over matters of a kind ordinarily dealt with by the State Supreme Courts.’

<sup>34</sup> See, eg, *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; the authorities discussed in *R v Young* (1999) 46 NSWLR 681, 688–90 (Spigelman CJ).

<sup>35</sup> *R v Hickman; Ex parte Fox* (1945) 70 CLR 598, 617 (Dixon J). Cases subsequent to *Kirk* have assumed that the ‘*Hickman* principles’ no longer apply when interpreting a privative clause: see, eg, *Director General, NSW Department of Health v Industrial Relations Commission of NSW* (2010) 77 NSWLR 159, 163 [15] (Spigelman CJ); *Carnley v Grafton Ngerrie Local Aboriginal Land Council* [2010] NSWSC 837 (30 July 2010) [15] (Garling J); *Valerie Clegg v Gandangara Local Aboriginal Land Council* [2011] NSWSC 28 (9 February 2011) [18] (Hoeben J).

<sup>36</sup> See, eg, *Clancy v Butchers’ Shop Employees Union* (1904) 1 CLR 181, 204 (O’Connor J); *Baxter v New South Wales Clickers’ Association* (1909) 10 CLR 114, 140 (Barton J), 146 (O’Connor J), cf 131–2 (Griffith CJ); *Mitchforce Pty Ltd*

That said, it is debatable whether the prerogative writs (or orders in the nature of) had been successfully abolished in jurisdictions purporting to have done so.<sup>37</sup> In *Tasman Quest Pty Ltd v Evans*,<sup>38</sup> the Supreme Court of Tasmania held that its power to issue orders in the nature of the prerogative writs had survived its purported removal. This was because the Court's power to grant relief was conferred by ss 3 and 11 of the *Australian Courts Act 1828* (Imp), and this Act had not been repealed.<sup>39</sup>

Nonetheless, *Kirk* is considered a landmark case due to the *constitutional* recognition it gave to the supervisory jurisdiction of the Supreme Courts. It has been noted that the emergence of a constitutional dimension (or indeed, foundation) for administrative law is one of the most important developments of the past decade.<sup>40</sup> This has occurred at both the federal and State levels, with the *Constitution* exerting what has been termed a 'gravitational pull' on the common law (and statutory) systems of judicial review.<sup>41</sup> In simple terms this means that the common law cannot develop

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*v Industrial Relations Commission of NSW* (2003) 57 NSWLR 212, 233 [92] (Spigelman CJ) (a case which considered the IR Act s 179). But see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 114 (McHugh J); *Woolworths Ltd v Hawke* (1998) 45 NSWLR 13, 18 (Priestly JA).

<sup>37</sup> *Judiciary Act 2000* (Tas) s 43; *Judicial Review Act 1991* (Qld) s 41.

<sup>38</sup> *Tasman Quest Pty Ltd v Evans* (2003) 13 Tas R 16.

<sup>39</sup> *Ibid* 19–21 [8]–[9] (Blow J).

<sup>40</sup> J J Spigelman, 'The centrality of jurisdictional error' (2010) 21 *Public Law Review* 77, 77.

<sup>41</sup> James J Spigelman, 'Jurisdiction and Integrity' (Speech delivered at the 2004 National Lecture Series for the Australian Institute of Administrative Law, Adelaide, 5 August 2004) 13. An example of this phenomenon can be evidenced in 'the constrained bases for judicial review of administrative action ... within the State constitutional system': *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, 393 [104] (Basten JA). See also Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 51.



in too divergent a manner from the s 75(v) jurisprudence. For example, this phenomenon necessitates the distinction between jurisdictional and non-jurisdictional error of law in Australia,<sup>42</sup> a distinction which is strictly only constitutionally required at the federal level. According to the Honourable James Spigelman, the decision in *Kirk* means that the ‘gravitational [pull] has now done its work.’<sup>43</sup> That is, the *Constitution* has now become the focal point of judicial review,<sup>44</sup> and State judicial review now has a constitutional foundation within Chapter III.

#### D *Reaction to the Decision*

At least in legal circles, the decision in *Kirk* has been widely lauded.<sup>45</sup> However, the joint judgment’s method of reasoning has been criticised. Essentially, this is due to the joint judgment’s reliance on only one case, *The Colonial Bank of Australasia v Willan*,<sup>46</sup> in support of the proposition that supervisory jurisdiction was a ‘defining characteristic’ of a Supreme

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<sup>42</sup> See, eg, James J Spigelman, ‘Jurisdiction and Integrity’ (Speech delivered at the 2004 National Lecture Series for the Australian Institute of Administrative Law, Adelaide, 5 August 2004) 23–4; *Bros Bins Systems Pty Ltd v Industrial Relations Commission of NSW* (2008) 74 NSWLR 257, 264 [30] (Spigelman CJ). Cf the position in England: see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

<sup>43</sup> J J Spigelman, ‘The centrality of jurisdictional error’ (2010) 21 *Public Law Review* 77, 77, 91.

<sup>44</sup> Matthew Groves, ‘Reforming judicial review at the state level’ 64 *Australian Institute of Administrative Law Forum* 30, 31.

<sup>45</sup> The Honourable James Spigelman describes *Kirk* as having attracted ‘unmitigated admiration’: J J Spigelman, ‘The centrality of jurisdictional error’ (2010) 21 *Public Law Review* 77.

<sup>46</sup> (1874) LR 5 PC 417.

Court in 1900.<sup>47</sup> Moreover, critics contend that the proper interpretation of *Willan* does not even support this proposition.<sup>48</sup> That is, it is argued that in cases before *Kirk* ‘*Willan* was seen as concerned with the *interpretation* of a privative clause, rather than about the limits of colonial and, later, State legislative power’.<sup>49</sup> For example, in *In re Biel*<sup>50</sup> (which came after *Willan*) the Supreme Court of Victoria held that the impugned privative clause *did* prevent the issue of certiorari for jurisdictional error. This was because the privative clause was a ‘strong one’ and referred explicitly to ‘want or alleged want of jurisdiction’<sup>51</sup> (ie jurisdictional error).<sup>52</sup> The general argument being made is succinctly put by Professor Goldsworthy:

[i]n *Kirk*, the High Court asks us to believe that all [the privative clauses enacted in or around 1900 and subsequently] were inconsistent with a concept central to the constitutional thought of legislators, lawyers and judges in the year 1900, even though none of them noticed it. The Court is

<sup>47</sup> See, eg, Leslie Zines, ‘Kirk v Industrial Court (NSW)’ (Speech delivered at the Australian Association of Constitutional Law Annual General Meeting, Sydney, 26 November 2010) 6.

<sup>48</sup> See, eg, John Basten, ‘The supervisory jurisdiction of the Supreme Courts’ (2011) 85 *Australian Law Journal* 273, 284; Ronald Sackville, ‘Bills of rights: Chapter III of the Constitution and State charters’ (2011) 18 *Australian Journal of Administrative Law* 67, 78. Cf Joshua P Knackstedt, ‘Judicial review after Kirk v Industrial Court (NSW)’ (2011) 18 *Australian Journal of Administrative Law* 203, 210.

<sup>49</sup> Leslie Zines, ‘Kirk v Industrial Court (NSW)’ (Speech delivered at the Australian Association of Constitutional Law Annual General Meeting, Sydney, 26 November 2010) 8 (emphasis added). See also *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180, 194 [33] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).

<sup>50</sup> (1892) 18 VLR 456. *In re Biel* was raised in argument before the High Court in *Kirk*.

<sup>51</sup> *Licensing Act 1890* (Vic) s 203.

<sup>52</sup> *In re Biel* (1892) 18 VLR 456, 458–9 (Higinbotham CJ).

claiming that, 110 years later, it has arrived at a more accurate understanding of their concepts than they themselves possessed.<sup>53</sup>

Furthermore, it is argued that *Willan* only explicitly referred to the supervisory jurisdiction of colonial Supreme Courts with respect to inferior courts, not administrative tribunals.<sup>54</sup> However, at Federation it was not yet generally accepted that an administrative tribunal was amenable to certiorari, unless it was shown that the tribunal had a duty to act ‘judicially’.<sup>55</sup>

In summary, then, the joint judgment’s argument that as at 1900 a privative clause did not operate to prevent a Supreme Court from exercising its supervisory jurisdiction is said to be ‘perfunctory’,<sup>56</sup> or at best ‘not convincing’.<sup>57</sup>

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<sup>53</sup> Jeffrey Goldsworthy, ‘The Limits of Judicial Fidelity to Law: The Coxford Lecture’ (2011) 24 *Canadian Journal of Law and Jurisprudence* 305, 305–6. Notwithstanding the criticism of the joint judgment’s reasoning in *Kirk*, Professor Goldsworthy’s general thesis is that a one-off violation of the rule of law is sometimes necessary in order to strengthen the rule of law in other respects or overall. Thus, although in his view the reasoning in *Kirk* violates the rule of law (as it involves ‘a deliberate change to the Constitution’), this ‘means’ can be rationalised due to the ‘ends’ that the *Kirk* decision effects. Cf Ronald Sackville, ‘Bills of rights: Chapter III of the Constitution and State charters’ (2011) 18 *Australian Journal of Administrative Law* 67, 73, who argues that ‘[t]he framers of the *Constitution* would have been surprised to learn that a century or so from Federation, s 75(v) has been construed to entrench the supremacy of the judicial branch of government over the elected branch’.

<sup>54</sup> *The Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417, 440–2 (Sir James Colvile).

<sup>55</sup> See, eg, *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 272 ALR 750, 753–5 [6]–[19] (Spigelman CJ), 768 [82]–[84] (Basten JA), 798–800 [252]–[260] (McDougall J).

<sup>56</sup> Jeffrey Goldsworthy, ‘The Limits of Judicial Fidelity to Law: The Coxford Lecture’ (2011) 24 *Canadian Journal of Law and Jurisprudence* 305, 305.

<sup>57</sup> Leslie Zines, ‘*Kirk v Industrial Court (NSW)*’ (Speech delivered at the Australian Association of Constitutional Law Annual General Meeting, Sydney, 26 November 2010) 9.

This article attempts to engage with the two differing reactions to *Kirk*. Firstly, it explains exactly why the decision in *Kirk* is such a laudable one. Essentially, this is because it upholds the rule of law.<sup>58</sup> Secondly, by working backwards from this justifying principle this article attempts to engage with the criticisms of the joint judgment's reasoning in *Kirk* by offering a slightly re-positioned argument for the ultimate conclusion.<sup>59</sup> In summary, this argument is that *Kirk* can be reasoned as a logical extension of the '*Kable* doctrine'.<sup>60</sup>

## II *KIRK*: UPHOLDING THE RULE OF LAW

### A *The Rule of Law in Australian Public Law*

As a democratic state the rule of law—the pre-eminent legitimating political ideal in the world today<sup>61</sup>—holds a central place in the Australian politico-legal system. Indeed, in *Australian Communist Party v Commonwealth*,<sup>62</sup> Dixon J stated that the rule of law is an 'assumption' upon which the *Constitution* should be interpreted.<sup>63</sup> This proposition has been cited numerous times with approval.<sup>64</sup> Moreover, as cl 5 of the

<sup>58</sup> See also Suri Ratnapala, 'Rule of Law Ruling Widens Separation of Powers', *The Australian* (12 February 2010).

<sup>59</sup> See also Joshua P Knackstedt, 'Judicial review after *Kirk v Industrial Court* (NSW)' (2011) 18 *Australian Journal of Administrative Law* 203, 210.

<sup>60</sup> *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

<sup>61</sup> Brian Z Tamanaha, *On The Rule of Law History, Politics, Theory* (Cambridge University Press, 2004) 4.

<sup>62</sup> (1951) 83 CLR 1.

<sup>63</sup> *Ibid* 193 (Dixon J).

<sup>64</sup> See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 540; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 [89] (Gummow and Hayne JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103]

*Constitution* states that the *Constitution* is ‘binding on the courts, judges, and people of every State and of every part of the Commonwealth’, this assumption applies throughout the different Australian jurisdictions.<sup>65</sup>

However, in Australia the rule of law is not given a direct normative operation.<sup>66</sup> That is, the rule of law is an ‘assumption’ or ‘constitutional posture’ in Australian law rather than a ‘hard-edged legal principle’.<sup>67</sup> As such, the test for the validity of an Australian law remains to be determined according to whether the law in question is in conflict with the *Constitution*<sup>68</sup> or is otherwise contrary to positive law.<sup>69</sup> By contrast, the

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(Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *APLA Ltd v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 351 [30] (Gleeson CJ and Heydon J), 441 [350] (Kirby J); *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1, 91 [232] (Hayne J), 155 [423] (Crennan and Bell); *Momcilovic v The Queen* (2011) 280 ALR 221, 383 [563] (Crennan and Kiefel JJ).

<sup>65</sup> See also *South Australia v Totani* (2010) 242 CLR 1, 42 [61] (French CJ), 91 [233] (Hayne J); Elizabeth Carroll, ‘Woolworths Ltd v Pallas Newco Pty Ltd: a case study in the application of the rule of law in Australia’ (2006) 13 *Australian Journal of Administrative Law* 87, 89; J J Spigelman, ‘Public law and the executive’ (2010) 34 *Australian Bar Review* 10, 22. See generally *Re Buchanan* (1964) 65 SR (NSW) 9, 10; Philip A Joseph, ‘The demise of ultra vires—judicial review in the New Zealand courts’ [2001] *Public Law* 354, 358.

<sup>66</sup> See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 [72], 24–5 [76] (McHugh and Gummow JJ); *Western Australia v Ward* (2002) 213 CLR 1, 392 [963] n 1091 (Callinan J). Cf, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 73 ALD 1, 38 [161] (Kirby J); Michael Kirby, ‘The rule of law beyond the law of rules’ (2010) 33 *Australian Bar Review* 195, especially at 204–11.

<sup>67</sup> Cameron Stewart, ‘The Rule of Law and the Tinkerbelle Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law’ (2004) 4 *Macquarie Law Journal* 135, 144.

<sup>68</sup> Furthermore, the *Constitution* itself is said to contain ‘a delineation of government powers rather than a charter of citizen’s rights’: Sir Anthony Mason, ‘Procedural Fairness: Its Development and Continuing Role of Legitimate Expectations’ (2005) 12 *Australian Journal of Administrative Law* 103, 109.

<sup>69</sup> David Clark, David Bamford and Judith Bannister, *Principles of Australian Public Law* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2007) 84. See also *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 409–10 [10]–[14]

rule of law holds a more directly significant constitutional position in a number of other common law countries. That is, the rule of law incorporates procedural requirements, but also requirements about the content of the law. For example, in England it has been held that '[t]he rule of law enforces minimum standards of fairness, both substantive and procedural'.<sup>70</sup>

So if the rule of law does not have substantive content in Australia, the focus must then turn to a 'formal'<sup>71</sup> theory of the rule of law—a theory which focuses on certain abstract characteristics of a politico-legal system said to be necessary in order to establish that the rule of law exists.<sup>72</sup> In the context of a formal, 'vertical'<sup>73</sup> conception of the rule of law, it is submitted that the principle has a generally accepted core of meaning in

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(Gaudron, McHugh, Gummow and Hayne JJ). For example, an Australian law will not be invalidated by the courts merely because it is in conflict with international human rights standards or other 'fundamental' rights: David Clark, David Bamford and Judith Bannister, *Principles of Australian Public Law* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2007) 83–4; George Winterton, 'Extra-Constitutional Notions in Australian Constitutional Law' (1986) 16 *Federal Law Review* 223, 232.

<sup>70</sup> *R v Secretary of State of the Home Department; Ex parte Pierson* [1998] AC 539, 591 (Lord Steyn).

<sup>71</sup> Cheryl Saunders and Katherine Le Roy use the metaphor of 'thin' and 'thick' versions of the rule of law in order to describe the distinction between a more 'rule-based' and a more 'rights based' conception of the rule of law: Cheryl Saunders and Katherine Le Roy, 'Perspectives on the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 1, 5–6.

<sup>72</sup> David Clark, David Bamford and Judith Bannister, *Principles of Australian Public Law* (LexisNexis Butterworths, 2003) [3.24].

<sup>73</sup> A 'vertical' conception in the sense that the concern is with the law as a means of regulating the relationship between citizens and the state: Martin Krygier, 'Rule of Law' in Neal J Smelser and Paul B Baltes (eds), *International Encyclopedia of the Social and Behavioural Sciences* (Cambridge University Press, 2001) 13 403, 13 406.

Australia.<sup>74</sup> Specifically, the rule of law can be defined as encompassing two key limbs: the principle of legality<sup>75</sup> and the notion of formal equality before the law.<sup>76</sup>

The principle of legality is based on the idea that executive decision-makers (indeed, arguably all decision-makers) need legal authority for any action that they undertake.<sup>77</sup> In this sense, a contrast between private and

<sup>74</sup> Although beyond this narrow formal conception, the rule of law has been termed an ‘essentially contested concept’: see, eg, Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ (2002) 21 *Law and Philosophy* 137; Leslie Green, ‘The Political Content of Legal Theory’ (1987) 17 *Philosophy of the Social Sciences* 1, 18. The rule of law in current politico-legal theory has also been heavily criticised, for example by Marxist, feminist and critical legal studies scholars. For a useful summary of these criticisms see, eg, Cameron Stewart, ‘The Rule of Law and the Tinkerbelle Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law’ (2004) 4 *Macquarie Law Journal* 135, 147–60.

<sup>75</sup> I distinguish this principle from the ‘principle of legality’ from English jurisprudence, see, eg, *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman), which reflects the idea that ‘Parliament must [when limiting the courts’ role in securing fundamental common law rights] squarely confront what it is doing and accept the political cost’. This understanding has gained salience in Australian courts: see, eg (recently), *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *South Australia v Totani* (2010) 242 CLR 1, 28–9 [31] (French CJ); *Hogan v Hinch* (2011) 243 CLR 506, 535–6 [29] (French CJ); *Momcilovic v The Queen* (2011) 280 ALR 221, especially at 241–5 [42]–[51] (French CJ), 349 [441] (Heydon J), 370 [512] (Crennan and Kiefel JJ).

<sup>76</sup> This conception of the rule of law has broad support from a range of notable scholars in the field of politico-legal philosophy: see, eg, A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10<sup>th</sup> ed, 1959) 188, 193; Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 11 (the ‘rule book’ conception of the rule of law); Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67, 69; Joseph Raz, ‘The Rule of Law and Its Virtue’ in Robert L Cunningham (ed), *Liberty and the Rule of Law* (Texas A&M University Press, 1979) 3; Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (Free Press, 1976); Paul P Craig, ‘Formal and substantive conceptions of the rule of law: an analytical framework’ [1997] *Public Law* 467; Brian Z Tamanaha, *On The Rule of Law History, Politics, Theory* (Cambridge University Press, 2004); H W R Wade and C F Forsyth, *Administrative Law* (Clarendon Press, 10<sup>th</sup> ed, 2009) 17–19.

<sup>77</sup> See, eg, H W R Wade and C F Forsyth, *Administrative Law* (Clarendon Press, 10<sup>th</sup> ed, 2009) 17; Jeremy Kirk, ‘The entrenched minimum provision of judicial

public law may be drawn. Generally speaking, in private law any action which is not unauthorised is legal. By contrast, in public law any action which is not authorised is illegal. The principle of legality requires that every act of governmental power must be done according to law; there must be rule *by* law. The origins of this philosophy are in the notion of restraint of government tyranny. In Anglo-Australian jurisprudence this can be traced back to the signing of the Magna Carta in 1215, and the attempt to subordinate the sovereign to law. If government in all its actions is bound by rules fixed and announced beforehand, it makes it possible for the citizen to foresee with fair certainty how the government will use its coercive powers in given circumstances.<sup>78</sup> Unfettered, discretionary power is absent.<sup>79</sup> Chief Justice French (writing extra-judicially) has termed the principle of legality the 'dominant requirement of the rule of law in Australia'.<sup>80</sup>

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review' (2004) 12 *Australian Journal of Administrative Law* 64, 69. Cf the use of the constitutional principle of legality in South African administrative law: see generally Cora Hoexter, 'The Principle of Legality in South African Administrative Law' (2004) 4 *Macquarie Law Journal* 165, 181–5.

<sup>78</sup> F A Hayek, *The Road to Serfdom* (George Routledge & Sons, 1944) 54. Cf Friederich A Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960) 205–6.

<sup>79</sup> See generally A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10<sup>th</sup> ed, 1959) 188, 202; F A Hayek, *The Road to Serfdom* (George Routledge & Sons, 1944) 72; Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 11; Justice Robert French, 'Administrative law in Australia: Themes and values' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 15, 18; Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 72–3.

<sup>80</sup> Justice Robert French, 'Administrative law in Australia: Themes and values' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 15, 18.



The notion of formal equality before the law (in the public law context) means that the law must apply equally to all actors within the state, including both government and citizens. If this proposition is accepted, it then follows that the law must be enforced by the same, impartial courts who hear both governmental and non-governmental matters. For example, as a matter of practical application, it is for the ordinary courts to ensure that decision-makers act within the confines of their jurisdiction; not, say, a wholly separate system of administrative tribunals.<sup>81</sup>

## B Kirk: *Upholding the Rule of Law in Australian Public Law*

The rule of law is considered to be at the root of the notion of supervisory review.<sup>82</sup> As Brennan J articulated this proposition:

[j]udicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.<sup>83</sup>

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<sup>81</sup> See also Naomi Sidebotham, 'Shaking the foundations: Dicey, fig leaves and judicial review' (2001) 8 *Australian Journal of Administrative Law* 89, 92.

<sup>82</sup> See generally, *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 157 [56] (Gaudron J); Duncan Kerr and George Williams, 'Review of executive action and the rule of law under the Australian Constitution' (2003) 14 *Public Law Review* 219, 228; Murray Gleeson, 'Courts and the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 178, 185; Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 38; David S Tatel, 'The Administrative Process and the Rule of Environmental Law' (2010) 34 *Harvard Environmental Law Review* 1, 3.

<sup>83</sup> *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70 (Brennan J).

The favourable response to the *Kirk* decision from the legal community results from the fact that the decision upholds the rule of law.<sup>84</sup> That is, the effect of the decision is to defend both limbs of the rule of law outlined in the previous sub-section.

Pursuant to the first limb of the rule of law, all exercises of official power, whether legislative, executive or judicial, must be supported by constitutional authority or a law made under such authority.<sup>85</sup> That is, the rule of law requires that decisions made by the executive, inferior courts and superior courts of limited jurisdiction be within the boundaries of jurisdiction conferred. As Chief Justice French has affirmed: 'no decision-maker has *carte blanche* ... [u]nlimited power would be unconstitutional power.'<sup>86</sup> In the federal context '[s 75(v)] is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them.'<sup>87</sup> Similarly, at the State level, if executive decision-makers, inferior courts or superior courts of limited jurisdiction either neglect or exceed the jurisdiction bestowed upon them, their decisions must be amenable to

<sup>84</sup> See, eg, Chris Finn, 'Constitutionalising supervisory review at State level: The end of *Hickman*?' (2010) 21 *Public Law Review* 92, 108; Wendy Lacey, '*Kirk v Industrial Court of NSW*: Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641, 666; Justice J Gilmour, '*Kirk*: Newton's apple fell' (2011) 34 *Australian Bar Review* 155, 156; Ronald Sackville, 'The constitutionalisation of State administrative law' (2012) 19 *Australian Journal of Administrative Law* 127, 130. Cf John Basten, 'The supervisory jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 280.

<sup>85</sup> Justice Robert French, 'Administrative law in Australia: Themes and values' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 15, 18.

<sup>86</sup> Robert S French, 'The Executive Power' (2010) 12 *Constitutional Law and Policy Review* 5, 7.

<sup>87</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513–14 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

supervisory review if the rule of law is to prevail. Following this line of reasoning, the ‘unifying principle’<sup>88</sup> of jurisdictional error provides a suitable means of ensuring the legality of such decisions.<sup>89</sup>

Pursuant to the second limb of the rule of law, the executive (through its control over the legislature) must be unable to insulate its decisions from judicial supervision. Furthermore, common law legal systems arguably require a unified system of courts which hear both private and public law matters. In this sense, a contrast may be drawn with many civil law jurisdictions, where a separate system of ‘*droit administratif*’ (or equivalent) exists. *Droit administratif* is a system of rules and principles developed and applied in the administrative courts.<sup>90</sup> This system is separate and distinct from the rules and principles which are developed and applied by the ordinary courts.<sup>91</sup> However, in Anglo-Australian politico-legal theory, leaving redress of administrative illegality entirely to the administrative or political processes contradicts our conception of the rule of law.<sup>92</sup> That is, pursuant to our conception of the rule of law, the

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<sup>88</sup> J J Spigelman, ‘Public law and the executive’ (2010) 34 *Australian Bar Review* 10, 16.

<sup>89</sup> It is arguable that jurisdictional error is now the central (and unifying) element in the constitutionally entrenched systems of State and federal judicial review: see also J J Spigelman, ‘The centrality of jurisdictional error’ (2010) 21 *Public Law Review* 77, 83; Joshua P Knackstedt, ‘Judicial review after Kirk v Industrial Court (NSW)’ (2011) 18 *Australian Journal of Administrative Law* 203, 214; Ronald Sackville, ‘The constitutionalisation of State administrative law’ (2012) 19 *Australian Journal of Administrative Law* 127, 131.

<sup>90</sup> Walter Cairns and Robert McKeon, *Introduction to French Law* (Cavendish Publishing, 1995) 121. See generally L Neville Brown and John S Bell, *French Administrative Law* (Clarendon Press, 4<sup>th</sup> ed, 1993).

<sup>91</sup> Walter Cairns and Robert McKeon, *Introduction to French Law* (Cavendish Publishing, 1995) 121.

<sup>92</sup> Mark Aronson, ‘Commentary on “The entrenched minimum provision of judicial review and the rule of law” by Leighton McDonald’ (2010) 21 *Public Law Review*

executive must be as equally subject to the ‘ordinary law’—administered by ‘ordinary courts’—as private persons. If this proposition is true, there must then be an ultimate, ‘superior’ court with the ability to ensure that executive decision-makers are kept within the boundaries of their jurisdiction. At the State level in Australia this court is the Supreme Court. If the necessity of the existence of a ‘superior’ court at the State level is recognised, this also means that, being in a federal system with an integrated judiciary,<sup>93</sup> there must be a federal superior court. Therefore, pursuant to the second limb of the rule of law, the superintendence of the High Court as the ‘Federal Supreme Court’ must not be impermissibly hindered.<sup>94</sup>

If the Supreme Courts are at the apex of the hierarchy of ‘ordinary courts’ at the State level, this requires that their supervisory review jurisdiction over inferior courts of *general* jurisdiction be preserved. (Indeed, it is arguable that the existence of a ‘superior’ court with supervisory jurisdiction is even more important at the State level due to looser boundaries regarding the separation of judicial power that exist.<sup>95</sup>)

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35, 37. See also *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 447, 451–2 (Kirby P).

<sup>93</sup> See, eg, s 73(ii) of the *Constitution*.

<sup>94</sup> Cf *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>95</sup> There is no strict separation of judicial power at the State level, under either the Commonwealth: see, eg, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 614 [86] (Gummow J); or State Constitutions: see, eg, *Clyne v East* (1967) 68 SR (NSW) 385; *Building Construction Employees and Builders’ Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381 (Street CJ), 400 (Kirby P), 407, 419 (Glass JA); *S (a child) v The Queen* (1995) 12 WAR 392, 394 (Kennedy J), 401–2 (Steytler J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 93–4 (Toohey J); *Wainohu v NSW* (2011) 243 CLR 181, 197 [22] (French CJ and Kiefel J). Although note that provisions such as s 73(6) of the *Constitution Act 1889* (WA) and s 88(5) of the

Furthermore, a Supreme Court's jurisdiction to supervise superior courts of limited jurisdiction (for example, courts such as the NSW Land and Environment Court<sup>96</sup>) must be maintained.<sup>97</sup> That is, the second limb of the rule of law requires that specialised courts not become 'islands of power'.<sup>98</sup> According to the joint judgment in *Kirk*, this is required as a matter of 'public policy'.<sup>99</sup> Similarly, in his separate judgment, Heydon J reasoned that when specialist courts are set up to hear specific matters there is a tendency for such courts 'to lose touch with the traditions, standards and mores of the wider profession and judiciary.'<sup>100</sup> That is, '[c]ourts which are "preoccupied with special problems" ... are likely to develop distorted positions.'<sup>101</sup> Specialist courts undoubtedly have a role in hearing matters requiring specialist expertise. However, their decisions in respect of

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*Constitution Act 1934* (SA) do entrench the Supreme Court's jurisdiction to hear some State constitutional suits.

<sup>96</sup> *Land and Environment Court Act 1979* (NSW) s 5(1).

<sup>97</sup> But see Chief Justice Brian J Preston, 'Commentary on paper by Dr M Groves, "Federal Constitutional Influences on State Judicial Review"' (Speech delivered at the Australian Association of Constitutional Law Seminar, Sydney, 26 August 2010) 2, who questions whether provisions such as the *Land and Environment Court Act 1979* (NSW) s 20(1)(e) (which gives the NSW Land and Environment Court the same supervisory jurisdiction as the Supreme Court to review administrative decisions and subordinate legislation made under specified planning or environmental legislation) and s 71(1) (which provides that proceedings of the kinds referred to in s 20(1)(e) may not be commenced or entertained in the Supreme Court) infringe *Kirk*. His Honour argues that they may not, if the courts' supervisory jurisdiction is viewed collectively. That is, the entrenched minimum provision of judicial review at the State level does not have to be solely exercised by the original Supreme Court of a State. Rather, it can be distributed between the original Supreme Court and other superior courts.

<sup>98</sup> *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>99</sup> *Ibid* 567–8 [57], 569–70 [62] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>100</sup> *Ibid* 590 [122] (Heydon J).

<sup>101</sup> *Ibid*, citing Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 962–3.

questions of general law and principles of interpretation should not be shielded from supervisory review as this would contravene the rule of law.<sup>102</sup> Instead, these bodies 'should be subject to the control of the courts of more general jurisdiction.'<sup>103</sup> At the State level this court is the Supreme Court.

### III RE-POSITIONING THE *KIRK* DECISION

In a number of common law countries the rule of law is invoked to *directly* rationalise a guaranteed entitlement to judicial review. This position can be contrasted with the position at the federal level in Australia, where the existence of an explicit provision of judicial review through s 75(v) of the *Constitution* has meant that rule of law principles have never gained much foreground, apart from simply to justify the existence of this jurisdiction.<sup>104</sup> For example, in England courts have held that the rule of law obliges them to disregard privative clauses.<sup>105</sup> Indeed, more broadly it is argued that a

<sup>102</sup> See also Ernest Barker, 'The "Rule of Law"' [1914] *Political Quarterly* 116, 118; Justice P W Young, 'Current issues' (2011) 85 *Australia Law Journal* 7, 8–9.

<sup>103</sup> Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 963, cited in *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 570 [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>104</sup> See, eg, *Re Carmody; Ex parte Glennan* (2000) 173 ALR 145, 147 [3] (Kirby J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 498 [321] (Kirby J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482 [5] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 73 [113] (Kirby J); *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, 45 [17]–[19] (Spender J).

<sup>105</sup> See, eg, *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574, 586 (Lord Denning); *Ansiminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 208 (Lord Wilberforce). See Sir Anthony Mason, 'Australian Administrative Law Compared with Overseas Models of Administrative Law' (2001) 31 *Australian Institute of Administrative Law Forum* 45, 53–4, for the difference in the fundamental doctrines influencing judicial review in Australia compared to England.

theory of ‘higher-order laws’ or a ‘framework of fundamental principles’ derived from the common law constrains the exercise of executive and legislative power.<sup>106</sup> Similarly, in New Zealand the Court of Appeal has held that ‘the judicial review powers of the High Court are based on the central constitutional role of the court to rule on questions of law ... The essential purpose of judicial review is to ensure that public bodies comply with the law.’<sup>107</sup> Lastly, in Canada the Supreme Court has held that limits on the exercise of executive power come from (inter alia) the common law, the rule of law principle and societal values.<sup>108</sup> Interestingly, Canada (unlike England and New Zealand) has a written constitution<sup>109</sup> and a rigid separation of judicial power more akin to the Australian federal judicial system provided for in Chapter III of the *Constitution*.

In the State context, commentators and judges have periodically sought to invoke rule of law values in attempting to rationalise a guaranteed entitlement to judicial review. For example, in *Fish v Solution 6 Holdings Ltd*,<sup>110</sup> Kirby J argued that ‘[t]he rule of law, which is an acknowledged implication of the ... *Constitution*, imposes ultimate limits on the power of any legislature to render governmental action, federal, State or Territory, immune from conformity to the law and scrutiny by the courts against that

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<sup>106</sup> John Laws, ‘Law and Democracy’ [1995] *Public Law* 72, 92.

<sup>107</sup> *Peters v Davison* [1999] 2 NZLR 164, 192 (Richardson P, Henry and Keith JJ).

<sup>108</sup> See, eg, *Baker v Canada (Minister for Citizenship and Immigration)* [1999] 2 SCR 817, 817, 853, 855, 859–62 (L’Heureux-Dubé J).

<sup>109</sup> In the sense that England and New Zealand do not have a single core constitutional document: Hilarie Barnett, *Constitutional & Administrative Law* (Cavendish, 5<sup>th</sup> ed, 2004) 9.

<sup>110</sup> (2006) 225 CLR 180.

basal standard.’<sup>111</sup> Such arguments have received very little judicial support (or even consideration). However, notwithstanding the judicial reluctance to adopt this reasoning, it is submitted that the rule of law *can* be invoked to explain the existence of a minimum provision of judicial review at the State level. That is, it is submitted that one can work backwards from the rule of law principle in order to reposition and, with respect, more persuasively reason *Kirk’s* conclusion. To begin with, though, it is important to expand on the propositions drawn in Section II and understand exactly how the rule of law is manifested in Australian public law.

### A *An Institutional Approach to the Rule of Law*

In Section II it was argued that the concept of jurisdictional error substantiates and helps to uphold the principle of legality. While this is certainly true, it is important to recognise that a label of jurisdictional error is merely ‘conclusory’<sup>112</sup> (ie the label is applied after a court arrives at the conclusion that an error is one going to jurisdiction). Furthermore, as was accepted in *Kirk*, the label of jurisdictional error is given largely on the basis of policy, rather than conceptual analysis.<sup>113</sup> Indeed, the Honourable James Spigelman has described jurisdictional error as ‘of undefined,

<sup>111</sup> Ibid 224 [146] (Kirby J). See also *Mitchforce Pty Ltd v Industrial Relations Commission of NSW* (2003) 57 NSWLR 212, 237–8 [124] (Spigelman CJ). Both cases considered s 179 of the *Industrial Relations Act 1996* (NSW).

<sup>112</sup> Mark Aronson, ‘Commentary on “The entrenched minimum provision of judicial review and the rule of law” by Leighton McDonald’ (2010) 21 *Public Law Review* 35, 37 n 10.

<sup>113</sup> See, eg, *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 570–1 [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also Leslie Zines, ‘Kirk v Industrial Court (NSW)’ (Speech delivered at the Australian Association of Constitutional Law Annual General Meeting, Sydney, 26 November 2010) 13.



probably undefinable, content.’<sup>114</sup> At a higher level, the principle of legality substantiated through the notion of jurisdictional error certainly underlies State (and federal) judicial review. Ultimately, though, it is for the superior courts (the Supreme Courts and the High Court) to police the boundaries of legality.<sup>115</sup> Therefore, it is submitted that a practical theory of the rule of law in Australia must focus on the ‘integrity’ of these institutions whose role it is to enforce the principle of legality and provide review for jurisdictional error. Following this line of reasoning, it is submitted that the rule of law in the Australian public law context is best understood as a system of institutional arrangements. Specifically, this is a system of independent courts with the capacity, *inter alia*, to supervise inferior courts, superior courts of limited jurisdiction and executive decision-makers.<sup>116</sup>

In Australia a system of independent courts is established by Chapter III of the *Constitution*; in this sense it is said that Chapter III gives practical effect to the rule of law.<sup>117</sup> Specifically, Chapter III establishes the High Court and makes provision for other federal courts, and also impliedly

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<sup>114</sup> J J Spigelman, ‘Public law and the executive’ (2010) 34 *Australian Bar Review* 10, 17.

<sup>115</sup> Cf *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 122 ALD 237, 241 [2] (French CJ).

<sup>116</sup> Cf J M Bennett (ed), *Some Papers of Sir Francis Forbes* (Parliament of New South Wales, 1998) 143.

<sup>117</sup> See, eg, *South Australia v Totani* (2010) 242 CLR 1, 156 [423] (Crennan and Bell JJ), quoting *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ), citing *APLA Ltd v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 351–2 [30] (Gleeson CJ and Heydon J). As one of the drafters of the *Constitution* contended, ‘[t]he supremacy of the judiciary ... finds its ultimate logical foundation in the conception of the supremacy of law as distinguished from the possession and exercise of governmental power’: A Inglis Clark, ‘The Supremacy of the Judiciary under the Constitution of the United States, and under the Constitution of the Commonwealth of Australia’ (1903) 17 *Harvard Law Review* 1, 18.

entrenches the existence and ‘defining characteristics’ of State Supreme Courts<sup>118</sup> and envisages that other State courts will be vested with federal jurisdiction.<sup>119</sup> Therefore, State courts have a status and a role that extends beyond their status and role as part of the State judicial system;<sup>120</sup> they are part of the integrated judiciary set up by Chapter III. The constitutional status of State courts means that State legislative power is not immune from restrictions derived from Chapter III.<sup>121</sup> That is, a State cannot legislate with respect to its courts in such a way as would contravene the principles in Chapter III.<sup>122</sup> The primary Chapter III restriction on State legislative power is the *Kable* doctrine, a doctrine which mandates the preservation of the ‘institutional integrity’ of all State courts capable of being vested with federal jurisdiction.<sup>123</sup> Therefore, if Chapter III gives effect to the rule of law, and the *Kable* doctrine is the primary means of

<sup>118</sup> *Constitution* s 73(ii). See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 141 (Gummow J); *Forge v Australia Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ), quoted in *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>119</sup> *Constitution* ss 71, 77(iii).

<sup>120</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 114 (McHugh J); *Momcilovic v The Queen* (2011) 280 ALR 221, 391 [595] (Crennan and Kiefel JJ).

<sup>121</sup> See, eg, *Commonwealth v Queensland* (1975) 134 CLR 298, 314–15 (Gibbs J); *Gould v Brown* (1998) 193 CLR 346, 446 [194]–[195] (Gummow J). Cf *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 60–2 (Mason J).

<sup>122</sup> However, the separation of judicial power doctrine itself does apply at the State level: see, eg, *South Australia v Totani* (2010) 242 CLR 1, 86 [221] (Hayne J); *Wainohu v New South Wales* (2011) 243 CLR 181, 5 [7] (French CJ and Kiefel J). Cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 118 (McHugh J), quoted in *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 354 [53] (French CJ).

<sup>123</sup> Note that the *Kable* doctrine does not have its source in the doctrine of the separation of powers: *Wainohu v New South Wales* (2011) 243 CLR 181, 209 [45] (French CJ and Kiefel J).

giving effect to the principles in Chapter III for State courts, it is submitted that at the State level the rule of law is maintained via the preservation of the ‘institutional integrity’ of courts.<sup>124</sup> In the remainder of this section this line of reasoning will be followed through in making the argument that *Kirk* can (and should) be reasoned as an extension of the *Kable* doctrine.<sup>125</sup>

## B The Kable Doctrine

As alluded to, the seminal case on the Chapter III limitations on State legislative power is *Kable v Director of Public Prosecutions (NSW)*.<sup>126</sup> *Kable* concerned legislation enacted by the NSW Parliament, the *Community Protection Act 1994* (NSW), which was specifically targeted at a particular prisoner, Gregory Wayne Kable.<sup>127</sup> Mr Kable was serving a prison sentence for manslaughter, and had written threatening letters to the relatives of his victim (his deceased wife) and other persons. In response (and in the context of an impending election), the NSW Parliament enacted the *Community Protection Act 1994* (NSW). Section 8 of this Act allowed the Director of Public Prosecutions to apply for a preventive detention order against Mr Kable. Following this application, s 5 of the *Community*

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<sup>124</sup> See also *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 123 [197] (Kirby J).

<sup>125</sup> I am not the first person who has suggested a link between these two doctrines: see, eg, J J Spigelman, ‘The centrality of jurisdictional error’ (2010) 21 *Public Law Review* 77, 80; Wendy Lacey, ‘*Kirk v Industrial Court of NSW*: Breathing Life into *Kable*’ (2010) 34 *Melbourne University Law Review* 641, 649; but see Alexander Vial, ‘The Minimum Entrenched Supervisory Review Jurisdiction of State Supreme Courts: *Kirk v Industrial Relations Commission* (NSW) (2010) 239 CLR 531’ (2011) 32 *Adelaide Law Review* 145, 158–60. In fact, in *Momcilovic v The Queen* (2011) 280 ALR 221, 349 [438] even Heydon J seemed to imply that *Kable* and *Kirk* are linked.

<sup>126</sup> (1996) 189 CLR 51.

<sup>127</sup> *Community Protection Act 1994* (NSW) s 3.

*Protection Act 1994* (NSW) authorised the Supreme Court of NSW to make an order requiring that Mr Kable be detained if it was satisfied on reasonable grounds that he posed a significant danger to the public.

Mr Kable challenged the *Community Protection Act 1994* (NSW) in the High Court. A majority<sup>128</sup> of the Court found in his favour, declaring that the non-judicial functions which the Act conferred on the Supreme Court were incompatible with Chapter III of the *Constitution* and hence were invalid. In their broadly similar judgments, Gaudron, McHugh and Gummow JJ each noted that the *Constitution* contemplates a system where the functions of State and federal courts are integrated with each other.<sup>129</sup> This integration is twofold. Firstly, ss 71 and 77(iii) of the *Constitution* expressly allows the federal Parliament to invest State courts with federal judicial power.<sup>130</sup> Secondly, the 'constitutional scheme' provided for in s 73 places the High Court as the final court of appeal in both federal and non-federal matters.<sup>131</sup> In the view of Gaudron, McHugh and Gummow JJ, the *Community Protection Act 1994* (NSW) was invalid as it undermined the Supreme Court's independence from the NSW government and required the Court to act inconsistently with its traditional functions. This,

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<sup>128</sup> Toohey, Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting.

<sup>129</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 102 (Gaudron J), 111–15 (McHugh J), 137–9 (Gummow J).

<sup>130</sup> The 'autochthonous expedient': *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

<sup>131</sup> Cf *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 581 [98]–[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

it was reasoned, was incompatible with the Court's role under the *Constitution* as a constituent body of the national integrated judiciary.<sup>132</sup>

The separate majority judgments in *Kable* made it difficult to distil the principles that would apply to this new Chapter III limitation on State courts. As such, clarification of the character of the *Kable* doctrine<sup>133</sup> came only in later cases where the criterion for its operation was narrowed to one of 'institutional integrity'.<sup>134</sup> For example, a clear enunciation of the (revised) doctrine comes from Gleeson CJ in *Baker v The Queen*:<sup>135</sup>

since the *Constitution* established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by [State courts], State legislation which purports to *confer upon a [State] court a function which substantially impairs its institutional integrity*, and which is therefore incompatible with its role as a potential repository of federal jurisdiction, is invalid.<sup>136</sup>

<sup>132</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), 116 (McHugh J), 143 (Gummow J); cf 96–9 (Toohey J).

<sup>133</sup> Cf Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31 *Sydney Law Review* 411, 426, where the author argues that it is 'inappropriate, post-*Forge*, to continue to refer to the *Kable* principle by that title.'

<sup>134</sup> Arguably, this was first commonly accepted in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

<sup>135</sup> (2004) 223 CLR 513.

<sup>136</sup> *Ibid* 519 [5] (Gleeson CJ). This quote has been amended slightly to take into account the fact that the *Kable* doctrine extends to *all* State courts capable of exercising federal jurisdiction: see, eg, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363 [81] (Gaudron J), quoted in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 162 [27] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501. Further, the *Kable* doctrine arguably extends to all State/Territory courts that might in the future exercise federal judicial power, whether or not they are doing so currently: see, eg, *Baker v The Queen* (2004) 223 CLR 513, 534 [51] (McHugh, Gummow, Hayne and Heydon JJ), citing *North Australian Aboriginal Legal Aid Service Inc*

The *Kable* doctrine was unsuccessfully invoked a number of times in the High Court over the next 13 years<sup>137</sup> (although in 2004 it was successfully invoked in the Queensland Court of Appeal<sup>138</sup>), and for a time was described as ‘a constitutional guard-dog that [barked] but once.’<sup>139</sup> One such unsuccessful case was *Forge v Australian Securities and Investments Commission*.<sup>140</sup> In *Forge*, a challenge was made to the appointment of an acting judge to the Supreme Court of NSW. This was on the basis that the practice of appointing acting judges had become so extensive that the institutional integrity of the court had become impaired.<sup>141</sup> A 6:1 majority of the High Court rejected the challenge, yet all the judges (bar Heydon J who did not engage with the *Kable* doctrine) noted that there are limits to a State Parliament’s power to reconstitute its Supreme Court.<sup>142</sup> Specifically, a Parliament cannot change the composition of its Supreme Court in such a manner as would distort its institutional integrity as a ‘court’. Importantly, it is arguable that the judgments in *Forge* (except Heydon J’s) were

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*v Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

<sup>137</sup> See, eg, *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181; *Baker v The Queen* (2004) 223 CLR 513; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

<sup>138</sup> *Re Criminal Proceeds Confiscation Act 2002 (Qld)* [2004] 1 Qd R 40 (special leave to appeal from this decision was not sought).

<sup>139</sup> *Baker v The Queen* (2004) 223 CLR 513, 535 [54] (Kirby J).

<sup>140</sup> (2006) 228 CLR 45.

<sup>141</sup> A potential challenge which was foreshadowed in *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, 164 [32] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

<sup>142</sup> See, eg, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 69 [46] (Gleeson CJ, Callinan J agreeing), 79 [73] (Gummow, Hayne and Crennan JJ).

concerned with tying the requirements of institutional integrity back to the term ‘court’ as it appears in the *Constitution*, rather than an implied integrated system of courts provided for by Chapter III.<sup>143</sup> That is, *Forge* represented a refocusing on the text of the *Constitution* and a shift from indirect, systematic implications derived from its secondary, structural elements. (Arguably this reasoning first appeared in the judgments of Dawson, McHugh and Gummow JJ in *Kable*.<sup>144</sup>) High Court judgments subsequent to *Forge* have adopted this slightly revised approach to the doctrine.<sup>145</sup> Therefore, post-*Forge*, it is arguable that the relevant question when applying the *Kable* doctrine became: is a function conferred, or the structure or composition, of a State court capable of being vested with federal jurisdiction consistent with the character of a ‘court’, as constitutionally-defined?

<sup>143</sup> See, eg, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 67–8 [41] (Gleeson CJ), 76 [63] (Gummow, Hayne and Crennan JJ), 121 [192] (Kirby J); Anna Dziedzic, ‘*Forge v Australian Securities and Investments Commission: The Kable Principle and the Constitutional Validity of Acting Judges*’ (2007) 35 *Federal Law Review* 129, 140; Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks’ Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2009) 1155 [9.5.32].

<sup>144</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 83 (Dawson J), 117 (McHugh J), 141 (Gummow J).

<sup>145</sup> See, eg, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 576–7 [102]–[103] (Kirby J), 591 [161] (Crennan J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 530 [89] (French CJ), 544 [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 571 [253] (Kirby J); *South Australia v Totani* (2010) 242 CLR 1, 21 [4], 48 [70] (French CJ), 67 [149] (Gummow J), 88–9 [226] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J); *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J), 228 [105] (Gummow, Hayne, Crennan and Bell JJ); *Momcilovic v The Queen* (2011) 280 ALR 221, 258 [92]–[93] (French CJ), 281 [175] (Gummow J), 390 [593] (Crennan and Kiefel JJ). See also State Supreme Courts: eg, *P J B v Melbourne Health* [2011] VSC 327 (19 July 2011) [313] (Bell J); *Campbell v Employers Mutual Ltd* (2011) 110 SASR 57, 83 [110] (Gray and Sullan JJ).

However, one slightly anomalous case is *International Finance Trust Co Ltd v NSW Crime Commission*.<sup>146</sup> In *International Finance Trust Co Ltd* a constitutional challenge was made to s 10 of the *Criminal Assets Recovery Act 1990* (NSW). Section 10(2)(b) of this Act provided that the NSW Crime Commission could make an ex parte application to the Supreme Court of NSW for a restraining order preventing dealings with property which was suspected to have been derived from serious criminal activity. This application had to be supported by an affidavit deposing to the grounds upon which the deponent suspected the property to have been derived from serious criminal activity.<sup>147</sup> The Supreme Court had to make the restraining order if, having regard to the matters raised in the affidavit, it considered there were reasonable grounds for the suspicion.<sup>148</sup> The party whose property interest was affected by the order could apply under s 25 of the *Criminal Assets Recovery Act 1990* (NSW) for orders excluding those interests from the operation of the restraining order. However, the party had to prove that it is more probable than not that the property was not acquired fraudulently or illegally.

When the case reached the High Court the *Kable* doctrine was successfully invoked for only the second time in that court. However, the doctrine was applied in a slightly different way. In the joint judgment of Gummow and Bell JJ,<sup>149</sup> the judgment of Heydon J<sup>150</sup> and the judgment of the minority,<sup>151</sup> the constitutional validity of s 10 of the *Criminal Assets Recovery Act 1990*

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<sup>146</sup> (2009) 240 CLR 319.

<sup>147</sup> *Criminal Assets Recovery Act 1990* (NSW) s 10(3).

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid* 367 [98] (Gummow and Bell JJ).

<sup>150</sup> *Ibid* 379 [140], 385–6 [155]–[160] (Heydon J).

<sup>151</sup> *Ibid* 378 [136] (Hayne, Crennan and Kiefel JJ).



(NSW) was determined with reference to the notion of ‘repugnance to the judicial process’.<sup>152</sup> (This notion has its origins in Gummow J’s judgment in *Kable*.<sup>153</sup>) That is, Gummow, Bell and Heydon JJ concluded that the procedures achieved by s 10 were repugnant to the judicial process. Only French CJ (who also formed part of the majority) focussed on the ‘judicial function’ which s 10 impaired in such a way as to distort the Supreme Court’s institutional integrity.<sup>154</sup>

In later cases which have invoked the *Kable* doctrine courts have reverted back to the notion of institutional integrity of a court in assessing whether legislation impermissibly infringes the doctrine.<sup>155</sup> However, in assessing whether a court’s institutional integrity has been impaired it will be at least

<sup>152</sup> See also *South Australia v Totani* (2010) 242 CLR 1, 157 [426] (Crennan and Bell JJ). McCunn argues that ‘repugnance to the judicial process’ should be the (sole) controlling standard when determining whether State legislation offends the *Kable* doctrine: Ayowande McCunn, ‘The search for a single standard for the *Kable* principle’ (2012) 19 *Australian Journal of Administrative Law* 93.

<sup>153</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 132, 134 (Gummow J); see also 107 (Gaudron J), 122 (McHugh J). But see *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, where McHugh J argued that ‘[t]he pejorative phrase—“repugnant to the judicial process”—is not the constitutional criterion’: at 601 [42] (McHugh J).

<sup>154</sup> *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 355 [56] (French CJ). Interestingly, the phrase ‘institutional integrity’ was not mentioned in any of the other judgments.

<sup>155</sup> See, eg, *South Australia v Totani* (2010) 242 CLR 1, 21 [4], 48 [70] (French CJ), 67 [149] (Gummow J), 88–9 [226] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J); *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J), 228 [105] (Gummow, Hayne, Crennan and Bell JJ); *Momcilovic v The Queen* (2011) 280 ALR 221, 258 [92]–[93] (French CJ), 281 [175] (Gummow J), 390 [593] (Crennan and Kiefel JJ). See also State Supreme Courts: eg, *P J B v Melbourne Health* [2011] VSC 327 (19 July 2011) [313] (Bell J); *Campbell v Employers Mutual Ltd* (2011) 110 SASR 57, 83 [110] (Gray and Sullan JJ).

a material factor to consider whether a function conferred on the court is antithetical to the judicial process.<sup>156</sup>

### C Kirk: *An Extension of the Kable Doctrine*

What is curious about the joint judgment's reasoning in *Kirk* is the similarity to *Kable*-style reasoning and yet *Kable* is never cited (although it was raised in argument before the High Court). In this sub-section I will slightly re-position the joint judgment's reasoning in order to frame *Kirk* to fit within the *Kable* doctrine. Hopefully, this will engage with some of the criticisms that have been raised regarding the joint judgment's reasoning and will instead, with respect, define a more convincing basis for the decision.

As is evident from the overview above, the *Kable* doctrine has so far been held to potentially apply in two types of situations. The first is legislation which unconstitutionally *confers certain functions* on a Supreme Court (or other State court).<sup>157</sup> The second is legislation which unconstitutionally *changes the structure or composition* of a Supreme Court (or, presumably,

<sup>156</sup> See, eg, *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 620–11 [113]–[115] (Gummow J), 628 [141], 630–31 [144] (Kirby J), 655–6 [219] (Callinan and Heydon JJ); *Gypsy Jokers Motorcycle Club v Commissioner for Police* (2008) 234 CLR 532, 563 [50] (Kirby J), citing *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 134 (Gummow J); *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319, 353 [52] (French CJ), quoting *Thomas v Mowbray* (2007) 233 CLR 307, 55 [111] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1, 162 [443] (Kiefel J).

<sup>157</sup> See, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Baker v The Queen* (2004) 223 CLR 513; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1.

other State courts which are capable of being vested with federal jurisdiction).<sup>158</sup> It is submitted that *Kirk* can be reasoned as an extension of the *Kable* doctrine as the decision reinforces the two important facets of the *Kable* doctrine. Firstly, this is the constitutional significance of the integrated national judicial system defined by s 73 of the *Constitution* (the ‘unifying element in our judicial system’<sup>159</sup>) with the High Court as the final court of appeal. Secondly, and more importantly, this is the constitutional imperative of preserving the institutional integrity of Chapter III courts. That is, to rationalise the conclusion in *Kirk* via *Kable* reasoning, there are now constitutional restrictions, derived from Chapter III, which prevent a State Parliament from *removing certain functions* from its Supreme Court.<sup>160</sup>

In *Kable*, McHugh and Gummow JJ placed heavy reliance on s 73 of the *Constitution* in concluding that there was an integrated judicial system in Australia with the High Court at its apex.<sup>161</sup> (Although strictly speaking this only occurred in 1986 with the passing of the *Australia Acts*;<sup>162</sup> prior to this there were two final courts of appeal from State Supreme Courts: the Privy Council and the High Court.<sup>163</sup>) According to McHugh and Gummow JJ, as the *Constitution* establishes an integrated judicial system,

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<sup>158</sup> *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

<sup>159</sup> Leslie Zines, *Cowen and Zines’s Federal Jurisdiction in Australia* (Federation Press, 3<sup>rd</sup> ed, 2002) 182.

<sup>160</sup> See also W B Lane and Simon Young, *Administrative Law in Australia* (Lawbook Co, 2007) 34–5.

<sup>161</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 111–16 (McHugh J), 137–43 (Gummow J).

<sup>162</sup> *Australia Act 1986* (Cth) s 11; *Australia Act 1986* (UK) s 11.

<sup>163</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 113–14 (McHugh J), 138 (Gummow J).

it followed that State Parliaments cannot undermine this constitutional scheme. Indeed, continuing this line of reasoning McHugh J (in obiter) envisaged a constraint on a State law purporting to restrict a Supreme Court's supervisory jurisdiction, as this would be 'inconsistent with the principles expressed in s 73 and the integrated system of State and federal courts that covering cl 5 and Ch III envisages.'<sup>164</sup>

In *Kirk*, the joint judgment made a similar argument to McHugh J's, questioning 'the extent to which [a privative] provision [could] be given an operation that immunises the decisions of an inferior court or tribunal from judicial review, yet *remain consistent with the constitutional framework for the Australian judicial system*.'<sup>165</sup> That is, as Professor Zines argues: '[i]nsofar as [the] supervisory ... jurisdiction of State Supreme Courts can be reduced, the position of the High Court at the apex of the State's judicial system is also reduced.'<sup>166</sup> In other words, the national integrated judicial system becomes impaired. In this sense, the effective preservation of the supervisory role of the State Supreme Courts can be characterised as necessary in order to satisfy the constitutional judicial system set-up by Chapter III and reinforced by the *Kable* doctrine.<sup>167</sup>

More importantly, *Kirk* upholds the institutional integrity of Supreme Courts. That is, a common thread that runs through *Kable* and *Kirk* is the constitutional requirement of a standard of integrity which preserves the identity and essential functions of State Supreme Courts. In *Kable*,

<sup>164</sup> Ibid 114 (McHugh J).

<sup>165</sup> *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 579 [93] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added).

<sup>166</sup> Leslie Zines, 'Kirk v Industrial Court (NSW)' (Speech delivered at the Australian Association of Constitutional Law Annual General Meeting, Sydney, 26 November 2010) 12–13.

<sup>167</sup> Cf *South Australia v Totani* (2010) 242 CLR 1, 42–3 [61] (French CJ).

Gummow J stated that the term ‘Supreme Court’ in s 73 is a ‘constitutional expression’ whose meaning ‘is to be determined in the process of construction of the *Constitution*’.<sup>168</sup> Furthermore, it was explained in the previous sub-section that the notion of the institutional integrity of a court (the ‘touchstone’ of the *Kable* doctrine<sup>169</sup>) has come to encapsulate the maintenance of the ‘defining characteristics’ of a Chapter III court. As enunciated by Gummow, Hayne and Crennan JJ in *Forge*:

[the *Kable* doctrine] is one which hinges upon maintenance of the defining characteristics of a ‘court’, or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to ‘institutional integrity’ alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.’<sup>170</sup>

In *Kirk*, the joint judgment viewed the supervisory jurisdiction of a Supreme Court as one its defining characteristics, both in 1900 and as at the present.<sup>171</sup> However, as argued in Section I, it is debatable whether, as a matter of the common law in 1900, a colonial Supreme Court always had the jurisdiction to issue the prerogative writs in order to correct jurisdictional errors. What’s more, it is arguable that the joint judgment in *Kirk* did not need to tie itself to a historical point-in-time definition of a

<sup>168</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 141 (Gummow J); see also 83 (Dawson J), 117 (McHugh J).

<sup>169</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 618 [102] (Gummow J).

<sup>170</sup> *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ) (emphasis added). Interestingly, an earlier section of this paragraph was quoted in *Kirk: Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>171</sup> *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 581 [98]–[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

‘Supreme Court’ in order to ascertain its defining characteristics. That is, according to previous authority it was not necessary to frame the defining characteristics of a Supreme Court to those it held at Federation.

As mentioned above, in *Forge* the focus of the *Kable* doctrine shifted to a consideration of whether the defining characteristics of a ‘court’ were infringed by the impugned legislation. However, in *Forge*, there was some disagreement among the various judgments as to where the defining characteristics of a court were to be found. For example, Gleeson CJ looked at (inter alia) details of comparative law,<sup>172</sup> Kirby J looked at (inter alia) international human rights law and the interpretation of Art 14(1) of the *International Covenant on Civil and Political Rights*<sup>173</sup>,<sup>174</sup> and all the judgments looked at Australian history.<sup>175</sup> However, only Heydon J

<sup>172</sup> *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 62–3 [27]–[30] (Gleeson CJ); cf 81–2 [80] (Gummow, Hayne and Crennan JJ), 120 [187]–[189] (Kirby J), 139–40 [250] (Heydon J).

<sup>173</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976). Art 14(1) provides:

All persons shall be equal before the 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 judgement 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.

<sup>174</sup> *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 125–9 [204]–[214] (Kirby J).

<sup>175</sup> *Ibid* 60 [17]–[18] (Gleeson CJ), 82–3 [83]–[85], 84–5 [88]–[89] (Gummow, Hayne and Crennan JJ), 95–7 [127]–[133] (Kirby J), 141–6 [256]–[267] (Heydon J).

applied an originalist interpretation to give a *fixed* meaning to the term ‘court’ by looking to what the term meant in 1900.<sup>176</sup> By way of contrast, Kirby J took a broader view, stating that ‘matters of judgment and basic constitutional values’ inform this assessment, although these in turn are influenced by considerations of history.<sup>177</sup> In a similar vein, it has been argued that sociological or jurisprudential analyses could be used to arrive at the conclusion of what the defining characteristics of a court (or, more specifically, a Supreme Court) are.<sup>178</sup>

Thus, it is submitted that the joint judgment in *Kirk* unnecessarily restricted itself in its argument that a defining characteristic of a Supreme Court is its supervisory jurisdiction. The point is not that the capacity to engage in supervisory review is not a defining characteristic of a Supreme Court; it is that the joint judgment in *Kirk* did not have to tie itself to a 1900 definition of a colonial Supreme Court in order to arrive at this conclusion.<sup>179</sup> Instead, if a ‘basic constitutional value’ is invoked, it can more persuasively be argued that a defining characteristic of a Supreme Court, being a superior court of unlimited (State) jurisdiction, is its supervisory jurisdiction. That is, if the rule of law—an ‘assumption’ upon which the *Constitution* is interpreted<sup>180</sup>—is invoked, it can be argued that the supervisory jurisdiction of a Supreme Court should be viewed as one of its defining characteristics. This proposition is forwarded on the basis of

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<sup>176</sup> Ibid 141–6 [256]–[267] (Heydon J). Cf *Momcilovic v The Queen* (2011) 280 ALR 221, 349 [437] (Heydon J).

<sup>177</sup> Ibid 122–3 [195] (Kirby J).

<sup>178</sup> Anna Dziedzic, ‘*Forge v Australian Securities and Investments Commission: The Kable Principle and the Constitutional Validity of Acting Judges*’ (2007) 35 *Federal Law Review* 129, 143.

<sup>179</sup> Cf *South Australia v Totani* (2010) 242 CLR 1, 38 [50] (French CJ).

<sup>180</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

exactly the same arguments that were made in Section II, pertaining to how the supervisory jurisdiction of a Supreme Court upholds the rule of law.

Therefore, it is submitted that legislation which would remove from a Supreme Court its supervisory jurisdiction can be characterised as distorting its institutional integrity.<sup>181</sup> That is, such legislation will infringe the *Kable* doctrine and consequently the rule of law.

#### IV CONCLUSION

The *Kirk* decision is potentially wide-reaching and has left many areas open to be explored. For example, what other 'defining characteristics' does a Supreme Court have that are constitutionally protected by s 73(ii)?<sup>182</sup> What is the applicability of *Kirk* in the Territories?<sup>183</sup> These questions will help clarify the exact nature and content of the *Kirk* ratio and its place in wider Chapter III jurisprudence. However, what *Kirk* has affirmed is that the High Court sees judicial review as a constitutional necessity in Australia. This article explained how judicial review and the rule of law are necessarily linked, and thus the significance of *Kirk* in

<sup>181</sup> *Contra* Cameron Ford, 'The Territories and Kirk v Industrial Relations Commission (NSW)' (2011) *Northern Territory Law Journal* 28, 36.

<sup>182</sup> In *South Australia v Totani* (2010) 242 CLR 1, 45 [66] French CJ suggested that 'independence, impartiality, fairness and openness' are 'essential characteristics of the courts of the States.' Other 'defining characteristics' are noted in obiter in *Wainohu v New South Wales* (2011) 243 CLR 181, 19 [44] (French CJ and Kiefel J) as including the application of procedural fairness, adherence as a general rule to the open court principles, and the giving of reasons for a decision. See also Chris Finn, 'Constitutionalising supervisory review at State level: The end of *Hickman*?' (2010) 21 *Public Law Review* 92, 107–8.

<sup>183</sup> See generally *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 163 NTR 17, 52 [136] n 98 (Kelly J); Cameron Ford, 'The Territories and Kirk v Industrial Relations Commission (NSW)' (2011) *Northern Territory Law Journal* 28. The *Kable* doctrine does apply in the Territories: *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.



upholding the rule of law at the State level. Furthermore, this article argued that in Australia the rule of law is manifested through the constitutional arrangement which preserves the integrity of courts and judicial power. That is, at the State level, the rule of law is effectively preserved via the *Kable* doctrine. On this basis, this article argued that *Kirk* should be repositioned as a logical extension of the *Kable* doctrine. This, it was submitted, would outline a more logical basis for the decision and also create greater doctrinal cohesion in Chapter III jurisprudence.

## PARALLELS BETWEEN JUDICIAL ACTIVISM IN BRAZIL AND AUSTRALIA: A CRITICAL APPRAISAL

FÁBIO CONDEIXA<sup>\*</sup>

### Abstract

Judicial activism is a phenomenon that is increasingly growing in importance in both common-law countries like Australia and in civil-law countries like Brazil. This article analyses these legal systems and explains the nature of judicial activism in light of both Roman-Germanic and Anglo-American legal traditions. This is followed by a critical analysis of the techniques of judicial legitimacy as applied by the late legal-political philosopher John Rawls.

### I INTRODUCTION

Judicial activism is a phenomenon that is increasingly growing in importance all over the world, including in common-law countries like Australia and in civil-law countries like Brazil. However, if one takes into account the essentially different nature of these legal systems, could one possibly argue that both Brazil and Australia are facing the same sort of legal-political phenomenon?

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This article provides a comparative analysis of the legal-political concept called judicial activism in light of both Roman-Germanic and Anglo-American legal traditions. A critical appraisal of judicial activism is presented, followed by a discussion of whether or not certain techniques of judicial legitimacy should be applied, which are based on the theoretical assumptions of the late American philosopher John Rawls.

## II DIFFERENCES

Obviously, Australia and Brazil do not share the same legal system. Such as the vast majority of people in the world, Brazil is ruled by a legal system called civil law. Theoretically, the civil law system differs from the common law in the following aspects:

1. Law, in practice, is almost exclusively what is called ‘statutory law’ in common law, that is, the basic formal source of law is the positive law, enacted by the legislative branch or by any administrative branch exercising its regulatory power;
2. Judges are not bound to precedent; and
3. Legal concepts are frequently outlined by academics and renowned jurists.

As one may infer, the work of legal practitioners differ a lot from system to system. I had to deal with the common law on one occasion while working as an attorney at Petrobras, the Brazilian state oil company. I drafted and analysed international contracts ruled by English Law, which at that time appeared to me as lacking in proper law because of my experience with Brazil’s strict regulation of contracts by statutory law. The parties chose to be ruled by English law as it afforded more contractual liberty for them than the Brazilian law.

In Brazil, when a legal practitioner wishes to learn about a specific kind of contract, he or she seeks first to frame it in a contractual category as defined by the Brazilian Civil Code, or any other body of legislation, such as the *Tenancy Act*, the *Corporations Act*, the *Consumer's Protection Code*, etc. In these statutes he or she will find what contracts may or may not provide and, in particular, the type of clauses these contracts are not allowed to contain.

The lawyer resorts to any reputable doctrine in the field to clarify any possible doubt. Statutory provisions are analysed in such a manner as to provide the legal practitioner with elements for a better comprehension of the subject matter. Finally, and only to make sure of its practical validity, he or she also resorts to precedents, though fully aware that they are not binding and are often dissonant. What is more, precedents themselves often follow the steps above.

By contrast, in the common law system statutory provisions seem to me to succumb before the binding nature of precedent. Legal practitioners resort to judicial compendia, conscious as they are that judicial decisions therein shall be followed by the lower courts. Specific textbooks indeed are not as common in civil law jurisdictions as in common law jurisdictions.

This civil law obsession for legislation is grounded in its historical origins. The system stems from the Roman-Germanic medieval law whereby, from its very beginning, all the relevant laws were those enacted by the legislator. The first Roman statute known to us is the Law of the Twelve Tables (*Lex Duodecim Tabularum*), dated 449 BC.

Some others Roman statutes from about the same age were also enacted, including the *Lex Canuleia* (445 BC; which allowed the marriage — *ius connubii* — between patricians and plebeians), the *Leges Licinae Sextiae*

(367 BC; which imposed restrictions on possession of public lands — *ager publicus* — and also made sure that one of the consuls was a plebeian), the *Lex Ogulnia* (300 BC; providing plebeians access to priestly posts), and the *Lex Hortensia* (287 BC; about verdicts of plebeian assemblies — *plebiscita* — now binding to all people).

Almost two centuries after the enactment of the Law of The Twelve Tables, but still during the Roman Republic, the *Lex Aquilia*, a Roman Law of Torts, was enacted in 286 BC. And the great compound of Roman law was positivised only in the sixth century AD by the *Corpus Iuris Civilis* (Body of Civil-Law), issued by order of the Eastern Roman Emperor Justinian I. And yet, after the debacle of the Western Roman Empire, around the fifth century AD, barbarian forms of law mingled with the Roman tradition.<sup>1</sup>

In the Modern Era, when rationalism assaulted the hearts and minds of people, codification was expected to generate legal rules that would predict every human situation. This trend began around the eighteenth century and reached its apex during the Napoleonic period. Accordingly, the French Civil Code of 1804, frequently referred to as ‘Napoleonic Code’, explicitly prohibited judges from creating general norms, thus restraining the judicial ruling only to positive law related to any specific case brought to the attention of the courts. Thus it declared:

Art 5. *Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.* (The judges are forbidden to pronounce, by means of general and legislative determination, on the cases submitted to them.

Art 1351. *L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même ; que la*

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<sup>1</sup> HOLMES, Oliver Wendell. The Common-law. PDF Books.

*demande soit fondée sur la même cause ; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.* (The authority of res judicata has no place, except with respect to that which formed the object of the judgment. It is necessary that the case involved should be the same; that the demand should be founded on the same cause; that the demand should be between the same parties, and made by and against them in the same capacity.)

This in France is called '*arrêt de règlement*' (regulation halt). In Brazil this principle has been more and more mitigated, since the judiciary is turning towards increased activism. I will comment on this shortly. In brief, every judgment shall be grounded in a positive command of the legislator in the civil law system. In Brazil, judgments grounded in equity are permitted only in special instances as prescribed by the positive law. Let us see then what the Brazilian Civil Procedural Code provides:

Art 127. *O juiz só decidirá por equidade nos casos previstos em lei.* (The judge shall apply equity only in the cases allowed by legislation).

Besides, magistrates can only resource to analogy, usages and general principles of law when there is a real or perceived 'gap' in the positive law. This is explicitly stated by the *Introduction to Brazilian Interpretation Act (1942)* which declares:

Art 4. *Quando a lei for omissa, o juiz decidirá o caso de acordo com a analogia, os costumes e os princípios gerais de direito.* (When the legislation is silent, the judge shall decide according to analogy, usages and general principles of law).

In this case the civil law system is remarkably self-deceptive. As sagaciously explained by the Austrian-born jurist Hans Kelsen, one of the greatest civil law jurists ever, there are actually no gaps in the law. According to him:

Since a legal order is always applicable and is actually applied even when the court must dismiss the action on the grounds that the legal order does not contain a general rule imposing upon the defendant the obligation asserted by the plaintiff, so therefore the supposition, on which the cited rule is based, is a fiction. The fiction consists in this: a lack, based on a subjective, moral-political value judgment, of a certain legal norm within a legal order is presented as the impossibility of its application.<sup>2</sup>

Although this argument may, technically speaking, be regarded as self-deceptive, it actually contains some practical applications as its goal is to limit the temptation of judges to expand their law-making power, by telling them what they are not supposed to do, when, as a matter of fact, that is precisely what they are doing. Regarding existing legal gaps in both systems, the Italian Professor Pierluigi Chiassoni commented:

On the one hand, Civil-law theorists look at gaps as watch-repairers would. They think they have to deal with a clumsy conceptual machinery laid down by tradition and embodied in lawyers' common sense. They think their job is taking it to pieces, polishing it, and giving it back to practitioners, in a glittering, improved, shape, for everyday use. On the other hand, Common-law theorists cast on gaps the highbrow look of legal philosophy. From their perspective, gaps are just one issue of detail, among others, pertaining to what they perceive as the real, big, theoretical (and practical) issues at stake: namely, the inter-related issues concerning judicial discretion, the existence of right answers to legal problems, and law's determinacy (or indeterminacy).<sup>3</sup>

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<sup>2</sup> Hans Kelsen *The Pure Theory of Law* (University of California Press, first published 1967, 2005 ed) 247.

<sup>3</sup> Pierluigi Chiassoni, 'A Tale from Two Traditions: Civil-law, Common-law, and Legal Gaps' (Paper presented at the American-Italian Seminar on Relations between the *Ius Commune* and English Law, Facoltà di Giurisprudenza, Genova, 18-19 September 2006).

### III CONVERGENCE

Now that we have seen the conceptual differences between the civil law and the common law systems, it appears to me that many of those assumptions above mentioned are no longer entirely accurate. The civil law system has changed remarkably, drawing this system nearer and nearer to the common law system. Of course, the same could be said about the common law. In other terms, these two legal systems are converging, with one embodying features of another as if the small dots of the Yin Yang were spreading out onto their opposite's fields.

Let us take a look into what is taking place in the area of criminal law in Australia and England. Statutory offences are increasingly replacing common law offences. The proliferation of statutes in Anglo-American countries has inexorably softened the judge-made character of the system.

By contrast, in countries with a civil law legal system, the role of precedents is getting more and more remarkable. There are several reasons for this. Firstly, it is important to consider the increasingly growing number of cases brought before the courts. The more numerous the cases are, the bigger the chances of stumbling over a new situation that is not anticipated by the legislation. In civil law countries, judges are expected to resolve disputes in a reasonable way. Sometimes the mere reliance on specific statutory provision is not enough for the court to reach a minimally reasonable solution.

As long as cases of this nature become more and more recurrent, superior courts will inevitably bring about legal decisions that are often voluntarily followed by the inferior courts. But even if first-level judges do not follow them, these judges' sentences may be overruled by appeal, so that deciding differently becomes useless. Besides, recent changes in the procedural



legislation have allowed Brazil's Supreme Court to bind inferior courts in certain circumstances.

Now let us get into the very core of this presentation.

#### IV JUDICIAL ACTIVISM

Judicial activism is a phenomenon that is increasingly growing in importance all over the world, both in common law countries and in civil law countries. It is a position taken by magistrates that stems from the substantive due process of law theory adopted by the US Supreme Court since the late 1930s.<sup>4</sup> Accordingly, there are some acts against life, liberty and property that are beyond the reach of governmental regulation, no matter whether rules for their enactment were observed or not.

Justice Dyson Heydon of the High Court of Australia describes judicial activism as follows:

Using judicial power for a purpose other than that for which it was granted, namely doing justice according to law in the particular case. It means serving some function other than what is necessary for the decision of the particular dispute between the parties. Often the illegitimate function is the furthering of some political, moral or social program: the law is seen not as the touchstone by which the case in hand is to be decided, but as a possible starting point or catalyst for developing a new system to solve a range of other cases. Even more commonly the function is a discursive and indecisive meander through various fields of learning for its own sake.<sup>5</sup>

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<sup>4</sup> Robert M Cover, 'The Origins of Judicial Activism in the Protection of Minorities' (1982) 91 *Yale Law Journal* 1287.

<sup>5</sup> Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47 *Quadrant* 9.

Curiously, the American economist Thomas Sowell, an African-American conservative, reminds us that judicial activism has served in the past to legalise gross violations of human rights. He cites the notorious case of *Dred Scott v Sandford*<sup>6</sup> to state the following:

It is at least equally important to recognize that neither logic nor history inevitably ties the Issue of judicial activism to a particular political or social creed ... When Chief Justice Taney said, in the *Dred Scott* case, that a black man ‘had no rights which the white man was bound to respect’, he was ruling on the basis of substantive values, not process—and so must be classed with the judicial activists, however much modern liberals might resent the company.<sup>7</sup>

Although this sort of exercise in judicial activism would be unthinkable today, the transformation of the due process clause from a procedural to a substantive requirement was an obvious instance of judicial activism. According to Robert Bork, the concept of substantive due process developed by Justice Taney in *Dred Scott*, ‘has been used countless times since by judges who want to write their personal beliefs into a document that ... do not contain those beliefs’.<sup>8</sup> Naturally, an activist – or substantive value-based – judicial decision is not tied to any particular ideological perspective but it can serve many different political outcomes.

In the same way, Jean-Christophe Agnew stated that the US Supreme Court, during the ‘Lochner Era’, in the beginning of the twentieth century,

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<sup>6</sup> 90 US (19 Howard) 393 (1856).

<sup>7</sup> Thomas Sowell, *Judicial Activism Reconsidered: Essays in Public Policy No 13* (Hoover Institution, 1989) 26-7.

<sup>8</sup> Robert Bork, *The Tempting of America* (New York/NY: Touchstone, 1990), 31.

‘played a judicially activist but a politically conservative role’, striking down state statutes on workers’ behalf.<sup>9</sup>

## V CRITICS

To put in another way, judicial activism today is a self-conscious school of thought whose connections with a certain ideological *Weltanschauung* is rather obvious. The so-called ‘progressists’, are broadly identified as being leftists or (in the United States political language) as liberals who believe that their ideal of justice must always prevail and that society should not dress a straitjacket in the name of their long-dead ancestors’ ideals. This argument has been convincingly refuted by Thomas Sowell, who reminds us that what is really at stake is not so much whether the change should be accepted or not, but *who* is allowed to implement it. As Sowell puts it, ‘the more fundamental question is not what to decide but who is to decide’.<sup>10</sup>

Although the arguments provided by enthusiasts of judicial activists are altogether remarkably weak, they nonetheless raise some practical problems that should not be disregarded. In fact, there are some matters that demand undisputed changes but because of some practical obstacles regarding the nature of the legislative process, they do not occur in a timely manner. That is why I have tried to outline a sketch of methodological criteria to deal with it. This is my modest attempt to rescue what is reasonable in terms of judicial activism, so that we can put away the rest and exorcise all sores carried with it.

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<sup>9</sup> Jean-Christophe Agnew and Roy Rosenzweig, *A Companion to Post-1945 America* (Wiley, 2006) 386.

<sup>10</sup> Sowell, above n 6, 16.

Judicial activism is usually used as an antonym for judicial restraint. Supporters thereof use to argue that a legalist interpretation is, besides impossible, inconvenient to social interests. They believe that some legal changes cannot wait for the legislative process, which sometimes, according to them, do not meet people's aspirations in a timely and satisfactory manner.

This argument ignores – or pretends to ignore – that one of the basic postulates of politics is that *not to take a decision to change is actually to take a decision to maintain*. They speak as if maintenance were not a legitimate option, or even a valid option. Disregarding malicious intentions, it is obvious that this view is grounded in an ideology of permanent progress, so common in our current Western societies. On this basis, human history would be in a constant path towards enlightenment. Taking a look back in history, we must conclude that there are no reasonable motives for us to believe in it. There were plenty of changes that have caused a great deal of pain and suffering to peoples and that are deemed quite serious mistakes by future generations.

Judicial activism overrides the democratic debate that takes place in the proper spheres of political deliberation, taking the decision by storm. It is manifest that this attitude circumvents the democratic principle of majority rule, extrapolating the counter-majoritarian (constitutional) right of veto, which is inherent in the judicial branch. In countries ruled by the Roman-Germanic system, judicial activism becomes even more astonishing precisely because judges are explicitly forbidden by the law to create abstract and general norms.

That way of judging may also create problems concerning public budget, as mentioned by Justice Heydon.<sup>11</sup> He cites two examples of that in Australia: *Brodie v Singleton Shire Council*,<sup>12</sup> related to the liability of councils for defects in roads and footpaths, and *Dietrich v R*,<sup>13</sup> permitting the criminal trial of a person accused of a serious offence to be stayed if that person could not obtain legal representation.

The Brazilian Government endures similar kinds of challenges. Perhaps the most notorious examples of judicial activism are the decisions ordering the government, whether at federal, state or municipal level, to pay for health treatments, even abroad if necessary, and also for the paying of any kind of medicine no matter its cost. Undoubtedly, such decisions undermine any budget planning. On the other hand, article 196 of the *Brazilian Constitution* clearly provides that healthcare must be guaranteed for every citizen by the government. That provision was adopted by virtually all Brazilian courts, but now the matter is pending a decision of the *Supremo Tribunal Federal* (Brazil's Supreme Court), which will probably decide in the same way.

But the most controversial instance of judicial activism has occurred during a recent decision by the *Supremo Tribunal Federal* involving a case related to family law. The court legalised same-sex civil unions explicitly violating the *Brazilian Constitution*. In art 226, paragraph 3, the *Brazilian Constitution* states:

Para efeito da proteção do Estado, é reconhecida a união estável entre o homem e a mulher como entidade familiar, devendo a lei facilitar sua

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<sup>11</sup> Heydon, above n 5.

<sup>12</sup> (2001) 206 CLR 215.

<sup>13</sup> (1992) 177 CLR 292.

conversão em casamento. (For the purpose of governmental protection, it is recognised the civil union (only) between a man and a woman as a family entity, thus having the legislation to facilitate its conversion into legal marriage.)

So it is quite clear in this case that the *Supremo Tribunal* has actually legislated on matters of family law, overruling a constitutional provision that was not altered by means of amendment. That decision was actually grounded in the defeated theory of the German jurist Otto Bachof about unconstitutional constitutional norm, or the supposed unconstitutionality of certain constitutional norms.<sup>14</sup> Bachof advocated that there was a set of underlying values beneath the German Constitution (*Grundgesetz*) text, and that some less important aspects or provisions of the constitution could eventually conflict with them. In that case, the former should prevail over the latter. The German Federal Constitutional Court (*Bundesverfassungsgericht*) has emphatically rejected this kind of theory and assured the integrity of the German Constitution as well as the legitimacy of all its formal provisions.<sup>15</sup>

As for the Brazilian situation, eminent local jurists have emphatically remarked that ‘there are hermeneutic limits to keep the judiciary from turning itself into legislator (*há limites hermenêuticos para que o Judiciário se transforme em legislador*)’.<sup>16</sup> It is certain that those limits were crossed in the same-sex civil unions case.

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<sup>14</sup> K L, ‘Review of Otto Bachof, *Verfassungswidrige Verfassungsnormen?*’ (1953) 11 *Cambridge Law Journal* 495.

<sup>15</sup> Lênio Streck. Rafael Tomaz de Oliveira and Vicente de Paulo Barretto, *Normas Constitucionais Inconstitucionais?* *Revista Consultor Jurídico*, July 29th, 2009.

<sup>16</sup> *Ibid.*

## VI DIFFERENT KINDS OF JUDICIAL ACTIVISM WITHIN THE SAME LEGAL SYSTEM

I believe judicial activism is not definite enough for a theoretical approach, or to put it in Eric Voegelin's terms, there is not enough 'critical clarification'.<sup>17</sup> So much in common law as in civil law, different judicial measures are equally called judicial activism. For instance: when the judiciary imposes liability to city councils for damages caused by defects in roads, it is said to be activist. The same was said when the US Supreme Court overturned California's constitutional amendment to ban same-sex marriage,<sup>18</sup> which is completely different from the former case.

In the first situation, judges are applying general clauses of civil liability. It is not properly a usurpation of or an interference over the executive branch. The judiciary is supposed, whether in civil law as in common law, to enforce the law even against the state. What is criticised in decisions of this kind is that they promote unexpected changes that derail budget planning, and that is true, although I would not feel comfortable to say that they are completely inappropriate or deprived of reason. In other terms, in *executory judicial activism*, what is at stake is not the separation of powers, but the legal certainty, which is one of the bases of the rule of law as well.

In the Brazilian case of health treatments, we have seen that there is constitutional basis for the decisions of that kind. In the Australian case, I am not able to endorse or criticise decisions-makers' motives, but I guess that they are at least acceptable in light of some general liability principles,

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<sup>17</sup> Eric Voegelin, *The New Science of Politics: An Introduction* (University of Chicago Press, 1987).

<sup>18</sup> *Perry v Brown*, 671 F 3d 1052 (9<sup>th</sup> Cir, 2012).

specially by culpable negligence (*culpa in omittendo*, *in negligendo* or *in non faciendo*).

Those cases of alleged interference in administrative affairs are what I call *executory judicial activism*, in counter position to another species I am going to talk about right after: the *legislating judicial activism*. The *Perry v Brown*<sup>19</sup> case and the Brazilian Supreme Court's ruling on same-sex unions are good examples thereof.

I think this second type of judicial activism is more perilous and more insidious. In those cases, the judiciary is crossing the line, exceeding its powers, because it is not enforcing the law, but actually *making* the law. To some extent, it is expected from judges in the common law tradition, but it would be totally strange in a civil law context, if it was not for its approximation to the common law.

## VII SUBSTANTIAL DIFFERENCE BETWEEN JUDICIAL ACTIVISM IN AUSTRALIA AND IN BRAZIL

But in what aspect do both forms of activism differ? Aristotle stated that the substance is composed by matter and form. Matter, a chaotic aspect, is what something is made of, whereas form is the thing's logical-theological scheme.<sup>20</sup> If judicial activism in common law systems must, at least nominally, involve forms and procedures, perhaps we may be allowed to say that the difference lies in the form rather than the matter. Concerning the matter, I believe that it is the same in both activisms, and the identity point should reside therein. What would that matter be? I suppose it lies in its political intent.

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<sup>19</sup> 671 F 3d 1052 (9<sup>th</sup> Cir, 2012)

<sup>20</sup> Aristotle, *Metaphysics*.



Is it mere coincidence that supporters of judicial activism in both traditions have advocated the same substantive political agenda, namely same-sex marriage, abortion, and minority rights? I am not able to find too many conservatives advocating judicial activism, not even to support the causes that are regarded as very important for them. On the contrary, conservatives are those who have stood up against judicial activism as much in countries ruled by civil law as in those ruled by common law.

I suppose that only the *executory judicial activism* is quite the same phenomenon in Australia and in Brazil. In both cases, it is based on the law of liabilities, whether specific or general. However it may cause political or administrative trouble, it is somehow the judiciary's role, in Brazil and in Australia. Maybe the only thing needed is some parsimony, for practical reasons.

But what to say about the *legislating judicial activism*? It could be said that ruling general situations is also an activity of the judiciary in the common law, so much as enforcing the law, thus this kind of activism is deemed legitimate according to the common law principles. It only raises complaints when judges rule on controversial issues, deciding autocratically what is supposed to be decided according to democratic principles, that is, by the majority's (or its representatives') suffrage. I guess nobody here in Australia would rise against or even call judicial activism precedents that formed the Australian tort law. Some may disagree with courts' wits, but virtually nobody denies their right to do so. Thus, if courts are allowed to rule on tort law, why are they not equally allowed to rule on abortion, for instance? That is a question a civil law jurist might ask.

From my point of view, as suggested above, in the common law system there is a tacit agreement by which some strictly juridical or technical subjects are left to the courts' discretion, whereas controversial or political-biased issues are decided by the people, according to democratic principles. That appears to me a wise formula, except for the fact that the very judiciary is the one which is going to decide what is going to be ruled by itself. This has an inconvenience of a judge judging in his own cause, a situation that John Locke used to advise against.

Anyway, if there are no express limits or definite criteria to determine what judges can rule, then this also means that they are not technically exceeding their powers. Unwritten traditions such as the common law exhibit this kind of fragility.

On the other hand, in the civil law, as said elsewhere, judges are not supposed to rule on general situations, and it is expressly written in legal documents. Judges are altogether bound to concrete cases submitted to them and their wits are not binding on other judges. Thus, the legislating judicial activism subverts the whole system in the civil law. It is not about pushing a vague line in a tacit gentlemen's agreement. It is about actual usurpation of power, no matter how many moral, political, ideological alleged arguments one may posit on its behalf. So, what would be called 'activism' in common law, in the legislating sense, could perfectly be called 'abusism' in civil law.

The great paradox is that whereas the application of judicial activism in civil law countries have approximated them to the common law, the application of judicial activism in common law countries is said to substantially depart it from their own legal tradition! One may therefore conclude that they cannot be the same phenomenon. How can something

steer others in one direction and against it at the same time? Identity is possible only at one or some aspects.

## VIII ACTING LEGITIMATELY

Democracy entails submission to the majority's will. And, except for some eccentric personalities, this regime is accepted and desired both in common law and in civil law countries. Thus, the adoption and the maintenance thereof is an undisputed point.

The legitimacy of a legal system and its footstools lies on their accordance to democratic principles. Any kind of judicial review will face, in some degree, the counter-majoritarian dilemma, but some kinds thereof are deemed acceptable in light of democratic principles, others are not. Modern democracies learnt to live with it, because it can usually solve problems brought by flaws of the representative system.

Constitutionalism also taught us that there is a set of basic rights – civil rights in Australia; fundamental guarantees or rights in Brazil – that must remain untouchable, no matter what the majority says, directly or by its representatives. That marks Hans Kelsen's historical victory over Carl Schmitt.

Thus, democracy, such as it is understood today, is much more than the more-than-a-half simple formula. One might argue that this way too complicated formula is an artificial mental apparatus, but would it not apply to the simple model? As widely demonstrated by the French Philosopher Bertrand de Jouvenel,<sup>21</sup> both are far-fetched, but the former is more sophisticated.

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<sup>21</sup> Bertrand de Jouvenel, *Du Pouvoir: Histoire Naturelle de Sa Croissance* (Hachette, 1972).

Furthermore, those forms of majority restraint are not completely contradictory with the majority's will. If one observes carefully, he or she will find that any individual has several layers of opinions and desires which frequently contradict each other. It can be said about individuals, let alone collectivities.

Concerning *executory judicial activism*, so much in common law and as in civil law countries, recommendations and suggestions must be addressed to the executive or legislative branch – the one responsible for the government expenditure. If some liability is foreseeable for any governmental action or omission, this must be taken into account during budget planning. Of course that judges should seek to ease so much as possible the disastrous effects on public finances, protracting terms or permitting alternatives, but the individual's rights cannot be dismissed. We are not at the *fait du prince* era anymore, when the state was not chargeable for its acts.

On the other hand, if courts convert the state into a universal insurer, they will be changing tort law significantly. Thus, we are not before the *executory judicial activism* anymore, but before a case of *legislating judicial activism*.

Concerning these methods of judicial activism, I understand that in the common law the judiciary may have the power to improve the law. By comparison, in the civil law system a general ruling or an innovation of the law by the judiciary to adapt the law to the changing needs of society may be deemed a violation of the doctrine of separation of powers.

Despite those differences, *legislating judicial activism* should be confined to consensual changes, so much in civil law as in common law countries. In both systems, the virtual consensus – a perfect consensus is impossible – repels the possibility of abuse of the judiciary's counter-majoritarian

prerogative. So, if there is no way for the subject to be decided otherwise in the proper instance, there will be no risk of circumventing or violating the democratic principle. It does not matter if procedural rules were not respected because their purpose was achieved.

The expectation of the majority is not enough to legitimise judicial activism. It would make no sense for a judge to mentally simulate a plebiscite. On the other hand, the honestly presumed consensus entails the certainty that majority rule is not being damaged or violated. This attitude meets what the American philosopher John Rawls called ‘overlapping consensus’<sup>22</sup>.

Rawls tried to reach some basic supra-moral grounds for democracy’s exercise. I believe this pursuit of Kantian universal standards is done in vain, if our goal is to achieve an objective criterion to identify reality, which may be rather useful if taken merely as a practical technique. In other words, Kantian – and, accordingly, Rawlsian – methods may be quite hazardous or innocuous if taken in the dimension expected by their formulators. But if we manage to narrow their scope, such methods can actually be good instruments to deal with significant matters of practical justice.

It is important to be clear, however, that what meets the Rawlsian ‘overlapping consensus’ is the previous decision to only submit to judicial activism the matters that are virtually consensual, not every concrete decision. The overlapping consensus would take place only to provide room to questions of unquestionable social consent.

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<sup>22</sup> John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

As for the solution for legal gaps, the method exposed here would be meta-juridical in nature. It would nonetheless be an inoffensive juridical concession to a necessarily practical convenience. Thus, urgent aspirations for legal change would be quenched without putting at risk the very integrity of the entire judiciary.

That attitude is what I call *turning the overlapping consensus into an actual consensus*. In other terms, we put aside some procedural rules on behalf of their very goal, which consists of maintaining and strengthening the democratic principle. On the other hand, if the change is controversial, the judiciary must abstain to implement it and leave the door opened for the people to decide.

Let us take a look at the *Perry v Brown*<sup>23</sup> case. When the US Supreme Court held that the Californian constitutional amendment, passed by ballot, was unconstitutional before the US Federal Constitution, it denied to the entire American people the right to decide differently. This understanding is based on the constitutional value of liberty, but it overlooks the equally important value of popular sovereignty. Which one must prevail? It is not up to me to arbitrate which one is more important, but it seems clear that referring to same-sex marriage as an expression of liberty is a verbal contortion, even out of an originalist interpretation. This sort of judicial manipulation can be quite an easy exercise. Every claim can be fit in a constitutional substantive value. One could claim for instance the right of walking naked on the street grounded in the right of liberty, which would contravene *Criminal Code* (WA) s 203.

Basing decisions on a virtual consensus, we can avoid those silly and tricky sophisms and dodge from interpretation discussions because it was as if the

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<sup>23</sup> 671 F 3d 1052 (9<sup>th</sup> Cir, 2012).

majority decided. It is not about construing legal texts anymore: it is about choosing. Judges are not allowed to choose in our names, but if a virtual consensus does exist, what would be the harm?

## IX CONCLUSION

It seems to me that a judicial activist ruling, to be deemed lawful in light of the principle of separation of powers, and legitimate in light of the democratic system, ought to be virtually consensual. Apart from the losing party's opinion, such ruling should therefore substantiate a decision that must be accepted by virtually the community as whole. In that situation, there would be no abuse of the court's counter-majority (and constitutional) prerogative. The idea is difficult to define but easy to apply, and somehow tautological.

Judicial activism reaches for the limbo where the boundaries separating the branches of power are evanescent. And sometimes it tries to stretch them unlawfully. Since judicial activists hold a different worldview as in relation to supporters of judicial restraint, some democratic values or principles may be put aside on behalf of other values that are more estimated by the former group. That posture does not fit in the 'overlapping consensus' concept brought up by the American philosopher John Rawls, without which democracy may be not possible. Accordingly, if we want to preserve democracy, we must first abandon values that are based on democracy's fragilities and then support what is grounded in its intrinsic virtues. In order to attain that, judicial review must be used parsimoniously: it is the remedy for the sores of democracy that can kill the patient if excessively administered.

To conclude, the judiciary is the branch that traditionally must restrain its own power on behalf of the others because it always has the last word in

matters of legal interpretation and adjudication. Judges need therefore to be extremely scrupulous. Otherwise, the entire institutional building is in jeopardy, risking being demolished by a still unknown but presumed spooky monster: the rule of judges rather than the rule of law or, in other words, the tyranny of the judiciary. And who on earth would benefit from it? Certainly the members of the small judicial elite and all those who make up the judges' minds.



## **THE IDEA OF EVOLUTION AND ITS IMPACT ON WESTERN POLITICAL AND LEGAL THEORY IN ANTIQUITY**

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### **Abstract**

The term ‘evolution’ is defined as a process of change and development over time, typically tending towards greater complexity (although not necessarily greater improvement) and one that is unidirectional and non-cyclical. Nevertheless, the idea of evolution as conceived throughout western history has not always comported with this definition, with evolution often being understood teleologically as destined for some clear end, be it total perfection or total destruction, depending on one’s worldview or wishes. Heraclitus’ notion of constant change or ‘flux’, although a necessary, but not sufficient, condition for the definition of evolution planted the seed of the idea of evolution in western thought. Plato, like Heraclitus, saw all social change as degeneration and decay from a past Golden Age, but, unlike Heraclitus, did not view such change as merely governed by fate, but rather capable of being controlled and ultimately arrested once the ideal state, ‘the Republic’, was realised. Apart from his Republic being a template for totalitarians attracted to distorted (often racist) ideas of evolution, Plato’s greatest influence on the

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western idea of evolution was, arguably, the desire to arrest it, primarily to recapture a privileged past, thus making him the ‘Godfather of western conservative elitism’. Like Plato’s Republic, Aristotle’s final cause doctrine has also influenced totalitarians and their teleological ideas of evolution, while the Epicureans, Stoics, and Sceptics of Ancient Greece have variously influenced social, political and legal evolutionary thought in the attitudes they espouse rather than any actual ideas (although Epicurus could be credited with one of the world’s first social evolution theories). Finally, in ancient Rome, the first real western jurisprudence emerged and apart from some prototype social contract theories, the idea of evolution was not much in evidence in this era, although of course the Roman legal system itself was in fact a striking example of an evolving legal system that has since inspired and formed the basis of western jurisprudence.

## I THE MEANING OF EVOLUTION

The *Oxford Dictionary* defines evolution as:

1. gradual development esp. from a simple to a more complex form. 2. *Biol* a process by which species develop from earlier forms, as an explanation of their origins. 3. the appearance or presentation of events etc. in due succession (*the evolution of the plot*); 4. a change in the disposition of troops or ships. 5. the giving off or evolving of gas, heat, etc. 6. an opening out. 7. the unfolding of a curve. 8. *Math.* dated the extraction of a root from any given power (cf INVOLUTION).<sup>1</sup>

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<sup>1</sup> Bruce Moore, *Australian Concise Oxford Dictionary* (Oxford University Press, 5<sup>th</sup> ed, 2009) 486.

The *Webster WordNet Dictionary* defines evolution as:

1. a process in which something passes by degrees to a different stage (especially a more advanced or more mature stage)...
2. (biology) the sequence of events involved in the evolutionary development of a species or taxonomic group of organisms.<sup>2</sup>

The *Australian Macquarie Dictionary* evolution is:

1. any process of formation or growth; development.
2. *Biol.* the continuous genetic adaptation of organisms or species to the environment.<sup>3</sup>

*Chambers Twenty First Century Dictionary* defines evolution as:

1. the process of evolving.
  2. a gradual development.
  3. *biol* the cumulative changes in the characteristics of living organisms or populations of organisms from generation to generation, resulting in the development of new types of organism over long periods of time.
  4. *chem* the giving off of a gas.
- Evolutionary *adj* relating to, or as a part of, evolution. Evolutionism **noun**, *anthropol*, *biol* the theory of evolution. evolutionist *noun* a person who believes in the theory of evolution. ETYMOLOGY: 17c: from Latin *evolutio* unrolling.

It can be seen from the above definitions contained in some of the world's leading English dictionaries that the term 'evolution' has itself evolved from its 17<sup>th</sup> Century meaning, when the term first entered the English lexicon. These definitions also show that early uses of the term 'evolution' were more directed to specific contexts such as warfare (ie changes in the disposition of ships or troops) and maths (ie extraction of a root from any given power). Although initially only intended to function in a biological context, the Darwinian notion of evolution has all but colonised the

<sup>2</sup> Princeton University, *Definition of Evolution* (2003) WordNet <<http://www.webster-dictionary.org/definition/evolution>>.

<sup>3</sup> *Macquarie Little Dictionary 2002* (MacQuarie Library, 2002) 183.

meaning of the term in public consciousness today in a number of contexts (social, political and economic as well as biological). However, it is submitted that nonetheless there is still an *essential* meaning of the term ‘evolution’ that has withstood the test of time which is not imprisoned in any specific context; namely: *ongoing change and development over time*.

Furthermore, from the above dictionary definitions, it might be cautiously concluded that a *narrative* or *history* of the thing undergoing the change is implied – that is, from one particular state at a certain point in time to another more complex or developed state at a later point in time. It should be noted, however, that it is not a necessary condition of this new state that it be superior to, or more improved than, the former state. Indeed, the essence of ‘evolution’ as a process of change and development over time is a value-free concept, and this is significant when one looks at the commonly misconceived idea that ‘evolved’ means ‘better’, ‘improved’ or ‘progress’ or is in some way ‘purposeful’ (ie what might be called the *teleological fallacy* associated with the term ‘evolution’). Moreover, it is probably reasonable to assume that evolution means something that is more or less *uni-directional* and non-cyclical, so that once something *has* evolved, there is no completely returning to its former state – and this is also significant when examining evolution as an idea in society, as will be discussed below in regards to Plato’s ideal *Republic* based on the past Dorian States of the ‘Golden Age’.

Evolution is thus conceived in this paper as a linear process, which is to say evolution is *lineal*. Evolution might be *unilineal* (as when a plant breaks the soil and grows upwards, for example) or *multilineal* (as when a plant stalk sprouts lateral shoots or branches which grow outwards in different directions). Evolution is usually considered to be in a *forward* linear direction (ie towards a more complex state) but it could also be in a *reverse*

linear direction towards a more degenerated state and thus assume the label ‘*devolution*’ – a limited case of evolution. Even though an argument could be made for a process that is *cyclical* still being, in a sense, evolution (as something might move in one linear direction and then return in the same, albeit reversed, linear direction), for the purpose of this paper, ideas that are expressed in cyclical terms are not considered to be ‘evolutionary’. This is because evolution in essence, as noted above, usually expresses the idea of irreversible or irredeemable change in the sense that the thing changed does not return to the place from whence it came (ie the core idea of cyclical thinking). Linear thinking has been the predominant mode of thought in the West. Notwithstanding eastern influences and some cyclical thinking going back as far as Pythagorean mystic notions of reincarnation discussed later in this paper, western thinking has been resolutely linear with its *grand narratives* such as the celebrated *Big Bang theory* that demands not only a beginning but also a definite end (ie cosmos ‘heat death’ brought on by entropy) and Christian eschatology with man’s first appearance and awakening in the idyllic Garden of Eden *in the beginning* (or at least shortly thereafter) and his last hurrah and mortal extinguishment in the much less inviting Armageddon in the *end of days*.

Nevertheless, whatever one considers to be the correct linguistic or essential meaning of the term ‘evolution’, it is important, when considering evolution’s role in the history of ideas, not to dismiss misconceptions surrounding the term ‘evolution’ such as the teleological fallacy noted above or the misconception of allowing evolution to be wholly colonised by Darwinism and its concomitant concepts of adaptation, blind chance and competition for survival; indeed it is these very misconceptions which have had the greatest influence on the deployment of the idea of evolution in

society and provide the most interesting cases in the study of the history of this idea in western thought.

## II THE IDEA OF EVOLUTION IN ANCIENT GREECE: HERACLITUS AND PLATO

The idea of evolution makes its first appearance in western thought in Ancient Greece during the time of the pre-Socratic philosophers who speculated about the world they lived in and the nature of the substances and processes that comprised it and directed it. Of course, one of these processes was *change*.

### A *Heraclitus*

Heraclitus (BC 544–483),<sup>4</sup> according to Karl Popper was ‘the philosopher who discovered the idea of *change*’.<sup>5</sup> Popper explains:

Down to this time, the Greek philosophers, influenced by oriental ideas, had viewed the world as a huge edifice of which the material things were the building material... They considered philosophy, or physics (the two were indistinguishable for a long time), as the investigation of ‘nature’, ie of the original material out of which this edifice, the world, had been built. As far as any *processes* were considered, they thought of either as going on within the edifice, or else as constructing or maintaining it, disturbing or restoring the stability of the balance of a structure which was considered to be fundamentally static. These were cyclic processes... This very natural approach, natural even to many of us today, was superseded by the genius of Heraclitus. The view he introduced was that there was no such edifice, no

<sup>4</sup> Bernard Grun, *The Timetables of History: A Horizontal Linkage of People and Events* (Simon & Schuster/Touchstone, 3<sup>rd</sup> ed, 1991) 12.

<sup>5</sup> Karl Popper, *The Open Society and Its Enemies Volume One: The Spell of Plato* (Routledge Classics, 2003) `8.

stable structure, no cosmos. 'The cosmos, at best, is like a rubbish heap, scattered at random' is one of his sayings. He visualised the world not as an edifice, but rather as one colossal process; not as the sum-total of all *things*, but rather as the totality of all events, or changes, or *facts*. 'Everything is in flux and nothing is at rest' is the motto of his philosophy.<sup>6</sup>

Indeed, the truly novel approach of Heraclitus's notion of change was to break with the idea of a state of a permanent status quo, or one that is returned to after a temporary change (ie cyclical change), that had pre-occupied other pre-Socratic Greek philosophers.

Heraclitus' notion of change was therefore uni-directional, non-cyclical, and arguably prefigured two very enduring ideas in the history of thought: first, from the 17<sup>th</sup> Century onwards, the scientific idea of entropy that is Newton's *Second Law of Thermodynamics*, and, second, more relevant here and more proximate to Heraclitus' time, the notion of disintegration and decay *in society*, which (when added to the moral sphere later by Platonic notions of a 'fall' from a Golden Age as will be discussed) was to influence later political, religious and philosophical thought not only in ancient Greece, but in the Middle Ages and even through to the present day (for example, the analogous notions of a 'fall' from grace in Christianity).

Heraclitus hailed from a royal family of priest kings of Ephesus in Ionia, and, while resigning his claims to royal ascendancy to his brother, he continued to support the aristocrats' cause against the rising tide of social revolutionary (democratic) forces under Persian rule<sup>7</sup>. However, as Popper notes:

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid 9.

Heraclitus' fight for the ancient laws of his city was in vain, and the transitoriness of all things impressed itself strongly upon him. His theory of change give expression to this feeling: 'Everything is in flux'....'You cannot step twice into the same river'. Disillusioned, he argued against the belief that the existing social order would remain forever...<sup>8</sup>

Hence, Heraclitus's notion of change in the sense of degeneration and decay can be seen as a lamentation of a new social order replacing an old one from his conservative perspective. However, his notion of change (at least when considered in contexts other than a purely social one) can equally be a positive one – Heraclitus's point is simply that things do not stay the same.

Does *anything* stay the same for Heraclitus? One exception is the 'living fire':

This world, which is the same for all, no one of gods or men has made; but it was ever, is now, and ever shall be an ever –living Fire, with measures kindling and measures going out.<sup>9</sup>

Heraclitus's notion of everything being reducible to fire follows, in a sense, the thinking of his contemporaries, the Milesian school (Thales, Anaximander, Anaximenes) who opined that everything is made of one substance (Thales – water; Anaximenes – air; and Anaximander – one indefinable substance from which the elements earth, wind, fire and water are made).<sup>10</sup> Unlike them, however, Heraclitus was not strictly a monist, as for him fire was not the substance from which things were made, but rather the *principle* of creation and destruction and change from one substance to

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<sup>8</sup> Ibid 10.

<sup>9</sup> Bertrand Russell, *History of Western Philosophy* (Routledge Classics, 2004) 50.

<sup>10</sup> Ibid 33–8.



another (whatever that substance happened to be). Also, as noted above, Heraclitus did not have the tendency to understand things as ultimately returning to their former state as did his pre-Socratic contemporaries – he was truly a *linear* thinker.

Moreover, Bertrand Russell suggests that the permanence of the principle of Heraclitus's fire makes it a *process* rather than a substance, and although Russell cautions this view should not be attributed to Heraclitus himself,<sup>11</sup> it is submitted this is perhaps the correct way to view Heraclitus's notion of change – that is, an ever-changing *process*, the only constant being that of change itself.

Returning to the definition of evolution above, Heraclitus' notion of change appears to capture the essence of 'evolution' as change over time but not always change *and development*, at least insofar as it alludes primarily to degenerative change (so at best, it might be only a limited case of evolution, 'devolution'). However, Heraclitus was not only concerned with destructive forces, but also creative forces (ie *all* change), and if according to him things are constantly in flux, a destroyed thing will develop into something else after being subjected to the 'ever living Fire' (indeed, it is a truism that many things are created after something else is first destroyed – omelettes from broken eggs to use a well-worn example). In terms of evolution, however, creation-through-destruction is again, at best, only a limited case of evolution as the process of development certainly continues long *after* the initial cataclysmic destructive events have kick-started this process and no obvious destructive forces continue to be at work.

Thus, Heraclitus' notion of constant change would appear to be a necessary, but not sufficient, condition for the idea of evolution.

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<sup>11</sup> Ibid 53.

## B *Plato*

Heraclitus' view, noted above, that the society in which he lived was undergoing a process of degeneration and decay, was a view shared by many of his aristocratic contemporaries and near-contemporaries, perhaps most notably Plato (BC 427–347).<sup>12</sup>

Karl Popper paints the following picture of the young Plato:

Plato lived in a period of wars and of political strife which was, for all we know, even more unsettled than that which had troubled Heraclitus. While he grew up, the breakdown of tribal life of the Greeks led in Athens, his native city, to a period of tyranny, and later to the establishment of a democracy which tried jealously to guard itself against any attempts to reintroduce either a tyranny or an oligarchy, ie a rule of the leading aristocratic families. During his youth, democratic Athens was involved in a deadly war against Sparta, the leading city state of the Peloponese, which had preserved many of the laws and customs of the ancient tribal aristocracy... Plato was born during the war and he was about twenty-four when it ended. It brought terrible epidemics, and in its last year, famine, the fall of the city of Athens, civil war, and a rule of terror, usually called the rule of the Thirty Tyrants; these were led by two of Plato's uncles, who both lost their lives in the unsuccessful attempt to uphold their regime against the democrats'.<sup>13</sup>

While Plato's celebrated *Theory of Forms and Ideas*, effectively a theory of unchanging universals, is the ideological polar opposite of Heraclitus' notion of constant change, the two men did share a similar social heritage that led each of them to have a deeply pessimistic view of the societies in which they lived and where those societies were headed, compared to, what

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<sup>12</sup> Grun, above n 5, 12.

<sup>13</sup> Popper, above n 6, 15–16.

appeared to both men, a far more superior past. This pessimism led Plato to be of the view, as Heraclitus had been, that constant change was indeed a fact of life, particularly *social* life. As Popper explains:

From the feeling that society, and indeed ‘everything’ was in flux, arose ... the fundamental impulse of his philosophy as well as the philosophy of Heraclitus; and Plato summed up this social experience, exactly as his historicist predecessor had done, by proffering a law of historical development. According to this law... *all social change is corruption or decay or degeneration*. This ... forms, in Plato’s view, part of a cosmic law – of a law which holds for created or generated things. All things in flux, all generated things, are destined to decay. Plato, like Heraclitus, felt that the forces which are work in history are cosmic forces.<sup>14</sup>

However, the pessimistic attitude towards change in both Heraclitus’ and Plato’s worldviews is only half of the story. Both men also saw a potentially positive aspect of change in the societies in which they lived, albeit in very different ways.

Popper describes Heraclitus’ more ‘positive’ vision of change in the following terms:

But having reduced all things to flames, to processes, like combustion, Heraclitus discerns in the processes a law, a measure, a reason, a wisdom; and having destroyed the cosmos as an edifice, and declared it to be a rubbish heap, he reintroduces it as the destined order of events in the world process.

Every process in the world, and especially fire itself, develops according to a definite law, its ‘measure’. It is an inexorable and irresistible law, and to this extent it resembles our modern conception of natural law as well as the conception of historical or evolutionary laws of modern historicists. But it

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<sup>14</sup> Ibid 16–17.

differs from these conceptions in so far as it is the decree of reason, enforced by punishment, just as is the law imposed by the state. The failure to distinguish between legal laws or norms on the one hand and natural law or regularities on the other is characteristic of tribal tabooism; both kinds of law alike are treated as magical, which makes a rational criticism of the man-made taboos as inconceivable as an attempt to improve upon the natural world: 'All events proceed with the necessity of fate....The sun will not outstep the measure of his path; or else the goddesses of fate, the handmaids of Justice, will know how to find him'. But the sun does not only obey the law; the Fire, in the shape of the sun and ... of Zeus' thunderbolt, watches over the law; and gives judgement according to it.<sup>15</sup>

One can see in this, from a political perspective, something much more insidious than a mere sigh of resignation toward the changing nature of things. After avoiding any teleological fallacy with his notion of entropy-like destruction in his conception of the cosmos, Heraclitus then appears to succumb to this fallacy, in his conception of society, by recruiting these very same cosmic forces in ensuring that *justice* will somehow prevail. But justice in favour of whom? Popper discusses Heraclitus's apparent relativism in his theory of opposites<sup>16</sup> and his celebrated aphorisms such as 'the path that leads up and the path that leads down are identical' and 'the straight path and the crooked path are one and the same' which one would think would answer this question in the negative, but notes all the same that this relativist position:

... does not prevent Heraclitus from developing upon the background of his theory of the justice of war and the verdict of history a tribalist and romantic ethic of Fame, Fate and the superiority of the Great Man, all strangely

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<sup>15</sup> Ibid 11.

<sup>16</sup> The theory that opposites combine to produce a motion which is in harmony or a unity arising out of diversity – Heraclitus used the example of attunement of opposite tensions in the bow and the lyre – see Russell, above n 10, 51.

similar to some very modern ideas: ‘Who falls fighting will be glorified by gods and by men...The greater the fall the more glorious the fate...The best seek one thing above all others, eternal fame... One man is worth more than ten thousand if he is Great’.<sup>17</sup>

As to *Plato’s* view on the ‘positive’ aspects of change, Popper notes some similarities with Heraclitus’s position, but observes:

Whether or not he (Plato) also believed that this tendency (to depravity) must *necessarily* come to an end once the point of extreme depravity has been reached seems to me uncertain. But he certainly believed that it is *possible* for us, by a human rather than a superhuman effort, to break through the fatal historical trend, and to put an end to the process of decay.

Great as the similarities are between Plato and Heraclitus, we have struck here an important difference. Plato believed that the law of historical destiny, the law of decay, can be broken by the moral will of man, supported by the power of human reason....

Plato believed that the law of degeneration involved moral degeneration. Political degeneration at any rate depends on his view mainly upon moral degeneration (and lack of knowledge; and moral degeneration, in its turn, is due mainly to racial degeneration. This is the way the general cosmic law of decay manifests itself in the field of human affairs.

.... Plato may well have believed, just as the general law of decay may have manifested itself in moral decay leading to political decay, the advent of the cosmic turning-point would manifest itself in the coming of a great law-giver whose powers of reasoning and whose moral will are capable of bringing this period of political decay to a close. It seems likely that the prophesy, in the *Statesman*, of the return of the Golden Age, of a new millennium, is the expression of such a belief in the form of a myth ... The state which is free from

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<sup>17</sup> Popper, above n 6, 13–14.

evil of change and corruption is the best, the perfect state. It is the state of the Golden Age which knew no change. It is the *arrested state*.<sup>18</sup>

Popper shows how this political view of the arrested state links to Plato's more celebrated idea of the *Theory of Forms and Ideas*:

According to the *Republic*, the original or primitive form of society, and at the same time, the one that resembles the Form or Idea of a State most closely, the 'best state', is a kingship of the wisest and most godlike men.<sup>19</sup>

Plato's thinking, on the surface, therefore appears to capture both essential elements of change and development referred to in the definition of evolution above – *change* which is acknowledged by both Heraclitus and himself as a fact of life and *development* due to the possibility of positive change due to morally and politically directed forms action which Plato considers possible but Heraclitus seems content to leave mostly to Fate. However, Plato's plan of consciously taking society effectively backwards to its past glorious state and arresting it at that point is hardly a process of *ongoing* change and development in the evolution sense, and is actually inimical to the idea of evolution. Further, the positing of a specific utopian society in the manner of the *Republic* renders Plato's type of thinking explicitly *normative* compared to Heraclitus's supposedly *relativistic* thinking referred to above.

Summing up, in embracing change as a fact of life, albeit reluctantly since it affected their privileged positions in society, two of the most influential thinkers in Ancient Greece, Heraclitus and Plato, both sought to rationalise the concept of change in historicist terms. Heraclitus is best remembered most for noting constant change as a fact of life, explaining it in

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<sup>18</sup> Ibid 17–18.

<sup>19</sup> Ibid 40.

metaphysical terms, and for well-known aphorisms such as ‘you never step in the same river twice’ noted earlier, but a closer examination of his attitude towards change and whom it may (or may not) favour is far from benign resignation or relativism – his was a yearning for a something that resembled his privileged past that perhaps Fate would deliver, at least to the strong and war-like, and those (in Heraclitus’ mind) who justly deserved it. If Heraclitus’s thinking does not map neatly onto the idea of evolution as previously defined in this paper, it does at least introduce the notion of a process of constant change which is a necessary, if not sufficient, condition for this idea. Also, Heraclitus does share a certain purportedly relativistic (yet still ideological) disposition common to subsequent totalitarian thinkers who have expressly used the idea of evolution to advance their worldviews. Whether Heraclitus can be said to have influenced these thinkers is a moot point, but he did influence Plato,<sup>20</sup> and the latter’s influence on subsequent thinkers who have expressly adopted the idea of evolution is well settled.

Less passively and mystically than Heraclitus, Plato’s historicism relies on a degenerated society being restored to something approaching past glory. This is not done by leaving things to *Fate* or *Destiny* and adopting a manly disposition in the hopes of being favoured thereby (as Heraclitus would), but rather (in the manner of the *Republic*), by using politically and morally directed forms action to arrest the devolution of society on the path of degeneration and decay and, once built, to arrest any further evolution of the reformed ideal state, since it would only again fall into degeneration and decay. While Plato’s belief that the future course of a society can be guided by action, his program is primarily one to restore it to its supposedly

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<sup>20</sup> Russell, above n 10, 109. Bertrand Russell notes the philosophical influences on Plato were Pythagoras, Parmenides, Heraclitus and Socrates.

former ideal self. The concept that any further development should be arrested in the belief that some sort of ideal status quo can be maintained suggests that, while Plato shared Heraclitus' views on change as a process, and degeneration and decay in particular as they relate to society (both limited cases of evolution – devolution), Plato's desire to arrest the course of evolution runs counter to the very essence of 'evolution' (whose underlying premises is *ongoing* change and development- the notion of 'arrested development' can never be a valid postulate of the idea of evolution).

Thus, while the constant-change aspect of the idea of evolution has been bequeathed to us by Heraclitus, we can thank Plato for the idea that change and even evolution itself might be arrested and even reversed. Although this may seem a preposterous idea and not physically possible (which of course, it isn't), it has been an idea entertained often throughout history since Plato, namely by that phenomenon in society which could call itself the arch-rival of the idea of evolution in the sense of changing the existing status quo: *conservative elitism*. Plato is arguably the 'Godfather' of western conservative elitism and with that appellation one would expect his influence on the use of the idea of evolution in political, legal and social theory to be profoundly negative. Nevertheless, as mentioned earlier, he was also influential in a *positive* way on subsequent totalitarian thinkers who have deployed the idea of evolution to advance their worldviews in explicit fashion. While this seems to be a paradox, it really isn't, particularly when one considers that the propensity of conservative elitists and totalitarians (of whatever background) is to use their theories as a means of gaining power or *control*. The idea of evolution is of course very differently deployed by these two groups – conservatives, in the negative sense, by attempting to turn back the clock and arrest development or



‘progress’, or at least development or progress which they do not like nor have any control over; and totalitarians, in the positive sense, attempting to take society in some new direction in line with what their economic, racial, religious or cultural beliefs or preferences dictate it ought to be (often to a more privileged future than their unprivileged pasts – indeed, two of the greatest modern dictators, Hitler and Stalin, came from profoundly unprivileged backgrounds compared to their future positions in the regimes they subsequently helped to build).<sup>21</sup>

### III THE IDEA OF EVOLUTION IN ANCIENT GREECE: ARISTOTLE

Plato’s famous pupil Aristotle (BC 384–322)<sup>22</sup> did not embrace his teacher’s *Theory of Forms and Ideas* so did not regard all sensible things as imperfect copies of their ideal original selves. Thus, on the concept of change, he did not share Plato’s view that there is a degeneration or decay from a thing’s perfect past (where it inhabited the ideal realm) to its far from perfect present (in which it is an imperfect copy of its former glorious self).

Aristotle did indeed have his own ideas on evolution; however, partly due to his rejection of Plato’s Theory of Forms and Ideas, it was effectively an inversion of Plato’s theory of change so that sensible things tend *towards* perfection rather than retreat from it. This is apparent in Aristotle’s *Final Causes* doctrine, as Karl Popper explains:

Aristotle insists, of course, that unlike Plato he does not conceive the Forms or Ideas as existing apart from sensible things. But in so far as this difference is important, it is closely connected with the adjustment in the

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<sup>21</sup> Allan Bullock, *Hitler and Stalin: Parallel Lives* (Fontana Press, 1991).

<sup>22</sup> Grun, above n 5, 14.

theory of change. For one of the main points in Plato's theory is that he must consider the Forms or essences or originals (or fathers) as existing prior to, and therefore apart from, sensible things, since these move further and further away from them. Aristotle makes sensible things move towards their final causes or ends, and these he identifies with their Forms and essences.<sup>23</sup>

Prolific as his output was to the history of ideas generally, Aristotle did not seem, unlike his master Plato, to have a historicist bent. Significantly, he did not apply his doctrine of Final Causes to the evolution of society; but this is not to say that others have not done so. As Popper explains, after noting that Aristotle 'who was a historian of the more encyclopaedic type, made no direct contribution to historicism'<sup>24</sup> and that he did not seem 'to have interested himself in the problem of historical trends'<sup>25</sup> that:

In spite of this fact ... his theory of change [final cause doctrine] lends itself to historicist interpretations, and that it contains the elements needed for elaborating a grandiose historicist philosophy.<sup>26</sup>

Thus, it can be argued that Aristotle's final cause doctrine has had a pernicious, even if only mainly unconscious, influence on evolutionary ideas in western political, social and legal thought by imbuing them with their promoters' (often malign) *purposes*.

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<sup>23</sup> Karl Popper, *The Open Society and Its Enemies Volume Two: The High Tide of Prophecy, Hegel, Marx and the Aftermath* (Routledge Classics, 2011) vol 2, 223.

<sup>24</sup> Ibid 224.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

#### IV OTHER EVOLUTIONARY THINKERS IN ANCIENT GREECE

Before moving on from Ancient Greek thought, it is worth briefly mentioning some other prominent identities and schools of that era. It is submitted that while these thinkers' ideas have had much less impact on political, social or legal evolutionary thought than the thinkers already discussed, firstly, their prominence in history demands that they be accounted for in the type of survey undertaken in this paper, and secondly, their ideas may in some measure have helped shape the ideas of the thinkers already discussed, or later thinkers influenced by the idea of evolution, in subtle and indirect ways.

After the Milesian school, which has already been mentioned, the most significant early Greek philosopher and a contemporary of that school was Pythagoras.

*Pythagoras* (BC 581–497)<sup>27</sup> spoke of change in a cyclical sense, but it was mainly informed by his celebrated mysticism including his teachings that 'first, the soul is an immortal thing, and that it is transformed into other kinds of living things; further, that whatever comes into existence is born again in the revolutions of a certain cycle, nothing being absolutely new'.<sup>28</sup> Although much of Pythagorean thought has echoed down through the millennia (not least his mathematical theories), it has had little impact on the idea of evolution in Western social, political or legal thought. There is also the fact already mentioned that this paper is not concerned with cyclical processes but lineal processes insofar as the idea of evolution is concerned.

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<sup>27</sup> Grun, above n 5, 10.

<sup>28</sup> Russell, above n 10, 41 quoting Dikaiarchos.

*Parmenides* was a contemporary of Heraclitus, albeit some 30 years younger than the latter.<sup>29</sup> His theory of change was proposed as the antithesis of Heraclitus' theory of change; rather than the Heraclitian notion of everything being in a constant state of flux, according to Parmenides, *nothing* changes. Citing key passages in his poem *Nature* where Parmenides famously set out his dual doctrines *the way of opinion* and *the way of truth*, Russell explains with respect to the latter doctrine (since this is the doctrine relevant to Parmenides' theory of change) that:

What he says about the way of truth, so far as it has survived, is, in its essential points as follows:

'Thou canst not know what is not – that is impossible – nor utter it; for it is the same thing that can be thought and that can be.'

'How, then can what **is** be going to be in the future? Or how could it come into being? If it came into being, it is not; nor is it if it is going to be in the future. Thus is **becoming** extinguished and **passing away** not to be heard of.

'The thing that can be thought and that for the sake of which the thought exists is the same; for you cannot find thought without something that is, as to which it is uttered'

The essence of the argument is: When you think, you think of something; when you use a name, it must be the name of something. Therefore both thought and language require objects outside themselves. And since you can think of a thing or speak of it at one time as well as another, whatever can be thought of or spoken of must exist at all times. Consequently there can be no change, since change consists in things coming into being or ceasing to be.<sup>30</sup>

<sup>29</sup> Parmenides was born BC 515: Grun, above n 5, 10.

<sup>30</sup> Russell, above n 10, 56.

Russell pays Parmenides' argument the generous compliment of being 'the first example in philosophy of an argument from thought and language to the world at large'<sup>31</sup> and notes that 'what makes Parmenides historically important is that he invented a form of metaphysical argument that, in one form or another, is to be found in most subsequent metaphysicians down to and including Hegel'.<sup>32</sup> Parmenides' theory of change, celebrated as it is in the realm of metaphysical thought, could hardly be said to have any *direct* impact on the idea of evolution as applied to much more down-to-earth realm of social, political or legal thought. However, Parmenides' theory could be said to have had an *indirect* impact on later thinkers who have had a significant impact on this realm (perhaps most notably Hegel, as Russell observes in the above passage).

*Empedocles* (BC 490–430)<sup>33</sup> also developed a metaphysical notion of change. Like Heraclitus, he believed strife was the agent of change, but unlike Heraclitus, he did not believe strife was the only agent of change, and believed there were effectively two agents at work: *love* and strife.<sup>34</sup> The fact that these forces effectively see-saw over time with the world being dominated by one or the other in an endless cycle is an attempt to explain motion in terms of the arguments of his older contemporary Parmenides, but he was not in agreement with Parmenides about an *unchanging* universe.<sup>35</sup> Empedocles also saw these agents of change being ruled by *chance and necessity* rather than purpose.<sup>36</sup> Empedocles is

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid 55.

<sup>33</sup> Grun, above n 5, 10.

<sup>34</sup> Russell, above n 10, 62.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

primarily remembered for being a scientist (arguably, the West's *first* scientist, if not the West's first eccentric scientist).<sup>37</sup> His contribution to evolution as an idea is limited to the realm of metaphysics, although his metaphysical arguments have not had anywhere near the impact on western philosophy as Parmenides' celebrated change paradox mentioned above. On the other hand, Empedocles' account of biological evolution, could earn him the appellation of *proto-Darwinist*, even if not quite *proto-social Darwinist*, given his colorful account, involving, among other things, solitary limbs, eyes and other body parts joining together to form human bodies in prehistoric times.<sup>38</sup>

## V THE IDEA OF EVOLUTION IN HELLENIC AND HELLENISTIC GREECE

The three main schools of philosophical thought that have been identified in Hellenic and Hellenistic Greece are: Epicureanism, Stoicism, and Scepticism.<sup>39</sup> Apart from Epicureanism, there were no explicit ideas of evolution espoused in these schools (and perhaps not even by the Epicureans as will be discussed), but the main influence of these schools of thought comes from their openness to (in the case of Epicureanism), ambivalence towards (in the case of Stoicism), and indifference towards (in the case of scepticism) the use of the idea of evolution in subsequent

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<sup>37</sup> Ibid 60. Bertrand Russell notes 'Legend had much to say about Empodocles. He was supposed to have worked miracles, or what seemed such, sometimes by magic, sometimes by means of scientific knowledge. He could control the winds, we are told; he restored life to a woman who seemed dead for thirty days; finally, it is said, he died leaping into the crater of Etna to prove he was a god'.

<sup>38</sup> Ibid 61.

<sup>39</sup> Ibid 211. Bertrand Russell notes that the philosophy in this age 'includes the foundation of the Epicurean and Stoic schools, and also of scepticism as a definitely formulated doctrine'.

periods of history and the modern world. Thus, these schools of thought are mainly influential on the idea of evolution in western political, social and legal thought in the attitudes they generate towards such an idea, rather than engaging with the actual content of the idea.

### *A Epicureanism*

Epicurus' (BC 340–271)<sup>40</sup> concept of change was, like Parmenides, that of an eternal unchanging realm comprised of an eternal substance, but refuting Parmenides' monism, and following the atomist Democritus (born 460),<sup>41</sup> Epicurus posited this eternal substance was comprised of unchanging atom-like particles (so that the forms they comprised change but not the atoms themselves) in a void.<sup>42</sup> Epicurus embraced scientific notions, according to Russell, mainly due to his stance against superstition and its erstwhile perceived agency on human affairs. Although believing in their existence, Epicurus believed that the gods 'did not trouble themselves with the affairs of our human world'.<sup>43</sup> Epicureanism has never really been synonymous with any *original* scientific insights, as Russell notes:

...the Epicureans contributed practically nothing to natural knowledge. They served a useful purpose by their protest against the increasing devotion of the later pagans to magic, astrology, and divination....<sup>44</sup>

Epicureanism's impact on intellectual thought is arguably as precursor to the *humanism* movement of the Renaissance. The Epicurean movement

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<sup>40</sup> Grun, above n 5, 16.

<sup>41</sup> Ibid 12.

<sup>42</sup> Russell, above n 10, 235.

<sup>43</sup> Ibid 239.

<sup>44</sup> Ibid 236.

*qua* humanism prototype and its notion of hedonism as pleasure being the only intrinsic good was nothing short of heresy to religion dominated medieval thinking. If one considers the idea of evolution in the form that it was expressly articulated from the time of Darwin onwards as a continuation of the Enlightenment project commenced a century or so before, Epicureanism as an *attitude* (if not a systematic thought discipline) can be seen as a significant *support* for the idea of evolution, even if not an intellectual influence.

However, one probably should not leave off on a discussion of the Epicureans' role in shaping the idea of evolution in the ancient world without looking to the work of Lucretius (BC 98–55),<sup>45</sup> who Russell notes was the ancient world's most eminent follower of Epicurus<sup>46</sup> and in his celebrated *The Nature of Things* sets out Epicurean philosophy.<sup>47</sup> Relevantly, a social theory of evolution and how civilization evolved, is set out in Lucretius' poem. While this theory did not directly or even indirectly influence later social and political thought in the way Epicureanism influenced humanism did from the time of the Renaissance, Epicurean social theory of civilisation as set out in Lucretius' poem is arguably the most explicit and thoroughgoing account of the evolution of society up to that time.

Lucretius' poem comprises six books. The following extracts are from Books V and VI:<sup>48</sup>

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<sup>45</sup> Grun, above n 5, 22.

<sup>46</sup> Russell, above n 10, 236.

<sup>47</sup> Ibid 237.

<sup>48</sup> Lucretius, *On the Nature of Things* (circa 50 BCE, translated by William Ellery Leonard) <[http://classics.mit.edu/Carus/nature\\_things.5.v.html](http://classics.mit.edu/Carus/nature_things.5.v.html)>.



### **Beginnings of Civilization**

Afterwards,  
When huts they had procured and pelts and fire,  
And when the woman, joined unto the man,  
Withdrew with him into one dwelling place,  
Were known; and when they saw an offspring born  
From out themselves, then first the human race  
Began to soften. For 'twas now that fire  
Rendered their shivering frames less staunch to bear,  
Under the canopy of the sky, the cold;  
And Love reduced their shaggy hardness;  
And children, with the prattle and the kiss,  
Soon broke the parents' haughty temper down.  
Then, too, did neighbours 'gin to league as friends,  
Eager to wrong no more or suffer wrong,  
And urged for children and the womankind  
Mercy, of fathers, whilst with cries and gestures  
They stammered hints how meet it was that all  
Should have compassion on the weak. And still,  
Though concord not in every wise could then  
Begotten be, a good, a goodly part  
Kept faith inviolate- or else mankind  
Long since had been unutterably cut off,  
And propagation never could have brought  
The species down the ages.  
Lest, perchance,  
Concerning these affairs thou ponderest  
In silent meditation, let me say  
'Twas lightning brought primevally to earth  
The fire for mortals, and from thence hath spread  
O'er all the lands the flames of heat. For thus  
Even now we see so many objects, touched  
By the celestial flames, to flash aglow,  
When thunderbolt has dowered them with heat.  
Yet also when a many-branched tree,

Beaten by winds, writhes swaying to and fro,  
Pressing 'gainst branches of a neighbour tree,  
There by the power of mighty rub and rub  
Is fire engendered; and at times out-flares  
The scorching heat of flame, when boughs do chafe  
Against the trunks. And of these causes, either  
May well have given to mortal men the fire.  
Next, food to cook and soften in the flame  
The sun instructed, since so oft they saw  
How objects mellowed, when subdued by warmth  
And by the raining blows of fiery beams,  
Through all the fields.  
And more and more each day

Would men more strong in sense, more wise in heart,  
Teach them to change their earlier mode and life  
By fire and new devices. Kings began  
Cities to found and citadels to set,  
As strongholds and asylums for themselves,  
And flocks and fields to portion for each man  
After the beauty, strength, and sense of each-  
For beauty then imported much, and strength  
Had its own rights supreme.

As these magisterial passages suggest, the emergence of humankind from isolation, the fruits of co-operative behaviour and the harnessing of fire and agriculture had obviously brought benefits to the human race. However, matters would now arise that challenged this idyllic initial condition, as humans were not content with this alone but sought greater advantage than their neighbours leading to the formation of elites and underlings:

Thereafter, wealth  
Discovered was, and gold was brought to light,  
Which soon of honour stripped both strong and fair;  
For men, however beautiful in form  
Or valorous, will follow in the main  
The rich man's party. Yet were man to steer  
His life by sounder reasoning, he'd own  
Abounding riches, if with mind content  
He lived by thrift; for never, as I guess,  
Is there a lack of little in the world.  
But men wished glory for themselves and power  
Even that their fortunes on foundations firm  
Might rest forever, and that they themselves,  
The opulent, might pass a quiet life-  
In vain, in vain; since, in the strife to climb  
On to the heights of honour, men do make  
Their pathway terrible; and even when once  
They reach them, envy like the thunderbolt  
At times will smite, O hurling headlong down  
To murkiest Tartarus, in scorn; for, lo,  
All summits, all regions loftier than the rest,  
Smoke, blasted as by envy's thunderbolts;  
So better far in quiet to obey,  
Than to desire chief mastery of affairs  
And ownership of empires. Be it so;  
And let the weary sweat their life-blood out  
All to no end, battling in hate along  
The narrow path of man's ambition  
Since all their wisdom is from others' lips,

And all they seek is known from what they've heard  
And less from what they've thought.

However, Epicurus (or Lucretius) is not against elitism *per se*. In the following stanza, Lucretius, in tones not unlike the lamentations of Heraclitus and Plato on the fall of society to democracy ('decay' in their minds), writes:

Nor is this folly  
Greater to-day, nor greater soon to be,  
Than' twas of old.  
And therefore kings were slain,  
And pristine majesty of golden thrones  
And haughty sceptres lay o'erturned in dust;  
And crowns, so splendid on the sovereign heads,  
Soon bloody under the proletarian feet,  
Groaned for their glories gone- for erst o'er-much  
Dreaded, thereafter with more greedy zest  
Trampled beneath the rabble heel. Thus things  
Down to the vilest lees of brawling mobs  
Succumbed, whilst each man sought unto himself  
Dominion and supremacy.

Unlike Plato, however, the prescription in this poem to this state of social decay, is not to restore society to a past Golden Age in the style of a utopian style *Republic*, but in a manner that is a prototype of the contractarian model articulated in various forms many centuries later by Hobbes, Rosseau and Locke, Lucretius writes:

So next  
Some wiser heads instructed men to found  
The magisterial office, and did frame  
Codes that they might consent to follow laws.  
For humankind, o'er wearied with a life  
Fostered by force, was ailing from its feuds;  
And so the sooner of its own free will  
Yielded to laws and strictest codes. For since  
Each hand made ready in its wrath to take  
A vengeance fiercer than by man's fair laws  
Is now conceded, men on this account  
Loathed the old life fostered by force. 'Tis thence  
That fear of punishments defiles each prize  
Of wicked days; for force and fraud ensnare  
Each man around, and in the main recoil

On him from whence they sprung. Not easy 'tis  
 For one who violates by ugly deeds  
 The bonds of common peace to pass a life  
 Composed and tranquil. For albeit he 'scape  
 The race of gods and men, he yet must dread  
 'Twill not be hid forever- since, indeed,  
 So many, oft babbling on amid their dreams  
 Or raving in sickness, have betrayed themselves  
 (As stories tell) and published at last  
 Old secrets and the sins.

What is significant about this account of the beginnings of civilization up to the point of its embrace of the rule of law is that it is arguably one of the earliest social contract theories and accounts of the emergence of the rule of law out of the evolution of society in western thought.

This account was to influence further ideas of social contract theory in Ancient Rome as will be discussed later in this paper.

## B *Stoicism*

The Stoics<sup>49</sup> were not concerned with historicism and there is no record of a Stoic social theory of evolution. The stoics were pragmatic, dealing with the issues of the day and of course are known for their celebrated aestheticism and studied moderation and temperance (hence the term 'stoic' being part of the English lexicon). Although it is nigh on impossible to point to stoicism as having any direct impact on *evolutionary* social, political or legal thought (although its direct impact on many other aspects on western thought is undeniable), stoicism has had an *indirect* impact on other schools of thought that have influenced or embraced the idea of evolution in western thought; this being either negatively, in its role in supporting religious views antithetical to the idea of evolution in the

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<sup>49</sup> Stoicism is thought to be founded by Zeno in the early part of the 3rd century BC: Russell, above n 10, 241.

Middle Ages with the predominance of a Christian worldview and its account of a created eternal universe, or positively, in complementing the stoic personalities of totalitarians who eagerly adopted their own versions of the idea of evolution to build their various regimes. Moreover, stoicism, like Epicureanism, is more an *attitude* than a sophisticated system of thought; but nonetheless an attitude that has resonated through the centuries to influence other more systematic intellectual schools of thought. Whereas the influence of Epicureanism on intellectual thought was to come to prominence during the Renaissance (and arguably positively influenced or supported ideas about evolution, including Darwin's, which soon followed), Stoicism's influence on intellectual thought was most prominent on intellectual thought from the beginning of the Middle Ages up to the Renaissance – and certainly during most of the devoutly Christian period that defined that era.

However, Stoicism resurfaced in modern times as a political force appealing to a certain mindset; as Russell explains:

Stoicism, unlike the earlier purely Greek philosophies, is emotionally narrow, and in a certain sense fanatical; but it also contains religious elements of which the world felt the need, and which the Greeks seemed unable to supply. In particular, it appealed to rulers....<sup>50</sup>

And:

The course of nature, in Stoicism as in eighteenth-century theology, was ordained by a Lawgiver who was also a beneficent Providence. Down to the smallest detail, the whole was designed to secure certain ends by natural means. These ends, except in so far as they concern gods and daemons, are

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<sup>50</sup> Ibid 241.

to be found in the life of man. Everything has a purpose connected with human beings.<sup>51</sup>

Russell also notes that Stoic virtue ‘consists in a will which is in agreement with Nature’<sup>52</sup> and points out the logical conundrum that natural laws determining virtue presents: ‘If I am wicked, Nature compels me to be wicked’<sup>53</sup>.

It is probably then with some justification that Russell says of the Stoics:

The Stoic is not virtuous in order to do good, but does good in order to be virtuous. It has not occurred to him to love his neighbour as himself; love, except in a superficial sense, is absent from his conception of virtue.<sup>54</sup>

The ‘Stoic stance’ is one that will be returned to later in this paper with respect to its influence on Roman thought.

### C *Scepticism and Cynicism*

Systematic Western Scepticism as a school of thought dates back to Pyrrho<sup>55</sup> in opposition to dogmatic assertions of the Stoics. Scepticism *per se* arguably began even earlier with the pre-socratic philosopher and poet Xenophanes’<sup>56</sup> critique of the Greek pantheon of Gods, or with Socrates’ mode of questioning all facts and assumptions and his celebrated claim of only knowing that he knew nothing; however, the Pyrrohnian school was

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<sup>51</sup> Ibid 243.

<sup>52</sup> Ibid 244.

<sup>53</sup> Ibid 244.

<sup>54</sup> Ibid.

<sup>55</sup> Russell, above n 10, 224.

<sup>56</sup> Grun, above n 5, 10.

the first to systematise doubt, as Rene Descarte and the phenomonologists were to do many centuries later. The same could be said for cynicism, a school derived from Socrates' pupil Antisthenes through its founder Diogenes<sup>57</sup> whose main contribution to western philosophy has been to challenge rather than construct intellectual edifices (including evolutionary dogma).

## VI THE IDEA OF EVOLUTION IN ANCIENT ROME

Rome's ascendancy began in the first and second Punic Wars (BC 264–241 and BC 218–201) in which Rome defeated the then dominant powers in the western Mediterranean, Syracuse and Carthage, followed by the conquest of Macedonian monarchies in the second century BC, Spain (in the course of Rome's war with Hannibal) and France in the middle of the first century BC, and finally England about a hundred years later, so that the Empire's frontiers, at its height, were the Rhine and Danube in Europe, the Euphrates in Asia, and the desert in North Africa.<sup>58</sup>

However, for all that, Russell notes that 'The only things in which the Romans were superior (to the Greeks) were military tactics and social cohesion'<sup>59</sup> and opines that 'To the end, Rome was culturally parasitic on Greece. The Romans invented no art forms, constructed no original system of philosophy, and made no scientific discoveries. They made good roads, systematic legal codes, and efficient armies; for the rest they looked to Greece'.<sup>60</sup> While this seems a harsh assessment, it is probably fair to say

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<sup>57</sup> Russell, above n 10, 221.

<sup>58</sup> Ibid 257.

<sup>59</sup> Ibid 263.

<sup>60</sup> Ibid.

the Romans' main philosophical influences were those to do with stoic virtue rather than the more abstract philosophical notions of Ancient Greece, let alone ideas to do with evolution (although as will be discussed towards the end of this paper there were, like the Epicurean conception of social evolution, Roman social evolution theories by Cicero and Seneca). Yet, as will be seen, Roman stoic virtue as nurtured in modern times has been an infamous albeit paradoxical support to the pernicious type of ideas of evolution that characterised the darkest sides of Social Darwinism and its appropriation in totalitarian regimes such as Nazi Germany.<sup>61</sup>

Nevertheless, although the idea of evolution itself was all but absent in Ancient Rome, its legal system was much more advanced than Greece's. Also, Rome's legal system was itself a product of evolution, even if the idea of evolution was not pronounced during this time. John Kelly describes the legal system in republican Rome thus: 'there were on the civil side several different jurisdictions which did not exactly compete or overlap, but whose coexistence cannot be explained on theory, only by reference to their origins and to the typical settings in which they are found operating'.<sup>62</sup> Kelly also notes that Rome's first emperor, Augustus (previously Octavian, nephew of the last of the Republic's rulers, Julius Caesar) did little to rupture this natural evolutionary course of the law as he 'appears to have had a genuine reverence for ancestral Roman laws and manners, and this alone might have led him to preserve everything in the

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<sup>61</sup> John Cornwell, *Hitler's Scientists: Science War and the Devil's Pact* (Penguin, 2004).

<sup>62</sup> John Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 42.



old constitution which was not inconsistent with his own permanent ascendancy'.<sup>63</sup>

However, this was not to say Augustus did not put his own personal political stamp on Rome's legal system, as Kelly notes:

The old system of judicature still functioned as before, its procedures actually rationalized. But a silent, hardly visible transformation, even transubstantiation, had in fact taken place; because every part of the constitution now contained a new, tacit term, namely acquiescence in the will of an individual.<sup>64</sup>

And:

Augustus and his successors, avoided demolishing the old republican structure, but they effectively created a new one alongside it, depending on and drawing its force from the emperor's personal authority.<sup>65</sup>

Although Greece did not have as developed legal systems as the Romans, the Romans' legal systems were informed by Greek thought and philosophy. The Roman poet Horace's epigram addressing Greek philosophy on the Roman mind reads '*Graecia capta ferum victorem cepit* (captive Greece took captive her wild conqueror)'.<sup>66</sup>

Kelly relates a particular event in Roman history, also noted by Cicero, of a visit of an embassy sent by Athenians in 155BC to petition the Roman senate for the reduction of a fine laid upon them in an arbitration for an offence against another Greek people which consisted of three leading

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<sup>63</sup> Ibid 43.

<sup>64</sup> Ibid 44.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid 46.

Athenian philosophers, including Phanaetius a follower of Stoic philosophy, who stayed on to deliver public lectures on rhetoric and presentation of argument which made an impression on their Roman audiences.<sup>67</sup>

Kelly notes that ‘A Stoic philosophy became the principal influence of the Roman educated class, and on the Roman lawyers... and hence contributed to what legal theory the Roman world can show.’<sup>68</sup> Also, that ‘...the Stoic philosophy found a most congenial soil in the Roman temperament, too; the streak of austerity, of simplicity, of indifference to good or ill fortune’<sup>69</sup> and that:

....the Stoic view of the world virtually conquered the mind of the late Roman republic and of the early empire; almost all Roman jurists, whose profession began to emerge at about the epoch of the Scipionic circle, followed Stoic teaching, as did those Romans who themselves wrote on philosophic themes: Cicero at the end of the republic, Seneca in the first century AD, the emperor Marcus Aurelius in the second.<sup>70</sup>

Nonetheless, apart from the rich legacy of philosophy, Kelly notes the impact of Greek models or methods of law on concrete Roman rules of practical law ‘was nil, or vitually nil’<sup>71</sup> and paints a picture of a paucity of structured legal method in ancient Greece:

It (the law) was the one area in which the Greeks had nothing to teach their intellectual captives... the Greek cities had laws, and traditions of

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<sup>67</sup> Ibid 47.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid 48.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

lawgiving. But nowhere was there a legal science or any very sophisticated legal technique. A mid fifth century Greek law code such as that of Gortyn in Crete, might be as elaborate and as extensive in scale as the Twelve Tables enacted by the Roman legislative commission at about the same date; but the subsequent life of a Greek system was led without any jurist's profession to guide, organise, expound and develop it. Moreover, at any rate in Athens if we can judge from the speeches which have survived from the fourth century orators of whom Demosthenes was the most famous, litigation was conducted less in the spirit of a contest about the objective applicability of a legal norm than as a rhetorical match in which no holds were barred. Even in Athens we do not know the name of a single person who worked as a legal adviser (rather than as a court orator), or who taught law to students, nor the name of a single book on a legal subject.<sup>72</sup>

Where did all this legal sophistication come from if not from the Greeks (like so many other aspects of Roman cultural life)? Kelly explains that 'already some time before the first encounter with the Greek mind...there were the beginnings of a legal profession of a kind that never existed in Greece and remained, unique in the world until the rise of the common lawyers in the high Middle Ages'<sup>73</sup> and:

This profession, pursed in some measure through a sense of public duty and the responsibilities of their class by men of rank engaged in running public affairs, was entirely secular, even though its remoter origins may lie partly in the function of the Roman priesthoods in an era when cult ritual, magic and the activation of legal forms were different aspects of the same complex of ideas, namely, those connected in the involvement of the gods in bringing about results in human affairs.<sup>74</sup>

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<sup>72</sup> Ibid 48–9.

<sup>73</sup> Ibid 49.

<sup>74</sup> Ibid 49.

If one suspects from the above description of Roman law, there is a sense of it having evolved rather than being handed down from another already established tradition, Kelly removes all doubt when he states:

For a period of nearly 400 years, from the last century of the republic until the turmoil of the third century AD, the science of these jurists represents – together with the Roman genius for imperial government – the most characteristic flower of Roman civilisation, and the one least indebted to foreign models, evidently growing *spontaneously* from some part of the Roman national spirit without parallel elsewhere in the ancient world.<sup>75</sup>

As noted above, however, while Roman law is perhaps a striking example of a legal system evolving in *fact* from very humble beginnings to a most impressive edifice that was to influence later legal systems in the Western World, it would not be correct to say such a system was informed in any appreciable way by the *idea* of evolution, although the *fact* of Rome's evolved legal system, on which the world's major modern legal systems are based, has undoubtedly influenced western legal theory and practice.

As mentioned earlier, the Epicurean theory of the origins of the state were set out in the Roman poet's Lucretius' *On the Nature of Things*. Unlike Russell, Kelly is of the view this theory of the origin of the state was not Epicurus' invention, but a Lucretian add-on.<sup>76</sup>

This germ of a contractarian idea was taken up by Cicero, a slightly older contemporary of Lucretius who was familiar with the latter's work, and who wrote his treatise on the state (*De Republica*) which Kelly describes in the following terms:

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<sup>75</sup> Ibid. Author's emphasis.

<sup>76</sup> Ibid 64.

The state is presented, first, in more general terms not unlike those of Lucretius: it is the ultimate fruit of man's instinct to associate with his fellows, broadening out from the primary association of marriage to parenthood. That instinct is the 'origin of the city, as it were, the seed-bed of the state...once one had explained this natural social instinct of man, the 'source of laws and of law itself...could be discovered.'<sup>77</sup>

Kelly maintains that Cicero then goes further than Lucretius, citing from the *De Republica*:

Not every assemblage of men howsoever brought together makes up the populus, but an assemblage of a great number allied together in binding agreement...and in a sharing of interests...And the first cause of their coming together is not so much their individual weakness as the natural social instinct of men; for the human race is not one of solitary wanderers.<sup>78</sup>

This conception of the social contract through Lucretius (assuming it is his idea and not Epicurus' as Kelly maintains), Cicero and later Seneca are examples of evolution as an idea (and perhaps the only ones) in Roman times. However, Cicero distinguishes his from Greek conceptions of the social contract and gives it a Roman flavour. Kelly writes:

That, in restating in Roman terms, the social contract theory of the state's origin which had already appeared among the Greeks, Cicero was conscious of the forerunners is perhaps proved by his express dissent from the idea – first put forward by the sophists – that the weakness of individuals had been their motive in entering the primordial social bargain.

In this contract based state there is (unlike the polity imagined long afterwards by Hobbes as under an absolute ruler whose dominion all have acquiesced in) no room for tyranny. Cicero represents tyranny, indeed the negation of the state itself.... A similar thought is expressed later by Seneca,

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<sup>77</sup> Ibid 65.

<sup>78</sup> Ibid.

when he visualises an original golden age subverted by the vice and sinking under tyranny: it was then, and tyranny's antithesis, that the need of laws arose'.<sup>79</sup>

It is surprising that these evolutionary ideas have not had more influence on history; Cicero is often celebrated as effectively the world's first natural lawyer but his social contract theory does not get mentioned along with the usual suspects Hobbes, Rousseau and Locke, although his (and later Seneca's) version of the social contract seems no less sensible than those of any one of the aforementioned trio. Perhaps the times were not very receptive of these ideas. Kelly, quoting W.J Gough writes 'while contractarian thought and phraseology were evidently still in being, the whole political atmosphere was one of absolutism and submission' and thereafter observes 'he (Seneca) was forced under Nero, to commit suicide'.<sup>80</sup>

It was not until many centuries later, that the evolutionary idea of the social contract was to re-emerge, namely with Hobbes in the 17<sup>th</sup> Century. Although Greek and Roman notions of the social contract often appear understated in works of philosophy, Hobbes and other more popular social contract theorists were not insensible to them, and were possibly inspired by these earlier theories.

Summing up, apart from social contract theory, there are no other evolutionary ideas worthy of note in ancient Roman times; however, its philosophy of Stoic virtue as noted above was to have a dramatic effect on shaping totalitarian inspired evolutionary thinking in modern times and assisted prominent religious movements which held sway during the

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<sup>79</sup> Ibid 66.

<sup>80</sup> Ibid.

Middle Ages to effectively thwart the idea of evolution throughout that era. Roman law was the first real western jurisprudence and is itself a spectacular example of a mainly spontaneously evolved legal system, so its influence has been arguably strongest in the doing rather than the telling.

## VII CONCLUSION

Although the idea of evolution in the way which that term is commonly understood and defined out the outset of this paper is primarily a modern phenomenon in that the idea has been only expressly adopted from the 19<sup>th</sup> Century onwards in thinking about change and development in the law, society and the natural sciences (particularly biology), the idea of evolution arguably would not have reached its full flowering (or malignant manifestation if one speaks of its deployment in totalitarian regimes) in later times without the intellectual foundations and attitudes of the Ancient World.

These foundations and attitudes are: Heraclitus' notion of constant change which is a necessary though not sufficient condition for the idea of evolution; Plato's confused attitude towards the notion of change with his hubris of arresting social change once a perfect State is installed on the one hand and his audacity of imagining such a State was possible on the other (inspiring, in respective order, modern day conservative elitists to turn back the clock to shore up their privileged positions or modern day totalitarians to change the world for their personal betterment, if no one else's); the influence of metaphysical arguments of change from Parmenides and others in their philosophies on other philosophers such as Hegel; the oppositional, supporting or questioning attitudes pioneered by the Stoic, Epicurean and Sceptic schools of thought respectively to ideas such as evolution; and Roman jurisprudence, if not for its explicit ideas (including

some of the earliest theories of the social contract), then from the fact of how it itself evolved, thus being a key influence in later times on the study of legal theory, actual legal practice and how later legal systems were themselves to evolve.



# VICARIOUS LIABILITY, NON-DELEGABLE DUTY AND CHILD SEXUAL ABUSE: IS THERE ANOTHER SOLUTION FOR SEXUAL ABUSE PLAINTIFFS IN AUSTRALIA AFTER THE *MAGA* DECISION IN THE UK?

A KEITH THOMPSON

## Abstract

Sexual abuse plaintiffs in Australia do not succeed when they make vicarious liability claims against institutions. The recent *Maga*<sup>1</sup> decision of the UK Court of Appeal against the Catholic Church provided that plaintiff with relief. Does that decision provide any more clarity for Australia? This article reviews the existing Australian law alongside *Maga* and its foundations in the Canadian decision in *Bazley*, developed by the House of Lords in *Lister*. The likely impact of the new state Child Protection legislation in most Australian jurisdictions, is also factored in. While the High Court of Australia has not yet found 'a grand principle' that can unify the relevant jurisprudence, this author suggests there is may be an underlying rule after all.

## D INTRODUCTION

A number of Australian legal scholars have expressed concern that Australian law is unfair to sexual abuse plaintiffs and denies remedies that have been made available under common law in other western countries.

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<sup>1</sup> *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441.

The High Court of Australia has not been prepared to accept that institutions should be vicariously responsible for the intentional torts or the crimes of their officers. The suggestion that institutions should be liable in tort to sexual abuse victims because those institutions owe them a non-delegable duty of care has similarly been unsuccessful in Australian courts. Australian courts have also declined to introduce the North American idea that institutions owe fiduciary duties to sexual abuse victims since Australian courts have only ever acknowledged the notion of fiduciary duty as applicable in cases of pure economic loss.

In the wake of the *Lepore* decision<sup>2</sup> of the High Court of Australia in 2003, Jane Wangmann<sup>3</sup> expressed concern that the “general lack of appreciation of the context and nature of sexual assault in schools”<sup>4</sup> revealed a “lack of [judicial] appreciation of the role of power in child sexual assault.”<sup>5</sup> She expressed general concern as to whether sexual assault victims could succeed in the High Court of Australia given the state of the relevant legal doctrines in Australia at that time.<sup>6</sup> She thought that then recent decisions of the Supreme Court of Canada<sup>7</sup> and the House of Lords in the United

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<sup>2</sup> *New South Wales v Lepore* (2003) 212 CLR 511.

<sup>3</sup> J Wangmann, ‘Liability for Institutional Child Sexual Assault: Where does *Lepore* leave Australia?’ (2004) 28 *Melbourne University Law Review* 1, 169.

<sup>4</sup> Ibid 1. Lisa Khou expressed similar concerns more recently in ‘Fiduciary Law, Non-Economic Interests and Amicus Curiae’ (2008) 32 *Melbourne University Law Review* 36.

<sup>5</sup> Wangmann, above n 3, 169 (headnote).

<sup>6</sup> Ibid where she said “this decision does not bode well for victims in future cases”. In Part IV of her article she “outline[d] the ways in which the High Court demonstrated a limited understanding in this judgment of child sexual assault within institutional settings” (171). In her conclusion, she also stated that a recognition of “power disparities and the special vulnerability of children” were mostly “absent from the judgments of most members of the High Court, or...[were] assessed in ways to avoid the imposition of liability” (200).

<sup>7</sup> *Bazley v Curry* [1999] 2 SCR 534 and *Jacobi v Griffiths* [1999] 2 SCR 570.

Kingdom,<sup>8</sup> had provided an adequate intellectual foundation for a more empathetic approach which took account of the interests of the child victims. Steven White and Graeme Orr concluded their analysis of the *Lepore* decision with the observation that there was no principled basis for the distinction between the victims of the intentional torts done by employees on the one hand and sub-contractors on the other.<sup>9</sup> Prue Vines said that the High Court had left “real clarification of the limits of vicarious liability for intentional conduct...hovering just over the horizon”.<sup>10</sup>

In Laura Hoyano's more recent comment on the favourable decision of the UK Court of Appeal in *Maga*,<sup>11</sup> which confirms the “rewritten rules for vicarious liability for intentional torts propounded by the Supreme Court of Canada in...*Bazley* and by the House of Lords in *Lister*”,<sup>12</sup> she has hoped that “the imposition of primary tort liability”<sup>13</sup> may yet bring justice to the child victims of historic sexual assault in the United Kingdom.

But is it likely that the UK Court of Appeal's decision in *Maga* will make a difference for sexual assault plaintiffs in Australia? There has been an additional High Court decision handed down on vicarious liability since the

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<sup>8</sup> *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

<sup>9</sup> Steven White and Graeme Orr, “Precarious liability: The High Court in *Lepore*, *Samin* and *Rich* on school responsibility for assaults by teachers”, (2003) 11 *Torts Law Journal* 101, 116.

<sup>10</sup> P Vines, ‘Schools' Responsibility for Teachers' Sexual Assault: Non-Delegable Duty and Vicarious Liability’ (2003) 27 *Melbourne University Law Review* 612, 626 (see also <<http://www.austlii.edu.au/au/journals/MULR/2003/22.html>>).

<sup>11</sup> *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441.

<sup>12</sup> L Hoyano, “Ecclesiastical Responsibility for Clerical Wrongdoing”, (2010) 18 *Tort Law Review* 154. See also <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1856705](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856705)>.

<sup>13</sup> *Ibid* 164.

High Court considered the 'new jurisprudence' of the Supreme Court of Canada and the House of Lords in *Lepore*,<sup>14</sup> and it seems clear that the impasse that Prue Vines observed in her 2004 case note<sup>15</sup> remains.

In Part I of this essay, I review the state of vicarious liability law in Australia in light of the most recent decision of the High Court of Australia in *Sweeney v Boylan Nominees*.<sup>16</sup> I discuss the diversity of the *Lepore* judgments, and the common threads which may unite some of the different opinions. I note that the concept of non-delegable duty favoured by McHugh J is dead. I note that Justices Gleeson CJ, Gummow, Hayne and Callinan JJ seem united in the traditional conservative idea that intentional torts and crimes can never form part of the scope of employment, though I note that Gleeson CJ left the impression that he might be persuaded otherwise. I note Kirby J's support for a broad general vicarious liability principle that would make employers responsible for the intentional torts of not only their employees but also their agents and volunteers. I further note that he maintained this view in *Sweeney* but that he did not garner any support from his fellow Justices. And I note Gaudron J's belief that vicarious liability doctrine ought to be seen as a subset of agency law – an understanding which I develop in Part III.

In Part II, I assess what impact, if any, the *Maga* decision will have in Australia. I explain the common threads and the differences between the vicarious liability jurisprudence of the United Kingdom and Canada. I note

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<sup>14</sup> *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.

<sup>15</sup> Vines, above n 10, 623. She wrote "Is it therefore possible for a school authority to be held vicariously liable for the sexual assault of a pupil by a teacher at school? Three judges seemed to consider that it might be possible — Gleeson CJ, Gaudron and Kirby JJ. Three judges seemed to think it was not possible — Callinan, Gummow and Hayne JJ".

<sup>16</sup> *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.

that even though the Supreme Court of Canada seems to have moved away from traditional ‘scope of employment’ analysis if the employer has introduced a material risk into the marketplace and it is fair to make the employer vicariously responsible if such risk eventuates, the scope of employment analysis is still there and likely explains the difference between its same day decisions in the *Bazley*<sup>17</sup> and *Jacobi*<sup>18</sup> cases. In the United Kingdom, I note that despite very clear approval of the Canadian jurisprudence by Lord Steyn in the *Lister* case,<sup>19</sup> the UK courts have in fact retained the ‘scope of employment’ test for vicarious responsibility. They have however, moved away from a mechanistic application of the century old Salmond test to more flexibly require only that a plaintiff demonstrate a ‘close connection’ between even the intentional wrongs of an employee and the scope of the employment. I conclude Part II with an assessment of the likely impact of legislative changes in Australia since *Lepore* was decided. I identify the legislation that has been passed to foreclose long delayed cases and discuss decisions in the United Kingdom and New Zealand which have enlarged time despite even abridged time limitation periods in statute. I then discuss the likely impact of the child protection regimes which have been introduced and improved in all Australian states and territories except in Tasmania and the ACT since the *Lepore* decision was handed down. Controversially perhaps, I opine that these new child protection ‘codes’ will likely protect institutions against vicarious liability claims where they have fully complied, but will lead to direct liability in negligence and for breach of statutory duty when they have not – the

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<sup>17</sup> *Bazley v Curry* [1999] 2 SCR 534.

<sup>18</sup> *Jacobi v Griffiths* [1999] 2 SCR 570.

<sup>19</sup> *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

upshot being, that vicarious liability issues in sexual abuse cases are likely to become more and more scarce.

In Part III, I discuss the doctrine that an institution may owe the vulnerable a non-delegable duty of care in light of Gaudron J's *Lepore* suggestion that there is still room for such argument, and I dismiss it. I review the Australian rejection of the Canadian (and American) idea that institutions may owe the vulnerable a fiduciary duty and whether there is any likelihood that this idea might be resurrected in Australia in the future. But I conclude that so long as the Australian courts fail to recognise fiduciary responsibility for non-economic torts, this avenue for sexual abuse plaintiff recovery against institutions is likewise closed. Part III concludes with my discussion of Gaudron J's statement in *Lepore* that vicarious liability doctrine is properly seen as forming part of a broader ostensible authority doctrine in agency law. While I agree with her opinion that this general insight does indeed explain all the cases (except *Sweeney* which was decided subsequently), I do not expect her insight will make any difference to the way the Australian law develops - because it really makes no difference to say that an employer is vicariously responsible because there was a close connection between an employee's intentional tort and his employment or to say the employer is vicariously liable because the intentional tort was perpetrated within the scope of the employee's ostensible authority.

I conclude that the *Maga* decision will not have significant impact in Australian sexual abuse jurisprudence. Partly, that is because the idea that an intentional tort can never be within the scope of employment is so deeply set in the minds of the Australian judges. In practice however, it is not that set of the Australian jurisprudential sails that will prevent Australian sexual abuse jurisprudence developing along Canadian and

English lines. Rather, the advent of statutory child protection regimes in Australia will ensure that any future cases that do arise are argued in terms of direct institutional negligence and breach of statutory duty if there has been non-compliance with the applicable child protection regime. Vicarious liability arguments will thus fall into disuse where sex abuse takes place in institutional settings in the future. Hopefully there will not be as many sexual abuse cases in the future anyway because the statutory child protection regimes will work at preventing child sexual abuse in the first place.

## E VICARIOUS LIABILITY IN AUSTRALIA

In her late 2003 comment on the High Court of Australia decision in the *Lepore* case Prue Vines concluded

Unfortunately, the High Court has once again failed to clarify the law to the point where solicitors can safely advise their clients. The initial excitement at finding a six to one decision quickly fades when one realises that the ratio of *Lepore* is difficult to find and that the judgments differ on various points. It is clear that non-delegable duty is not to be expanded to cover intentional torts, but real clarification of the limits of vicarious liability for intentional conduct remains hovering just over the horizon. Unfortunately, despite the opportunity offered by a case raising the issue, the High Court has failed to give education authorities and other employers clear guidance on how to protect themselves. This failure raises the prospect of innocent victims again being forced onto the long road of litigation all the way to the High Court.<sup>20</sup>

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<sup>20</sup> Vines, above n 10, 626.

In the abstract to her article she summarised both “that non-delegable duty in the context of schools may not be seen favourably in the future”,<sup>21</sup> and that the division in the *Lepore* decision was best explained by a “deep-seated concern about the basis of vicarious liability in a tort system that is deeply fault-oriented”.<sup>22</sup>

There were six separate judgments in *Lepore*. Only Gummow and Hayne JJ concurred. Only McHugh J dissented. He thought a decision in favour of all three victims<sup>23</sup> could be justified under the doctrine of non-delegable duty – a doctrine from which all the other members of the court retreated. Several members of the Court considered that the non-delegable duty of care cause of action was not available in the case of intentional torts as opposed to torts arising out of negligence.<sup>24</sup> Gaudron J seemed to accept

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<sup>21</sup> Ibid 612 (headnote). For more detail, see above n 24.

<sup>22</sup> Ibid.

<sup>23</sup> Three different appeals were heard together. *NSW v Lepore* where Lepore, a student from a state school in the 1970s had succeeded in the NSW Court of Appeal because the State had failed to prevent a teacher's sexual assault when the State was under a non-delegable duty of care; and two Queensland cases (*Rich v State of Queensland* and *Samin v State of Queensland*) arising out of 1960s sexual abuse by the teacher in a one teacher rural school, but where the Queensland Court of Appeal had not accepted the non-delegable duty of care argument which had succeeded in the *Lepore* case in New South Wales.

<sup>24</sup> *New South Wales v Lepore* (2003) 212 CLR 511. At [34], Gleeson CJ stated “The proposition that, because a school authority's duty of care to a pupil is non-delegable, the authority is liable for any injury...is too broad, and the responsibility with which it fixes school authorities is too demanding”. At [256] and [266], Gummow and Hayne JJ stated “all of the cases in which non-delegable duties have been considered in this court have been cases in which the plaintiff has been injured as a result of negligence...In the present cases...[n]either plaintiff suffered injury as a result of any negligent conduct of the teacher” (underlining original). They continued “[T]o hold that a non-delegable duty of care requires the party concerned to ensure that there is no default of any kind committed by those to whom care of the plaintiff is entrusted would remove the duty altogether from any connection with the law of negligence... This would introduce a new and wider form of strict liability to prevent harm, a step sharply at odds with the trend of decisions in this Court rejecting the expansion of strict liabilities”. Callinan J was more direct still when he said at [340] “Education authorities do not owe to



that a school could have a non-delegable duty “to take steps to eliminate abuse”<sup>25</sup> which suggests that “a school could be liable on the basis of a non-delegable duty when an intentional tort has been carried out”.<sup>26</sup> But she thought that even the cases which suggested that employers could be vicariously responsible for the intentional torts of their employees, could be explained by a principle of estoppel. That is, since the employer in even the supposedly intentional tort cases had given the employee the relevant task to fulfill, the employer was estopped from denying personal liability for the resulting loss or damage.<sup>27</sup> But her rationale<sup>28</sup> for deciding difficult vicarious liability cases did not gain traction with any other members of the court. Kirby J was persuaded by the Canadian idea that an enterprise should be vicariously liable for all the risks that flowed from its business whether they were at fault or not.<sup>29</sup> But he was essentially alone in that

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children for whose education they are responsible (absent relevant contractual provision to the contrary) a particular or unique non-delegable duty of care, in practical terms, giving rise to absolute liability”. At [295], Kirby J simply considered that “[s]pecial rules, such as non-delegable duty of care...should not be applied when the broader basis of vicarious liability applies to the circumstances as it does here”.

<sup>25</sup> Vines, above n 10, 615.

<sup>26</sup> Ibid.

<sup>27</sup> *New South Wales v Lepore* (2003) 212 CLR 511, [113] and [131].

<sup>28</sup> White and Orr said Gaudron J “developed a novel approach to vicarious liability”. She “stated that to apply the traditional course of employment test is ‘simply to apply the ordinary law of agency’”: Steven White and Graeme Orr, ‘Precarious liability: The High Court in *Lepore*, *Samin* and *Rich* on school responsibility for assaults by teachers’ (2003) 11 *Torts Law Journal* 101, 108.

<sup>29</sup> *New South Wales v Lepore* (2003) 212 CLR 511, [303]. At [307][308] Kirby J explained why the Canadian approach was a “return to a classic formulation” and opined that Salmond’s formulation of the scope of employment had provided the “germ of the more modern analysis of the scope of employment” ([316]) developed by the Supreme Court of Canada in *Bazley* and the House of Lords in *Lister*.

opinion<sup>30</sup> and his view did not affect the result since he agreed with the majority that all three cases involved in this appeal should be reheard at first instance. As Prue Vines has opined above,<sup>31</sup> there is no common theme and accordingly *Lepore* did not authoritatively answer any vicarious liability questions in Australian law nor signal a future direction. Five of the judges said that the *Lepore* case could be reheard so that further facts might be adduced to determine whether Lepore's conduct did fall within the scope of his employment. But Gleeson CJ, Gummow, Hayne and Callinan JJ all doubted whether an intentional tort and especially a criminal act, could ever fall within the scope of employment.<sup>32</sup> McHugh and Kirby JJ considered that the employer could be liable for both an employee's intentional torts and criminal acts though their reasons were quite different and they disagreed with each other. While Gaudron J concurred in the decision to require a new trial in *Lepore* because the appellate courts did

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<sup>30</sup> While Gleeson CJ was also attracted by the Canadian jurisprudence in *Bazley* and the House of Lord's review of same in *Lister*, Gleeson CJ considered that the school authority would only be liable for the intentional tort of the teacher in *Lepore* if it could be shown at a rehearing that "the alleged misconduct...could properly be regarded as excessive chastisement" (*Lepore*, [78]) and therefore within the more traditional scope of employment of a teacher.

<sup>31</sup> Vines, above n 10 and supporting text.

<sup>32</sup> Though Gleeson CJ acknowledged that historically sexual abuse would never have been adjudged as falling within the scope of employment (*Lepore*, [54]), he conceded it was possible that the scope of employment could enable the relationship which led to the abuse in some way, but this would have to be demonstrated before vicarious liability could be imposed (*Lepore*, [40], [78] and [85]). Gummow, Hayne and Callinan JJ were much more traditional. Gummow and Hayne JJ said that the idea that an employer should be vicariously liable if it had introduced a material risk which eventuated was unacceptable because that would mean the employer would always be liable (*Lepore*, [217]) and that "to adopt this approach would represent a radical departure from what has hitherto been accepted as an essential aspect of the rules of vicarious liability: the requirement that the wrongdoing be legally characterised as having been done in the course of employment" (*Lepore*, [223]). Callinan J said "deliberate criminal conduct lies outside, and indeed will usually lie far outside, the scope or course of an employed teacher's duties" (*Lepore*, [342]).

not have enough facts from which to make a decision, her belief that an employee could be estopped from denying responsibility for an employee's torts or crimes under the general law of agency distance her from the doubts of the rest of the majority.<sup>33</sup> But all three judges who thus seemed willing to develop the jurisprudence in favour of victims have now retired from the High Court.

*Sweeney v Boylan Nominees*<sup>34</sup> is the only case where the High Court has considered vicarious liability again since *Lepore*. But there is a sense that it does not really add much, perhaps because the facts arose outside of the more problematic sexual abuse context. Still, since the advocates of a more empathetic approach to sexual abuse cases necessarily make their arguments in terms of the need for grand principle, and because the case featured two members new to the High Court since *Lepore*,<sup>35</sup> *Sweeney* cannot be ignored.

Maria Sweeney was injured at service station and convenience store in Pymble, New South Wales when the door of a fridge fell on her when she tried to open it. She sued those whom "she alleged were the owners and operators of the service station...and the...respondents".<sup>36</sup> Those respondents had leased the fridge to Australian Cooperative Foods Ltd (ACF), but there was no evidence at trial as to the arrangements between ACF and the owners and operators of the service station.<sup>37</sup> The lease between the respondent Boylan and ACF, obliged Boylan "to service and

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<sup>33</sup> *New South Wales v Lepore* (2003) 212 CLR 511, [127][131].

<sup>34</sup> *Sweeney v Boylan Nominees Pty Ltd* (2006) 227 ALR 46.

<sup>35</sup> Gaudron J retired from the High Court on 10 February 2003 and McHugh J on 1 November 2005. They were succeeded respectively by Heydon and Crennan JJ.

<sup>36</sup> *Sweeney v Boylan Nominees Pty Ltd* (2006) 227 ALR 46, [4].

<sup>37</sup> *Ibid.*

maintain the refrigerator in a proper and workmanlike manner and to replace any part which required replacement due to the normal operation of the refrigerator”.<sup>38</sup> “The owners and occupiers were found to have done all that they could reasonably be expected to have done in the circumstances and were thus not negligent.”<sup>39</sup>

The negligent mechanic was described at trial as a contractor to the defendant. He ran his own business, though it is not clear from the report whether he did so as a sole trader or through a corporate entity of some kind.<sup>40</sup> The issue at trial was whether Boylan was vicariously responsible for the negligence of the mechanic. If so, was that because the mechanic was an employee, an agent or a representative of some kind?

In *Hollis v Vabu Pty Ltd*,<sup>41</sup> Vabu was vicariously liable for the negligence of a bicycle courier who was an independent contractor for tax purposes. He was deemed an employee for vicarious liability purposes because he wore the uniform of Vabu and was extensively subject to Vabu's direction and supervision.<sup>42</sup> He was an “emanation”<sup>43</sup> of Vabu.

In *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*,<sup>44</sup> CML was found vicariously liable for the slander of one its representatives because it had “authorized

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<sup>38</sup> Ibid [3].

<sup>39</sup> Ibid.

<sup>40</sup> Ibid [3] and [31].

<sup>41</sup> *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

<sup>42</sup> *Sweeney v Boylan Nominees Pty Ltd* (2006) 227 ALR 46, [32].

<sup>43</sup> *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, [50]

<sup>44</sup> *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41.

him on its behalf to address to prospective proponents such observations as appeared to him appropriate”.<sup>45</sup> According to the majority in *Sweeney*, the representative in *CML*, “acted in right of the principal, and not in an independent capacity, because he acted in execution of his authority to canvass for offers to contract with his principal.”<sup>46</sup>

Though “the development of the law in this area has not always proceeded on a correct understanding of the basis of earlier decisions”,<sup>47</sup> and though “there is no adequate and complete explanation of the modern law, except by the survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves”,<sup>48</sup> a principal could be liable for his independent contractor's acts if that contractor was acting as the principal's agent.<sup>49</sup> But in the *Sweeney* case, the mechanic was adjudged not to be acting as Boylan's agent. He was truly an independent contractor. McHugh J's broader proposition in *Scott v Davis*<sup>50</sup> and in *Hollis v Vabu Pty Ltd* “that if A “represents” B, B is vicariously liable for the conduct of A”<sup>51</sup> was simply too broad for the majority of the court.<sup>52</sup> Boylan was not responsible for the negligence of the mechanic simply because he was an independent contractor.

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<sup>45</sup> Ibid 50 (Dixon J).

<sup>46</sup> *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, [18].

<sup>47</sup> Ibid [11].

<sup>48</sup> Ibid [20] quoting Oliver Wendell Holmes Jr, *The Common Law* (1881) 232.

<sup>49</sup> Ibid [22].

<sup>50</sup> *Scott v Davis* (2000) 204 CLR 333.

<sup>51</sup> Ibid [26].

<sup>52</sup> Ibid [27] citing the judgments of McHugh J in *Scott v Davis* (2000) 204 CLR 333, 370 [110] and in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 5758 [93].

Kirby J did not agree with the majority. While he agreed that the mechanic was not Boylan's employee,<sup>53</sup> he was Boylan's representative agent within the meaning of the High Court's 1931 decision in *CML*.<sup>54</sup> The mechanic was "integrated into [Boylan's] enterprise."<sup>55</sup> Because the contractor has been armed with the authority to act as the principal's representative, law and justice sustain the rule in *CML* that, if sued, the principal will be liable for its representative's wrongs to others acting within the scope of that authority.<sup>56</sup>

This reasoning is consistent with Kirby J's judgment in *Lepore*. For while he concurred with most of the other judges who did not believe it appropriate to extend the doctrine of non-delegable duty to cover intentional torts,<sup>57</sup> he wrote a separate judgment so that he could articulate his idea that the wider doctrine of vicarious liability provided more than ample scope to remedy the injustice caused by the absence of effective remedy in institutional sexual abuse cases. He said simply "Where the employer has authorised the employee's conduct, there is no difficulty in assigning vicarious liability to that employer."<sup>58</sup> "The issue is whether vicarious liability extends to such situations of intentional wrongdoing of an employee."<sup>59</sup> Employer vicarious liability to cover the intentional torts of employees was a long established principle and was clear in a long line

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<sup>53</sup> *Sweeney v Boylan Nominees Pty Ltd* (2006) 227 ALR 46, [73].

<sup>54</sup> *Ibid* [78][85].

<sup>55</sup> *Ibid* [83].

<sup>56</sup> *Ibid* [94].

<sup>57</sup> *New South Wales v Lepore* (2003) 212 CLR 511.

<sup>58</sup> *New South Wales v Lepore* (2003) 212 CLR 511, [308].

<sup>59</sup> *Ibid* [309].

of decisions.<sup>60</sup> Attempts by other members of the court in *Lepore* to distinguish some of these cases were “feeble”.<sup>61</sup>

But again, both McHugh and Kirby JJ have now retired from the High Court and the alignment of their replacements with the majority in *Sweeney*, suggest that if anything, the room for extending the scope of either the doctrine of non-delegable duty or vicarious liability so as to encompass the intentional acts of employees, agents or other representatives is less rather than more likely. But is there anything new in the recent decision of the UK Court of Appeal in *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church*?<sup>62</sup> That would persuade the High Court otherwise?

## F THE *MAGA* DECISION: WHAT IMPACT IF ANY IN AUSTRALIA?

While he was a 12 or 13 year old boy in 1975 or 1976, Maga was abused by a Catholic priest named Father Clonan who had been authorised by the Church to engage with youth in the community and to run a disco to

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<sup>60</sup> Between [310] and [314], Kirby J cited the following cases as authority for his proposition that employers had been held vicariously responsible for the intentional torts of their employees: *Dubai Aluminium Co Ltd v Salaam* [2002] 3 WLR 1913, 1942 [123]; *Limpus v London General Omnibus Co* (1862) 1 H & C 526 [158 ER 993]; *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 246 [72] per Lord Millett; *Cheshire v Bailey* [1905] 1 KB 237; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716; *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580 noted in *Lister* [2002] 1 AC 215, 226 [19], 247 [76]; and even in the High Court of Australia in *Bugge v Brown* (1919) 26 CLR 110 at 117 per Isaacs J, and in other Australian State Courts in *Hayward v Georges Ltd* [1966] VR 202, 211; *Macdonald v Dickson* (1868) 2 SALR 32, 35 per Hanson CJ, with whom Wearing J concurred.

<sup>61</sup> *New South Wales v Lepore* (2003) 212 CLR 511; (2003) 195 ALR 412, [312].

<sup>62</sup> *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441.

involve them. Father Clonan was personally wealthy and always had a nice car. Though Maga was not a member of the church, he had come within Father Clonan's influence both through the church authorised disco program and in getting paid to wash the priest's car and to do other chores at the presbytery. The abuse had taken place at the presbytery. Father Ternan was Father Clonan's superior and supervisor. He had received various complaints concerning Father Clonan's relationship with the boys who came within his influence. He had reassured the parents that he would discuss the complaints with Father Clonan. But there was no evidence that he had done anything further. He certainly had not taken action which resulted in Father Clonan's dismissal. Long before this civil matter came on for trial, Father Clonan had disappeared first to Ireland and then to Australia, but he was now presumed dead. Father Ternan had also previously died.

The Court of Appeal agreed with the first instance decision that Maga was entitled to bring the claim out of time.<sup>63</sup> But because Maga was not a Catholic, at first instance Jack J found that there was insufficient connection between the abuse and Father Clonan's duties as a priest for the Birmingham Archdiocese to be vicariously liable for these intentional torts against the boy.<sup>64</sup> With only minor variation as to the scope of Father

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<sup>63</sup> Ibid [28].

<sup>64</sup> In the trial at first instance (*Maga v Roman Catholic Archdiocese of Birmingham* [2009] EWHC 780), Jack J said at [100] I accept that it was Father Clonan's position as a priest which gave him the opportunity to abuse the claimant. But, as *Jacobi* shows, that is not by itself sufficient...Father Clonan's association with the claimant was founded on his use of the claimant for money to wash his car, to do cleaning in the Presbytery and in other houses, and to iron his clothes. That employment was not a priestly activity. Father Clonan did not do anything to draw the claimant into the activities of the Church. The association was not part of evangelisation, before "even" in its most extended sense. I therefore conclude that the assaults which Father Clonan carried out on the claimant were not so closely



Clonan's employment,<sup>65</sup> the Court of Appeal was unanimous in upholding the appeal. Lord Neuberger MR said, that even though the claimant was not a Roman Catholic, there are a number of factors, which, when taken together, persuade me that there was a sufficiently close connection between Father Clonan's employment as priest at the Church and the abuse which he inflicted on the claimant to render it fair and just to impose vicarious liability for the abuse on his employer, the Archdiocese.<sup>66</sup>

Lord Longmore considered that it was not necessary, in defining the scope of Father Clonan's employment, that the Court of Appeal find that his duties included the duty to evangelise.<sup>67</sup> Lady Justice Smith did not think it mattered whether the scope of employment included or did not include the duty to evangelise and so encompass ministry to non-members of the church. Vicarious liability applied either way.<sup>68</sup>

All were agreed Father Clonan was normally dressed in clerical garb, and was so dressed, when he first met the claimant. At the very least, this factor...sets the scene. A priest has a special role, which involves trust and responsibility in a more general way even than a teacher, a doctor, or a nurse. He is, in a sense, never off duty; thus, he will normally be dressed in

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connected with Father Clonan's employment or quasi-employment by the Church that it would be fair and just to hold the Church liable.

<sup>65</sup> The parties had agreed for the purposes of this case 'that Father Clonan should be treated as its employee for the purposes of this case, but Mr Faulks emphasises that this should not be taken as a general admission that a priest is, or is in the same position as, an employee, of the Archdiocese.': *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441, [36].

<sup>66</sup> *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441, [44].

<sup>67</sup> *Ibid* [91].

<sup>68</sup> *Ibid* [96].

"uniform" in public and not just when at his place of work. So, too, he has a degree of general moral authority which no other role enjoys; hence the title of "Father Chris", by which Father Clonan was habitually known. It was his employment as a priest by the Archdiocese which enabled him, indeed was intended to enable him, to hold himself out as having such a role and such authority.<sup>69</sup>

Father Clonan also had a special responsibility to develop relationships with local youth which had enabled him to "groom" the claimant;<sup>70</sup> he had invited him to a disco on Church premises which he had organised in his role as a priest;<sup>71</sup> he was authorised by his employer to spend time alone with people who were searching for truth,<sup>72</sup> and "[t]he abuse started at the presbytery and continued there."<sup>73</sup> Accordingly, "Father Clonan's sexual abuse of the claimant was 'so closely connected with his employment' as a priest at the Church 'that it would be fair and just to hold the [Archdiocese] vicariously liable'"<sup>74</sup> within Lord Steyn's test laid down in *Lister*.<sup>75</sup>

All three judges also overruled the trial judge and found that the Archdiocese owed a duty of care to Maga through Father Ternan, "to keep a very careful eye on Father Clonan"<sup>76</sup> because of all the sexual abuse

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<sup>69</sup> Ibid [45].

<sup>70</sup> Ibid [47].

<sup>71</sup> Ibid [48].

<sup>72</sup> Ibid [50].

<sup>73</sup> Ibid [51].

<sup>74</sup> Ibid [55].

<sup>75</sup> Ibid applying *Lister v Hesley Hall Ltd* [2002] 1 AC 215, [28].

<sup>76</sup> Ibid [66].

reports he had received against him. If he had not thus been negligent, “the claimant [would not have] be[en] sexually abused”.<sup>77</sup>

*Lister v Hesley Hall*<sup>78</sup> is generally regarded to have changed the law in favour of sexual abuse plaintiffs in England before *Maga* was heard. In *Lister*, the warden of a school boarding house had been convicted of the sexual abuse of some behaviourally and emotionally challenged boys at the boarding house for whom he stood *in loco parentis*. He ensured order at the boarding house, sent the boys off to school each morning and even tucked them into bed at night. Two years earlier in *Trotman v North Yorkshire CC*,<sup>79</sup> the UK Court of Appeal had found that the employer of a school headmaster who sexually abused a boy on a school field trip was not vicariously liable for the headmaster’s tort because sexual abuse of a child was not within the scope of his employment as a headmaster. But in *Lister* Lord Steyn gave the leading judgment of the House of Lords and said, referring to and approving the then recent decision of the Supreme Court of Canada in *Bazley v Curry*<sup>80</sup> and *Jacobi v Griffiths*:<sup>81</sup>

Wherever such problems are considered in future in the common law world these judgments will be the starting point....Employing the traditional methodology of English law, I am satisfied that in the case of the appeals under consideration the evidence showed that the employers entrusted the care of the children in Axeholme House to the warden. The question is whether the warden’s torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On

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<sup>77</sup> Ibid [67].

<sup>78</sup> *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

<sup>79</sup> *Trotman v North Yorkshire County Council* [1999] LGR 584.

<sup>80</sup> *Bazley v Curry* [1999] 2 SCR 534.

<sup>81</sup> *Jacobi v Griffiths* [1999] 2 SCR 570.

the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axeholme House. Matters of degree arise. But the present cases clearly fall on the side of vicarious liability.<sup>82</sup>

The Salmond test which had been applied in the *North Yorkshire CC* case by the UK Court of Appeal, was stated to hold that an employer was vicariously responsible for the tort of its employee only if “it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master”. In *Lister* the House of Lords said that

it is necessary to face up to the way in which the law of vicarious liability sometimes may embrace intentional wrongdoing by an employee. If one mechanically applies Salmond's test, the result might at first glance be thought to be that a bank is not liable to a customer where a bank employee defrauds a customer by giving him only half the foreign exchange which he paid for, the employee pocketing the difference. A preoccupation with conceptualistic reasoning may lead to the absurd conclusion that there can only be vicarious liability if the bank carries on business in defrauding its customers. Ideas divorced from reality have never held much attraction for judges steeped in the tradition that their task is to deliver principled but practical justice.<sup>83</sup>

On the face of it, the law of the United Kingdom and Canada is now very much aligned. While it is still accurate to note that the UK jurisprudence has incorporated the “close connection” language into the pre-existing Salmond test<sup>84</sup> for vicarious liability since the ‘scope of employment’

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<sup>82</sup> *Lister v Hesley Hall Ltd* [2002] 1 AC 215, [27][28].

<sup>83</sup> *Ibid* [15][16].

<sup>84</sup> As quoted in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, [8] and [15]; “*Salmond on Torts*, 1st ed (1907), p 83; *Salmond, Law of Torts*, 9th ed (1936), 95; *Salmond and Heuston, Law of Torts*, 21st ed (1996), 443”.

doctrine remains, it would seem that the practical result will be the same as in Canada. There, if one reads only the *Bazley* decision, the Salmond test seems to have been subsumed into the policy driven idea that if the employer introduced material risks into the community as a part of its enterprise, then it will be fair and just to hold that employer vicariously responsible if those risks materialise into loss or injury. But there is still the difference between the Canadian decisions in *Bazley*<sup>85</sup> and *Jacobi*.<sup>86</sup> Is that difference reflected in the most recent English jurisprudence and is it relevant to the state of the law in Australia?

In *Bazley*, a paedophile unwittingly hired by a Children's Foundation to act as a surrogate parent, sexually abused a mentally troubled child in one of its residential care facilities. McLachlin J providing the unanimous judgment of the Supreme Court of Canada concluded:

the Foundation is vicariously liable for the sexual misconduct of Curry. The opportunity for intimate private control and the parental relationship and power required by the terms of employment created the special environment that nurtured and brought to fruition Curry's sexual abuse. The employer's enterprise created and fostered the risk that led to the ultimate harm. The abuse was not a mere accident of time and place, but the product of the special relationship of intimacy and respect the employer fostered, as well as the special opportunities for exploitation of that relationship it furnished.<sup>87</sup>

In *Jacobi*, an employee of a Boys' and Girls' Club had sexually abused a brother and a sister, mostly at his home away from the club. McLachlin J who had penned the unanimous decision of the Supreme Court in *Bazley* including its new test to guide lower courts as to when they could

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<sup>85</sup> *Bazley v Curry* [1999] 2 SCR 534.

<sup>86</sup> *Jacobi v Griffiths* [1999] 2 SCR 570.

<sup>87</sup> *Bazley v Curry* [1999] 2 SCR 534, [58].

appropriately impose vicarious tort liability for intentional torts, penned the 43 minority decision in *Jacobi*. She and her minority colleagues found that “the Club... positively encouraged an intimate relationship to develop between Griffiths and his young charges.”<sup>88</sup> Because of his position of trust empowered by the Club, this abuser came to exercise god-like power over these vulnerable victims.<sup>89</sup> Though most of the sexual assaults took place away from the Club at the abuser's home, “It was his fostering of trust at the Club... that enabled him to commit his despicable acts”.<sup>90</sup>

The majority applied the same test that McLachlin J had formulated in *Bazley* and applied in *Jacobi*, but came to the opposite result. Binnie J wrote the judgment. He and his colleagues considered the Trial Judge had gone “beyond reality...when he accepted Jody’s description at trial of Griffiths as a “god-like” authority.”<sup>91</sup> “The Club provided the employee with an opportunity to meet children”,<sup>92</sup> but “Griffiths had no job-created authority to insinuate himself into the intimate lives of these children.”<sup>93</sup> While McLachlin J for the minority had rejected the suggestion “that an employee’s job must bear a sufficient similarity to parenting to invoke vicarious liability in child abuse cases” (underlining original),<sup>94</sup> Binnie J for the majority noted:

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<sup>88</sup> *Jacobi v Griffiths* [1999] 2 SCR 570, [17].

<sup>89</sup> Ibid [18] and [19]. Note that the 'god-like power' phrase was taken by the trial judge from the testimony of the female victim.

<sup>90</sup> Ibid [21].

<sup>91</sup> Ibid [39].

<sup>92</sup> Ibid [43].

<sup>93</sup> Ibid.

<sup>94</sup> Ibid [26].

I would not want to be taken as suggesting that creation of a parent-type relationship constitutes a precondition to vicarious liability in child abuse cases. However, not only do the “parental” cases have a particular relevance to the facts of this appeal, they show how high the courts have set the bar before imposing no-fault liability.<sup>95</sup>

He continued:

It is as important on this subject as elsewhere to look at what courts do, and not merely at what they say... Adoption by this Court of the “enterprise risk” theory in *Children’s Foundation* was an effort to explain the existing case law, not to provide a basis for its rejection... [T]he existing case law does not support the imposition of vicarious no-fault liability on the respondent in this appeal.<sup>96</sup>

Policy considerations also dictated that vicarious liability should not be imposed in this case. Competing policy considerations had to be balanced;<sup>97</sup> it could not be ignored that the imposition of no-fault liability on a not-for-profit corporation would not achieve the same result as in the case of a school or for-profit corporation;<sup>98</sup> and

the imposition of no-fault liability...would tell non-profit recreational organizations dealing with children that even if they take all of the precautions that could reasonably be expected of them, and despite the lack of any other direct fault for the tort that occurs, they will still be held financially responsible for what, in the negligence sense of foreseeability, are unforeseen and unforeseeable criminal assaults by their employees.<sup>99</sup>

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<sup>95</sup> Ibid [64].

<sup>96</sup> Ibid [65][66].

<sup>97</sup> Ibid [67].

<sup>98</sup> Ibid [68].

<sup>99</sup> Ibid [75].

Ultimately the case was referred back for retrial because the negligence and fiduciary duty pleadings had not been decided.<sup>100</sup> But this was not a case where the employer should be held vicariously liable for the intentional torts of its employee Griffith.

What is surprising in the *Jacobi* decision is that the majority of the Supreme Court of Canada was as reluctant as the High Court of Australia to impose no-fault vicarious liability upon an employer which had done all it reasonably could to protect vulnerable children. That reluctance does not come out in the House of Lord's decision in *Lister* or in the UK Court of Appeal's more recent decision in *Maga*. Indeed, it seems that the Trial Judge's decision in *Maga* is more closely aligned with the majority in *Jacobi* than the interpretation preferred by the Court of Appeal.

What then is the High Court of Australia likely to decide in a child abuse case argued on vicarious liability grounds in the future? Unless there is a relationship akin to the surrogate parenthood that was required by the employment contract in both *Bazley* and *Lister*, it is submitted that the High Court of Australia is as unlikely as ever to impose vicarious liability on an employer. But legislative developments in Australia since the *Lepore* decision, also make it less likely that the High Court of Australia will decide a vicarious liability case arising from sexual abuse facts against an institutional employer in a plaintiff's favour. Those legislative developments fall into two distinct categories. First, legislation aimed at limiting the disability arguments that have previously succeeded in enabling historic sexual abuse plaintiffs to be heard outside normal statutory limitation periods. And secondly, state and territorial child

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<sup>100</sup> Ibid [87].



protection legislation targeted at protecting children in Australian society so that fewer cases arise in future for judicial resolution.

### A *Limitation Statutes*

The statute of limitations in the *Maga* case in the UK posed a significant initial barrier to recovery for that victim. Maga's lawyers had to convince the High Court Judge that he should be allowed to bring his case in 2007, more than 30 years after Father Clonan had abused him. It will be recalled that the alleged offending took place when he was 12 or 13 years old in 1975 or 1976. Most British jurisdictions have passed legislation requiring that actions in tort be brought within no more than six years from the time when the events complained of, took place. But six years is a comparatively generous limitation. Most Australian limitation statutes require that tort actions be brought within no more than two or three years of the relevant events, though extensions can be obtained.<sup>101</sup>

Maga's strategy to overcome the problem is generic. If his advocates could convince the court that he was suffering from a disability, then he could likely convince the same court that the limitation period should not start to run until the disability ended, if ever. In the case of historic sexual abuse victims, the proof of disability is more difficult because some victims are able to function quite satisfactorily in their regular lives but cannot muster the emotional capacity and strength to confront their abuse, let alone initiate legal action to seek compensation for their losses. Should the court discount their disability claims because they seem inconsistent with their apparently satisfactory functioning in other parts of their lives?

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<sup>101</sup> For details of the relevant legislation, see above n 116.

In *Maga*, the trial judge's analysis was upheld by the Court of Appeal.<sup>102</sup> Jack J concluded that Maga did not "have the capacity to conduct legal proceedings" and was therefore "of 'unsound mind' for the purposes"<sup>103</sup> of the relevant limitation legislation. After analysis, he also concluded that the defendant church would not be prejudiced by the delay in bringing the proceedings.<sup>104</sup> Though the Church denied that this boy was one of those abused by Father Clonan,<sup>105</sup> neither the Church nor the Police had been able to call the alleged abuser as a witness in any of the many other abuse cases that they had settled – and, in any event, the Church had "not ma[d]e enquiries and taken steps" to investigate the abuse claims as they should have done once they had been informed of the abuse "after the cause of action arose".<sup>106</sup> Jack J also doubted "that the Church would want to deny that Father Clonan was an abuser because of the subsequent claims which have been made which have, I understand, all been settled by substantial payments".<sup>107</sup>

Similar arguments have been accepted in other courts. For example, in *S v Attorney-General*<sup>108</sup> and in *W v Attorney-General*,<sup>109</sup> the New Zealand

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<sup>102</sup> *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441, [21][29].

<sup>103</sup> *Maga v Roman Catholic Archdiocese of Birmingham* [2009] EWHC 780, [53].

<sup>104</sup> *Ibid* [69], [70] and [72].

<sup>105</sup> *Ibid* [70].

<sup>106</sup> *Ibid* [76].

<sup>107</sup> *Ibid* [69].

<sup>108</sup> *S v Attorney-General* [2003] NZCA 149.

<sup>109</sup> *W v Attorney-General* [2003] NZCA 150.

Court of Appeal<sup>110</sup> decided in 2003, that claims dating back to 1967 could proceed despite the applicable six year statute of limitations.<sup>111</sup> They accepted expert evidence which the Trial Judge had rejected, that the symptoms of Post Traumatic Stress Disorder and Depression (PTSD) included the “develop[ment of] 'tunnel vision' shutting down stimuli apart from those they are focusing on. Such a person can do well in some areas of their life but at the expense of other functions.”<sup>112</sup> They accepted that this “appellant tried to get on with his life and 'parked' or repressed his childhood trauma”.<sup>113</sup> Once he was “released' by the death of his caregiver...and had appropriate medical and psychological support, he then had vigorously pursued the legal claim”.<sup>114</sup> The Trial Judge's focus on what the plaintiff could do, had seen him “overlook” the expert's evidence as to the enduring effects of the PTSD. In the *W* case, the Court of Appeal upheld the trial judge's interpretive finding that the six year limitation period did not start until the plaintiff made the link between the abuse and his mental injury in 1996.<sup>115</sup>

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<sup>110</sup> When appeals to the Privy Council were abolished effective in July 2004, and two of the five judges who sat in this case were promoted to compose the first New Zealand Supreme Court. Blanchard and Tipping JJ were appointed at the inception of the new court; McGrath and Anderson JJ were appointed in 2005 and 2006 respectively,

<sup>111</sup> *S v Attorney-General* [2003] NZCA 149, [30].

<sup>112</sup> *Ibid* [42].

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid* [44].

<sup>115</sup> *W v Attorney-General* [2003] NZCA 150, [23][24].

## B Other legislative developments in Australia

While the refinement of the applicable State and Territory Limitation laws in Australia to limit the scope of the disability arguments that plaintiffs can bring in Australia<sup>116</sup> may reduce the number and the likely success of historic sexual abuse claims in the future, what is more likely to reduce the number of such actions, is the advent of detailed statutory child protection schemes in most of the states and territories in Australia.<sup>117</sup> It is submitted

<sup>116</sup> *Limitation Act 1969* (NSW) s 50C(1)(b) now provides a “12 year long-stop limitation period”, though that period can be extended by a Court exercising its discretion under Division 4 of Part 3. Section 27E of the *Victorian Limitation of Actions Act 1958* similarly provides that a person under a disability can bring an action before the earliest to occur of six years after the disability ends or twelve years from when the action accrued. Section 27L is similar to Division 4 of Part 3 of the New South Wales legislation and sets out the basis upon which Courts may further extend these limitation periods. Section 11 of the *Queensland Limitation of Actions Act 1974* provides a three year limitation period in respect of personal injuries. Section 29 provides that period is extended by six years from the date when a disability ceases. Section 36 of the *South Australian Limitation of Actions Act 1936* provides a three year limitation period for personal injury claims, or three years after the claimant becomes aware of the relevant injury. Section 14 of the *West Australian Limitation Act 2005* provides a three year sunset on personal injury actions. Part 3 of the same act makes various provisions for extension depending on the nature of the disability (different minority ages and mental disability). In Tasmania, sections 5 and 5A of the *Limitation Act 1974* make a distinction between causes of action accrued before and after the date of the commencement of the act, with extensions possible under Part III for similar reasons that apply in NSW and Victoria. In the ACT, section 11 of the *Limitation Act 1985* provides a six year limitation on all causes of action, but section 35 grants the court discretion to enlarge that time after reviewing specified criteria. Section 12 of the *Limitation Act 2008* in the Northern Territory prescribes a three year limitation period on actions in tort. But section 36 provides for an extension of three years after the disability ends. It is also arguable that greater detail in the legislation where disability is concerned in fact enables disabled plaintiffs to more easily make their cases since the legislatures clearly contemplated that they might not be competent to bring cases within normal limitation periods and therefore actively gave courts discretion to extend time when necessary.

<sup>117</sup> Save for Tasmania and the ACT, all domestic Australian jurisdictions now have child protection regimes that require all persons who are employed to work with children, or who volunteer to work with children, are first subject to a police background check or that they first sign a statutory declaration confirming that they have no relevant criminal convictions. The legislation creating these requirements are: *Children and Young Persons (Care and Protection Act) 1998*

that these new statutory child protection regimes will be seen as creating codes of conduct in each jurisdiction for all organisations which work with children whether they do their work through employees or volunteers. If the organisations can show that they have complied with the legislation, then they will be able to present a prima facie 'no fault' case to defend themselves against direct abuse claims founded in negligence. If they have not complied, their non-compliance will be prima facie evidence of negligence, and might also make it easier to satisfy a court that such organisations should be indirectly but vicariously liable for the intentional torts of their employees and volunteers since the absence of fault will not cause anxiety.

The reason why non-compliance with child protection legislation might make it easier to convince a court that an institution should be vicariously liable for even the intentional tort of an employee is subtle. While no court and certainly not the High Court of Australia, has ever said that a plaintiff must prove fault to succeed in a vicarious liability case, the language of Binnie J for the Supreme Court of Canada in *Jacobi's* case and of Lord Steyn when discussing that decision in *Lister*, suggest that a perception of fault may now be a subliminal factor for judges working out whether it is fair to impose vicarious liability in Canada and the UK. For while there is nothing extraordinary in Binnie J's indication that the difference between direct liability in negligence and indirect vicarious liability is the same as that which exists between 'fault' and 'no-fault' liability,<sup>118</sup> his judgment that it would not have been fair to impose "vicarious no-fault liability" on

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(NSW); *Care and Protection of Children Act* 2007 (NT) ; *Child Protection Act* 1999 (Qld); *Children's Protection Act* 1993 (SA); *Working with Children Act* 2005 (Vic); and *Working with Children (Criminal Record Checking) Act* 2004 (WA).

<sup>118</sup> *Jacobi v Griffiths* [1999] 2 SCR 570, [64][67].

the employer in *Jacobi*<sup>119</sup> raises legitimate questions about why fairness dictated the imposition of vicarious liability in *Bazley*. McLachlin J did not think there was a lot of objective difference between the authority given by the two employers in the two cases. For Binnie J and his colleagues in the majority in *Jacobi*, the difference between the two cases was about how much risk the respective employers had introduced into the community<sup>120</sup> – which suggests it is fair to impose vicarious liability on an employer if he was less careful or at fault in some way. The connection between fault and fairness is perhaps more obvious in Lord Steyn’s judgment in *Lister* when he said

Enunciating a principle of "close connection" the Supreme Court unanimously held liability established in *Bazley's* case and by a 4 to 3 majority came to the opposite conclusion in *Jacobi's* case. The Supreme Court judgments examine in detail the circumstances in which, though an employer is not “at fault,” it may still be “fair” that it should bear responsibility for the tortious conduct of its employees.<sup>121</sup>

The judgments are consistent in maintaining the difference between direct and vicarious liability, or fault and no-fault liability. But the introduction of the enterprise risk test into scope of authority cases invokes notions of fairness, which may belie the traditional fault, no-fault dichotomy. For while it may still be fair for a court to impose vicarious liability when there was no fault, the notion that an employer’s introduction of a risk into the market place is sufficient reason to hold them vicariously liable for a resulting tort or crime, implies that the employer’s decisions were indeed a factor in the imposition of liability.

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<sup>119</sup> Ibid [66].

<sup>120</sup> Ibid [67].

<sup>121</sup> *Lister v Hesley Hall Ltd* [2002] 1 AC 215, [10].

The provisions of the applicable child protection statutes in Australia are also likely to define for Courts the scope of the duties of care that will apply in future child sexual abuse cases. While non-compliance with the codes as a species of fault may also lead to vicarious liability for employing organisations, it is likely that the High Court's reluctance to impose vicarious liability in the case of intentional torts and crimes will harden when there has been compliance with the relevant code. Some practical analysis may assist understanding.

Suppose that a church employee or volunteer sexually abuses a child to whom he was introduced in the course of his employment. Suppose further that the church had fully complied with the statutory child protection rules applicable in that state. When the sexual abuse victim brings her claim before the court, the church will be able to answer a direct claim of negligence by pointing out that it fully complied with the applicable law including in most cases, requiring the prospective employee to undergo a criminal records check.<sup>122</sup> The church will also express strong support for the relevant child protection laws behind its compliance and ask what else it could reasonably have done to prevent the tragic abuse that had taken place. It is submitted that these same arguments by the church would also likely defeat a claim that the church was vicariously responsible for an employee's tort and crime if the High Court were ever persuaded to apply the enterprise risk doctrine now applied in Canada and the UK. Perhaps courts in Australia would then respond as did the Supreme Court of Canada in *Jacobi v Griffiths* that such an

imposition of no-fault liability...would tell non-profit recreational organizations dealing with children that even if they take all of the precautions that could reasonably be expected of them [*and that the law*

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<sup>122</sup> Above n 117.

*required*], and despite the lack of any other direct fault for the tort that occurs, they will still be held financially responsible for what, in the negligence sense of foreseeability, are unforeseen and unforeseeable criminal assaults by their employees (*italics added by the author*).<sup>123</sup>

If however, the church has not complied with the relevant statutory child protection regime, such cases will likely be argued and won in terms of negligence and breach of statutory duty, though perhaps alternative and indirect vicarious liability claims may still be pled in the alternative.

The position in Tasmania and the ACT, where no statutory child protection regimes yet exist, is more difficult to assess. In those jurisdictions, where there is no state or territory support in place to enable criminal records checks before child care workers and volunteers are engaged, it is submitted that the institutions would do well to undertake similar checks voluntarily since the 'gravitational pull' of the other statutory regimes is likely to raise the duty of care bar even in their jurisdictions.<sup>124</sup> It should be noted however that privacy law presents a hurdle for institutions that try and do private criminal records checks. Absent statutory justification, they will not have official access to the most useful records.

None of this however provides hope of remedy for the victims of historic sexual abuse perpetrated long before the advent of child protection codes.

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<sup>123</sup> *Jacobi v Griffiths* [1999] 2 SCR 570, [75]. See also above n 99 and supporting text.

<sup>124</sup> For a discussion of the 'gravitational pull' of statutes in Australian jurisdictions without equivalent statutes, see Thompson AK, *Religious Confession Privilege and the Common Law*, Martinus Nijhoff, 2011, 207210. The idea that statutes exercise gravitational pull on the common law in other jurisdictions was suggested by Mason P, as he then was, in *Akins v Abigroup Ltd* (1998) 43 NSWLR 539, 547548 and was also discussed by Beazley JA and James J in *R v Young* (1999) 46 NSWLR 681, [205][326].



## G VICARIOUS LIABILITY FOR INTENTIONAL TORTS IN AUSTRALIA IN THE FUTURE?

Plaintiffs in child sexual abuse cases have tried various approaches to convince Australian courts that someone other than the immediate perpetrator should be responsible to compensate them for the injuries that they have suffered. The decision in the *Lepore* case effectively eliminated the idea that such recovery could be founded in the notion that employers owed children a non-delegable duty of care for even the intentional torts of their employees – though Gaudron J did leave open the possibility that schools could owe such a non-delegable duty of care.<sup>125</sup> Similarly, it seems clear that the ongoing majority of the High Court will not accept the proposition that an employer should be vicariously liable for the intentional torts of its employees or agents since intentional torts and crimes cannot reasonably be seen as falling within the scope of employment.<sup>126</sup> What of the other jurisprudential theories that have been raised as possible justifications for recovery from deep pocketed institutions which have the ability to spread such losses through society?

Though Gaudron J inferred that an employer could conceivably owe vulnerable children an absolute duty to take care of them,<sup>127</sup> she considered that the occasional cases which had found employers vicariously liable for the intentional torts of their employees could all be explained by the equitable concept of estoppel.<sup>128</sup> Can estoppel be used to prevent employers denying liability where those employers have sent their

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<sup>125</sup> See above n 2526 and supporting text.

<sup>126</sup> See above n 3552 and supporting text.

<sup>127</sup> *New South Wales v Lepore* (2003) 212 CLR 511, [99][105].

<sup>128</sup> *Ibid* [108][113], [130][131].

employees into the world as agents to perform tasks that either provided the opportunity for the abuse or licensed it in some way? Is this really any different than the vicarious liability arguments that the High Court has already rejected in the case of intentional torts? What about the idea, accepted in Canadian courts, that employers owe a fiduciary duty to children since they are vulnerable and trusting?<sup>129</sup> Does this additional equitable idea have the power to convince Australian courts of the justice served by compensating child sexual abuse victims when other logic has failed? Is it the reason why the plaintiff succeeded against the solicitors' firm in *Lloyd v Grace Smith*<sup>130</sup> in 1912? Or is there anything analogous to the notion of bailment, which has been used<sup>131</sup> to explain why the employer was held vicariously liable for the theft of a client's fur coat in *Morris*<sup>132</sup> in 1966 in the UK, that could be usefully argued in the future in Australia?

*A Is there any room for argument left under the non-delegable duty care jurisprudence?*

Gaudron J's point in apparently leaving the non-delegable duty of care argument open to plaintiffs in school cases, was that the plaintiffs in the three cases reported as *Lepore*, had not established the particular non-delegable duty of care their schools owed to them. She said that the non-delegable duties established to exist in *The Commonwealth v Introvigne*<sup>133</sup> were stated by Murphy J to be "[t]o take all reasonable care to provide

<sup>129</sup> For example, see *Jacobi v Griffiths* [1999] 2 SCR 570, [60] and [87].

<sup>130</sup> *Lloyd v Grace, Smith & Co* [1912] AC 716.

<sup>131</sup> See for example, Gleeson CJ's judgment in *New South Wales v Lepore* (2003) 212 CLR 511, [48].

<sup>132</sup> *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716.

<sup>133</sup> *Commonwealth v Introvigne* (1982) 150 CLR 258.

suitable and safe premises .... to provide an adequate system to ensure that no child is exposed to any unnecessary risk of injury; and .... to see that the system is carried out."<sup>134</sup> It is difficult to see from her judgment how and why the schools in *Lepore*, *Rich* and *Samin* did not breach those broadly expressed duties since it was accepted that each of these three plaintiffs were assaulted by their teacher. Gaudron J did say that non-delegable duties of care were not absolute; that because they were 'duties of care', the risks that materialised had to have been foreseeable<sup>135</sup> - which suggests that she considered the risk of the truck of the flagpole falling in *Introvigne* was more foreseeable than the risk of the teachers abusing the students in *Lepore*, *Rich* and *Samin*. However she does not explain why and we are left to speculate that she believed that if teachers were on duty in the playground as part of their normal supervision, they could have stopped the flagpole incident.<sup>136</sup> But Gaudron J did not think that anyone could have stopped the sexual abuse incidents because they were torts committed by a teacher, and far outside the scope of a teacher's employment.

If this speculative analysis of Gaudron J's underlying reasoning is correct, then we are back to the same core issues which have perplexed the High Court in vicarious liability argument. Namely, that it is very difficult to impose vicarious liability when there is no foreseeable risk and thus no fault. So it is probably not surprising that the 'non-delegable duty of care' argument has not been tried again since *Lepore*, and it is fair to conclude that it is unlikely to succeed.

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<sup>134</sup> *New South Wales v Lepore* (2003) 212 CLR 511, [102] quoting Murphy J in *The Commonwealth v Introvigne* (1982) 150 CLR 258, 274275.

<sup>135</sup> *New South Wales v Lepore* (2003) 212 CLR 511, [103].

<sup>136</sup> This was the ratio for the decision in *Commonwealth v Introvigne* (1982) 150 CLR 258. Gleeson CJ's analysis of the *Introvigne* decision in *Lepore*, [24][31] is to similar effect.

## B *Fiduciary Duty*

The High Court of Australia has stated on a number of occasions that the categories of fiduciary duty are not closed<sup>137</sup> However, the unanimity of the Court in *Breen v Williams*<sup>138</sup> in rejecting Canadian jurisprudence in relation to fiduciary duty, makes it unlikely that sexual abuse plaintiffs in Australia are soon going to be able to establish that they are owed fiduciary duties by the institutions which engaged their abusers.

In that case, though there were four separate judgments, all agreed that “the Canadian notion [of fiduciary duty does not] accord with the law of fiduciary duty as understood in this country.”<sup>139</sup> Julie Breen's wish to have access to her medical records without first signing an indemnity, did not put that case on all fours with the claim that the child victims of sexual abuse are the subjects of a relationship analogous to agency and are also vulnerable in such a way that fiduciary principles should apply.<sup>140</sup> And Julie Breen's claim that her Doctor Cholmondoley Williams, was under a

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<sup>137</sup> For example in *Hospital Products v United States Surgical Corporation* (1984) 156 CLR 141 per Gibbs CJ at 68 and per Mason J at 96; *Breen v Williams* (1996) 186 CLR 71 per Gaudron and McHugh JJ, [24].

<sup>138</sup> *Breen v Williams* (1996) 186 CLR 71.

<sup>139</sup> Ibid [15] (Brennan CJ), but see also [24] (Dawson and Toohey JJ); [36] and [40]-[42] (Gaudron and McHugh JJ), [71] (Gummow J).

<sup>140</sup> Brennan CJ stated that the two principal sources of a fiduciary duty were agency and a “relationship of ascendancy or influence by one party over another, or dependence or trust on the part of that other”: *Breen v Williams* (1996) 186 CLR 71, [14]. Others on the Court in *Breen* referred to the vulnerability of one party in a relationship which necessarily involved dominance or special knowledge and responsibility as a primary factor in invoking the fiduciary principles of equity. See [20] (Dawson and Toohey JJ); [24] (Gaudron and McHugh JJ); [59] and [62] (Gummow J).

duty to act in her 'best interests',<sup>141</sup> asserted a direct fiduciary relationship rather than that he was responsible for breach of any kind of vicarious duty as will most often arise in an institutional sexual abuse claim.

However, a sexual abuse claim alleging the existence of a fiduciary relationship with equitable duties applying, came before the full Federal Court two years after the *Breen* case in *Paramasivam v Flynn*<sup>142</sup> and was dismissed in accordance with the findings of the *Breen* decision. Paramasivan alleged that he had been sexually assaulted by his guardian Flynn over a period of many years. He alleged that the guardianship relationship was fiduciary in nature. The court agreed that the relationship of guardian and ward could give rise to fiduciary duties where, for example, the guardian unduly influenced the financial transactions of the ward. The breach of such duties could entitle the ward to compensation for any resulting economic loss.<sup>143</sup> However, Anglo-Australian law had not accepted that the breaches of trust and confidence which were alleged in this case were economic in nature.<sup>144</sup> Their honours continued:

Here, the conduct complained of is in within the purview of the law of tort..., which has worked out and elaborated principles according to which various kinds of loss and damage, resulting from intentional or negligent wrongful conduct, is to be compensated. That is not a field on which there is any obvious need for equity to enter and there is no obvious advantage to be gained from equity's entry upon it. And such an extension would, in our

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<sup>141</sup> Ibid [9] (Brennan CJ); [26], [27] and [30] (Dawson and Toohey JJ); [11][16], [18][19], [28], [30][31], [41], [51][52] and [71] (Gaudron and McHugh JJ). Gummow J did not use this phrase from the plaintiff in his judgment.

<sup>142</sup> *Paramasivam v Flynn* (1998) 160 ALR 203.

<sup>143</sup> Ibid [67].

<sup>144</sup> Ibid [68][69].

view, involve a leap not easily to be justified in terms of conventional legal reasoning.<sup>145</sup>

Their honours noted that in *Breen*, several of the judges had accepted that fiduciary duties could stand alongside duties arising in both contract and tort.<sup>146</sup> But they noted, even in the Canadian jurisprudence, that "[f]iduciary duties should not be super imposed on these common law duties simply to improve the nature or extent of the remedy."<sup>147</sup> For those reasons

a fiduciary claim, such as that made by the plaintiff in this case, is most unlikely to be upheld by Australian courts...To say, truly, that categories are not closed does not justify so radical a departure from underlying principle. Those propositions, in our view, lie at the heart of the High Court authorities to which we have referred, particularly, perhaps, *Breen*.<sup>148</sup>

Various commentators since have opined that there may still be room for such arguments.<sup>149</sup> It is submitted that Richard Joyce was most accurate

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<sup>145</sup> Ibid [70].

<sup>146</sup> Ibid [75][78].

<sup>147</sup> Ibid [77], quoting Sopinka J in *Norberg v Wynrib* [1992] 2 SCR 226 at 312; (1992) 92 DLR (4th) 449, 481.

<sup>148</sup> Ibid [79].

<sup>149</sup> For example, Lisa Zhou has observed that the "inadequacy of Australian fiduciary jurisprudence" and in particular the "lack of protection of non-economic interests...systematically disadvantages sexual abuse victims", "Fiduciary Law, Non-Economic Interests and Amicus Curiae", [2008] *Melbourne University Law Review* 36. In a note about the Cubillo decision by O'Loughlin J once again denying recovery for non-economic torts under fiduciary principles, Robert Van Krieken notes Father Frank Brennan's belief that the failure to provide a remedy for wrongs committed against the stolen generation is a "betrayal of national, moral and political commitment": 'Is assimilation justiciable? Lorna Cubillo & Peter Gunner v Commonwealth' [2001] *Sydney Law Review* 10.

when he stated, citing the decisions of O'Loughlin J in the *Cubillo* cases<sup>150</sup> and Rolfe J in *Johnson v Department of Community Services*:<sup>151</sup>

[I]t is clear that so long as the distinction between economic and non-economic interests continues to inform the operation of Australian fiduciary law, the likelihood for success of plaintiffs is low.<sup>152</sup>

In any event, when fiduciary duties have been considered in sexual abuse cases, there is no certainty that they will yield remedies any different than those available simultaneously in contract or tort.<sup>153</sup>

<sup>150</sup> *Cubillo (No 1)* (1999) 89 FCR 528 and *Cubillo* (2000) 174 ALR 97.

<sup>151</sup> *Johnson v Department of Community Services* (2000) Aust Tort Reports 81-540.

<sup>152</sup> Joyce R, 'Fiduciary Law and Non-Economic Interests' [2002] 28 *Monash University Law Review* (2) 239, 240.

<sup>153</sup> For example in *M(K) v M(H)* (1992) 96 DLR (4<sup>th</sup>) 289, 337, La Forest J for the majority suggested that in the absence of different policy considerations, the damages for breach of fiduciary duty would be the same as the equivalent damages in contract and tort. McLachlin J was not so sure the damages would be the same and Richard Joyce notes that the continuing separation of common law and equity in Australia, might yield a different result if the Canadian jurisprudence was ever followed in Australia ('Fiduciary Law and Non-Economic Interests' [2002] 28 *Monash University Law Review* (2) 239, 264). Note also that the NZ Court of Appeal in *S v Attorney-General* [2003] NZCA 149, [78] where Blanchard J wrote: Where a person, though under some fiduciary obligation, merely fails to exercise reasonable skill and care, there is no reason in principle for the law to treat that person any differently from those who breach duties of care imposed by contract or tort.

And in *W v Attorney-General* [2003] NZCA 150, [45], Blanchard J writing the only judgment added:

under this head [the allegation] is exactly the same as for the allegation of negligence, where in assessing damages the fact that the tort was deliberate and was committed on a child in the care of the perpetrator will be fully taken into account. Damages will be no greater in equity.

*C Can estoppel arguments provide sexual abuse plaintiffs with a remedy?*

White and Orr described Gaudron J's approach to finding a grand principle behind the vicarious liability cases as 'novel'.<sup>154</sup> However, they believed her "rationale seem[ed] forced".<sup>155</sup> Gaudron J proposed that employers were estopped from denying their liability for an employee's acts if those acts had a 'close connection' or were acting within the ostensible authority provided to the employee. White and Orr said that this interpretation could not account for the *Lloyd* and *Morris* decisions any better than Gummow and Hayne JJ,<sup>156</sup> and Kirby J had considered those interpretive efforts were 'feeble'.<sup>157</sup> This author is not sure that this partly shared analysis of Gaudron, Gummow, Hayne and even Kirby JJ should be so peremptorily dismissed. Indeed, it is doubtful that is really very novel since it is arguably the reason for the majority decision in the *Morris* case.<sup>158</sup>

Kirby J was consistent in *Lepore* and *Sweeney* in stating that employers can be held vicariously liable for the intentional torts of their agents. For him, the *Lloyd* and *Morris* decisions were cases in point and did not need to be distinguished. Whether an employer should be vicariously liable for the

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<sup>154</sup> Steven White and Graeme Orr, 'Precarious liability: The High Court in *Lepore*, *Samin* and *Rich* on school responsibility for assaults by teachers' (2003) 11 *Torts Law Journal* 101, 108.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid* referring to Gummow and Hayne JJ's joint judgment in *New South Wales v Lepore* (2003) 212 CLR 511, [225][239].

<sup>157</sup> *Ibid* referring to *New South Wales v Lepore* (2003) 212 CLR 511; [312] (Kirby J).

<sup>158</sup> That is, while Lord Denning MR said the employer was liable because of bailment principles, *Salmon* and *Diplock LJ* both decided the case on scope of employment/ostensible authority grounds and *Salmon LJ* specifically referred to the estoppel principle that Gaudron J picked up in her judgment in *Lepore*.



intentional torts of an employee for Kirby J, depended on the 'closeness of the connection'<sup>159</sup> of the acts in issue with the employment. This is the 'germ'<sup>160</sup> of an idea that he borrowed from the House of Lords' decision in *Lister*. He said, further borrowing from the Supreme Court of Canada in *Bazley* and *Jacobi*, that the connection will be close enough if the "employment [has] materially and significantly enhanced or exacerbated the risk of [the tort]" (underlining original).<sup>161</sup> In *Sweeney*, Kirby J applied Dixon J's judgment from the *CML* case and said that Boylan Nominees should be held vicariously liable for the mechanic's acts because he was "integrated into their enterprise".<sup>162</sup>

But what is the difference between stating with the Supreme Court of Canada and the House of Lords in England that there must be a 'sufficiently close connection' to hold an employer vicariously liable for an employee's intentional torts, and saying with Gaudron, Gummow and Hayne JJ (and Salmon and Diplock LJ), that an employer should be vicariously liable for an employee's torts if they were performed within the scope of the employee's ostensible authority?

It is submitted that Gaudron J's ostensible authority/estoppel analysis may indeed provide a key to establishing a principle which unifies most of the vicarious liability cases in Australia. For it explains why *CML* was vicariously liable for the slander of its representative – *CML* had authorised this representative to "address to prospective proponents such observations

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<sup>159</sup> *New South Wales v Lepore* (2003) 212 CLR 511, [315][320].

<sup>160</sup> *Ibid* [316].

<sup>161</sup> *Ibid* [318].

<sup>162</sup> *Sweeney v Boylan Nominees Pty Ltd* (2006) 227 ALR 46, [83].

as appeared to him appropriate.”<sup>163</sup> CML was thus justifiably estopped from denying that this representative had its authority to make the observations which were ultimately adjudged slanderous. Ostensible authority/estoppel analysis can explain why Grace, Smith & Co were vicariously liable for the fraud their clerk perpetrated on Emily Lloyd. Though the fraud committed was an intentional tort, it was committed by a solicitor’s clerk while functioning within the ostensible authority conferred by a professional firm. It was therefore equitably just that the firm should be estopped from denying it had indeed conferred authority upon this clerk.<sup>164</sup> Gaudron J’s principle can explain why CW Martin & Sons Ltd was vicariously liable for the theft of Mrs Morris’ fur – C W Martin & Sons Ltd had empowered the employee who stole the fur with its authority to take possession of the fur and to clean it. In equity, they were therefore justifiably estopped from denying that they had given their clerk the authority to possess the fur, even though they may not have envisaged the theft.<sup>165</sup> Gaudron J’s ostensible authority/estoppel principle can also explain why the Children’s Foundation and Hesley Hall Ltd were vicariously liable for the sexual abuse perpetrated by their residential carers in *Bazley* and *Lister*. The employers in those cases had given their carers ostensible authority to act as parents to the boys they ultimately abused and it would have been inequitable for those employers to deny such authority because crime and intentional torts are exceptions to liability under traditional ‘scope of authority’ doctrine. Gaudron J’s ostensible authority/estoppel analysis also explains why the school authorities were not vicariously liable for the sexual abuse of the school teachers in *Lepore*,

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<sup>163</sup> *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41, 50 (Dixon J).

<sup>164</sup> *Lloyd v Grace, Smith & Co* [1912] AC 716.

<sup>165</sup> *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716.

*Rich* and *Samin* and why the Boys' and Girls' Club of Vernon was not vicariously responsible for Griffith's sexual abuse in *Jacobi*. Unlike the 'in loco parentis' carers in *Bazley* and *Lister*, neither these Australian school teachers nor the Program Director of the Vernon BC Boys' and Girls' club, had ostensible authority from their employers for anything like bedtime intimacy. Accordingly the employers in *Lepore* and *Jacobi* could deny responsibility for the unauthorised and criminal acts of their employees. However, Gaudron J's ostensible authority/estoppel principle does not explain why Boylan Nominees Pty Ltd was not responsible for the mechanic's negligence in the *Sweeney* case since he was acting within the scope of his ostensible authority when he failed to repair the fridge which ultimately injured Ms Sweeney. In each case except *Sweeney*, Gaudron J's simple question - was the tort complained of, done by the employee, agent or representative of the employer/principal while exercising the ostensible authority of that employer/principal? - yields the same answer as was given by the relevant courts in their decisions, despite different analysis. While the bailment analysis, that some judges have found necessary to explain the vicarious liability of CW Martin & Sons Ltd for the loss of Mrs Morris' fur coat,<sup>166</sup> has helped some judges distinguish that decision from other cases where the employer has not been found vicariously liable for the intentional tort of an employee, it is submitted that simple ostensible authority creating an estoppel is a better explanation since it can also explain the results the judges chose in the other cases. In any event, it is unlikely that simple

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<sup>166</sup> The bailment analysis came from the judgment of Lord Denning MR in that case - *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 and was observed by all the High Court of Australia judges in *Lepore*: [48] and [52] (Gleeson CJ); [112] and [113] (Gaudron J); [147] (McHugh J); [236] (Gummow and Hayne JJ); and [312] (Kirby J). His brethren, Salmon and Diplock LJ decided the case on ostensible authority principles (coupled with estoppel in the case of Salmon LJ), as was pointed out by McHugh J at [147] of his *Lepore* judgment.

bailment analysis will be used very often to explain the vicarious liability of an employer in the future.

## H CONCLUSION

So what does all this mean for a plaintiff who wants to hold an institution vicariously liable for sexual abuse perpetrated by an employee, agent, or representative in Australia in the 21<sup>st</sup> century?

It is going to be a difficult task. It is unlikely that it will help to say that the institution owed the victim a non-delegable duty of care, no matter how carefully one can particularise such a duty. Similarly, the suggestion that the institution is or ought to be liable for the acts of the employee because either the employee or the institution owed the victim a fiduciary duty, is an argument that is unlikely to make much headway in Australia in the near future.

Therefore unless a plaintiff can make the case that the abuse was perpetrated by the employee, agent or representative while acting within the ostensible authority the employer or principal had conferred, a vicarious liability argument is unlikely to succeed. The High Court simply does not accept that vicarious liability should be imposed in cases of intentional tort or crime because it is nearly impossible to argue that an intentional tort or crime could ever fall within the scope of employment. The only way that a plaintiff seems likely to be able to convince the High Court that vicarious liability should be imposed, is by showing that the employer generated not just the opportunity for the tort, but the possibility that it could happen by virtue of the ostensible authority with which the employer clothed its servant. For if the intentional tort then appears to have been something done with the employer's ostensible authority and thus also within the

scope of employment, the employer will be estopped from denying responsibility.

However it is doubtful that future sexual abuse plaintiffs will premise their litigation in arguments about vicarious liability at all. Much more likely, given the forward march of Australian State and Territory Child Protection legislation since the *Lepore* case was decided, is that these cases will be argued in direct negligence or breach of statutory duty. Since most Australian jurisdictions have now created Child Protection regimes that oblige institutions which interact directly with children, to undertake state supported criminal checks before employees or volunteers are engaged, then if a plaintiff can show that no background check was carried out, it will be hard for the employer to deny direct responsibility in negligence. Such proof is a two-edged sword. If an institutional employer can show that it did all that was statutorily required, then it is submitted it will be difficult for any plaintiff to convince a court either that an institution was directly negligent or that it should be held vicariously responsible for the intentional tort or crime of an employee or volunteer. In those future cases where vicarious responsibility is still pled, the Australian courts are likely to retreat to the traditional scope of employment doctrine as the majority of the Supreme Court of Canada did in *Jacobi v Griffiths* and say that ‘this’ intentional tort was not within the scope of ‘this employee’s employment’.

There is a bright side to all of this though. For the fact that future plaintiffs may find it difficult to succeed against institutions if they bring vicarious liability claims will be more than offset by the likelihood that they will succeed directly in negligence. If they can prove that an institution did not comply with a Child Protection regime, the plaintiff will find it much easier to prove direct negligence than it has been in the past – and much easier than to succeed with a vicarious liability argument where the sexual abuse

perpetrated was beyond the scope of employment. Arguably all this is as it should be. Society, and state and territory Parliaments, have now recognised the need to eradicate the scourge of child abuse by passing appropriate protection legislation including criminal enforcement penalties. That legislative change will hopefully do away with the need to press the Australian courts to follow the common law in Canada and England when their minds seem so set against it. It remains to be seen whether police background checks will be truly effective in keeping paedophiles out of the institutions that care for our children.

**‘DO YOU KNOW WHOM YOU ARE TALKING TO?’ –  
THE SUBORDINATION OF LAW TO SOCIAL STATUS IN  
BRAZIL**

AUGUSTO ZIMMERMANN\*

*‘For my friends, everything; for strangers, nothing; for my enemies – the law!’*

Old Brazilian maxim

**Abstract**

This article notes the existence of a considerable chasm in Brazil that divides law on paper and ‘law’ in practice. It observes the prevailing perceptions of law in Brazilian society, noting, for instance, that Brazilians suffer from a substantial lack of respect for laws. Indeed, Brazilians can in theory be apparently governed by a rights-based democratic constitutional framework, while in practice they are far more regulated by unwritten social norms, which basically promulgate and protect the ethic of privilege and those who act on it.

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## I INTRODUCTION

Due to the chasm that, in Brazil, separates law on paper and ‘law’ in practice, anyone wishing to understand how the country really works will need to consider the ways in which people are able to exempt themselves from the content of positive laws.

An observation of Brazil’s reality reveals a society that is deeply regulated by *contra-legem* (anti-legal) rules. These are not the rules taught in the law schools but rather are socially defined rules that vary remarkably from the state codes and statutes, and the rulings of the courts.

This article provides a critical analysis of Brazil’s legal culture. By legal culture is meant the prevailing perceptions about law in society, and general attitudes toward the formal legal system. It is thus an explanation of the manner in which law operates in practice, as opposed to theory, in the Brazilian society.

## II INEFFECTIVE LAW

The Brazilian legal system is based on the civil-law tradition of Continental Europe. Accordingly, the lawmaker in Brazil introduces legislation in an attempt to predict, in advance, every scenario of social conflict. A corollary of this is the tendency to regulate all aspects of human life and society. The legislator looks upon society as his artificial creation; as inert matter that receives all its life, organisation, and morality from the legislative power of the Brazilian state. As Keith S Rosenn explains:

The Brazilian legal culture is highly legalistic; that is, the society places great emphasis upon seeing that all social relations are regulated by comprehensive legislation. There is a strong feeling that new institutions or practices ought not to be adopted without a prior law authorizing them. As



has been said with reference to German legalism, there is a ‘horror of a legal vacuum’. Brazil has reams of laws and decrees regulating with great specificity seemingly every aspect of Brazilian life, as well as some aspects of life not found in Brazil. It often appears that if something is not prohibited by law, it must be obligatory.<sup>1</sup>

The excess of legalism in Brazil comes as a legacy of the convoluted legal system introduced by the Portuguese colonizers. Thus, even when judges in Brazil were honest, the rather chaotic legal system would provide infinite scope for delays in appeals, of which lawyers took full advantage. As Norman Nardoff indicates:

The Portuguese fondness for form over substance, rooted firmly in Roman and Canon law, resulted in an incredibly formalistic legal system... Under the Portuguese legal system, the Crown pretended to rule and the subjects pretended to obey... Lisbon found great comfort in issuing reams of esoteric and unrealistic laws, while its Brazilian subjects took equal pleasure in finding ways around these ill-conceived edicts from the state.<sup>2</sup>

As a result, people in Brazil acquired the tendency to soften laws by not applying them properly. On the other hand, they have also inherited, via Portugal, the naïve belief or hope that laws can function as panaceas for every sort of social disease.<sup>3</sup> This hope maintains that one day everybody will suddenly start respecting the existing laws, and when this ‘miracle’ happens, laws will solve all the country’s social, economic and political

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<sup>1</sup> Keith S Rosenn, ‘The Jeito: Brazil’s Institutional Bypass of the Formal Legal System and its Developmental Implications’ (1971) 19 *American Journal of Comparative Law* 514, 528.

<sup>2</sup> Norma Nardoff, ‘Book Review: O Jeito na Cultura Jurídica Brasileira’ (2001) 32 *University of Miami Inter-American Law Review* 605, 607.

<sup>3</sup> Keith S Rosenn, *O Jeito na Cultura Jurídica Brasileira* (Renovar, 1998) 54.

problems. Thus a common witticism in Brazil says that the only thing the country needs is a new law to put all the existing ones into practice.<sup>4</sup>

Since colonial times, the excess of legalism has made it impossible ‘to distinguish with certainty the laws that were applied from those which were not applied, or which were not applied as they ought to have been’.<sup>5</sup> Because of this old tradition of overabundance of positive laws, the normal procedure during the passing of new legislation has been to vaguely declare as revoked any injunction to the contrary. The reason for such vagueness is that nobody really knows which laws would have to be repealed.<sup>6</sup>

It is also an indubitable fact that the lawmaker in Brazil exhibits the quite undesirable practice of introducing legislation, which are often too abstract and unrealistic to be put into practice. During colonial times, one might say, laws in Brazil were merely copied from those already applied in Portugal, without being adequately adapted to the new destination. For three centuries, the principal Portuguese law adopted in Brazil was the *Ordenações Filipinas* (1603).<sup>7</sup> This codified body of laws was notorious for its confused and contradictory provisions. Although it was obviously not designed with Brazil’s conditions in mind, it remained the nation’s basic civil law until the adoption of a new civil code in 1917.<sup>8</sup>

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<sup>4</sup> Manoel de Oliveira Lima, *The Evolution of Brazil Compared with that of Spanish and Anglo-Saxon America* (Russell & Russell, 1966) 58.

<sup>5</sup> Ibid.

<sup>6</sup> Rosenn, above n 3, 84.

<sup>7</sup> The Portuguese law was codified, or rather compiled, first in the *Ordenações Afonsinas* (1446–1457), revised in 1521 as the *Ordenações Manuelinas*, and finally in the *Ordenações Filipinas* (1603), also known as the *Código Filipino*.

<sup>8</sup> Rosenn, above n 3, 35–6.

One might say that the case has ever since been that Brazilian laws are often inspired by legislation enacted in other countries, especially in the United States and Western European nations.<sup>9</sup> However, legislators in Brazil usually fail to properly consider the social context in which laws are to be applied.<sup>10</sup> The result is an abysmal distance between law and social reality; for copycat laws have been introduced without a more careful attention to the prospects for their practical implementation in Brazilian society.<sup>11</sup> Indeed, the problem with utopian legislation occurs even at the level of the nation's basic law: the constitution. In Latin American countries such as Brazil, Rosenn points out:

Constitutions typically contain a substantial number of aspirational or utopian provisions that are either impossible or extremely difficult to enforce. Some of these provisions contain social rights that seem far more appropriate in a political platform or a sermon than in a constitution.<sup>12</sup>

The problem can be attributed to a lack of realism, which causes pragmatic solutions to be sacrificed to utopian postulations. The late historian José Honório Rodrigues noted that, regrettably, 'the most persistent element in Brazilian political life seems to have been the habit of adopting solutions that fit principles rather than situations'.<sup>13</sup> He concluded that this lack of

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<sup>9</sup> John W F Dulles, 'The Election of 1950' in L Hanke, *History of American Civilization*, (University of California Press, 1961) vol 2, 468.

<sup>10</sup> Nestor Duarte, *A Ordem Privada e a Organização Política Nacional* (Cia Editora Nacional, 1950) 221–2.

<sup>11</sup> Raymundo Faoro, *Os Donos do Poder: Formação do Patronato Político Brasileiro* (Globo, 1975), 745–45. \*\*\*\*

<sup>12</sup> Keith S Rosenn, 'The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation' (1990) 22 *University of Miami Inter-American Law Review* 1, 36.

<sup>13</sup> *Ibid* 57.

realism on the part of the legislator was caused by their incapacity for meeting challenges with real solutions, not with theories.<sup>14</sup>

### A    *A lei não pegou (The law did not take hold)*

One would be quite right in asserting that many laws have been introduced in Brazil with the almost certain knowledge that they will never be respected. Thus, as Rosenn explains: ‘Brazilians refer to law much in the same manner as one refers to vaccinations. There are those who take, and those who do not’.<sup>15</sup> He gives the insightful example of a Minister of Justice, Francisco Campos, who in the 1930s responded to criticisms about the enactment of a new law that was absolutely identical to another enacted by the same government only a year earlier by saying: ‘There is no harm done, my son. We are going to publish this one because the other *não pegou* (did not take hold)’.<sup>16</sup>

*A lei não pegou* (the law did not take hold) is the phrase that Brazilians commonly apply to the numerous instances in which laws can exist in theory but never in practice. Such laws are ineffectual despite their putative validity. They do not take hold when they supposedly contain unrealistic provisions related to such things as price controls, labour laws, or interest rates. A good example of such unrealistic provision is found in the original text of the Brazilian Constitution, which contained a section fixing the level of interest rates in the country at 12% a year. The provision was never truly enforced, because doing so would paralyse all the country’s economic activities.

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<sup>14</sup> Ibid 63.

<sup>15</sup> Rosenn, above n 1, 530.

<sup>16</sup> Ibid 531.

Perhaps the clearest example of a well-known legislation not taking hold involves the prohibition of a popular gambling raked called *jogo do bicho* (animal's game). The law was enacted more than one hundred years ago, but this absolutely illegal activity still employs more than 700,000 people and grosses more than \$150 million dollars a month. Although the game still remains illegal, candidates for public office have sought support from gambling bosses, 'who are known to contribute heavily to political campaigns'.<sup>17</sup> In Rio de Janeiro, gambling bosses sponsor official events, such as the world-renowned carnival, as well as the electoral campaigns of many politicians, including high-ranking government authorities.<sup>18</sup>

### III *PARA INGLÊS VER* (FOR THE ENGLISH TO SEE)

*Para inglês ver* (for the English to see) is a curious expression, important in helping reveal crucial aspects of Brazil's legal culture. It was coined in the first quarter of the nineteenth century, and now refers to any situation where something on the surface appears for all intents and purposes to have been done, while beneath nothing has, in actual fact, changed. Since it is quite an illuminating expression, it is worthwhile giving a short account of its origins.

Under pressure from the British government, which had helped Brazil in its negotiations for independence from Portugal, the Brazilian government signed a treaty in 1826 promising to abolish the slave trade within four years. On 7 November 1831, the pledge appeared to be honoured, with the enactment by the Brazilian Parliament of a statute declaring the freedom of

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<sup>17</sup> Joseph A Page, *The Brazilians* (Addison-Wesley, 1995) 248.

<sup>18</sup> Guido Groeschel, *Brazil and the Jeitinho: A Cultural Lesson in Bahia* (1 November 2003) Brazzil <<http://www.brazzil.com/component/content/article/21-november-2003/1152.html>>.

all Africans entering Brazil as slaves. But what the British government did not know was, that the 1831 Brazilian statute, as Brazilians started saying amongst themselves, ‘it is only for the English to see’. The elite in Brazil did not really wish to stop the slave trade, as they thought its end would eliminate the supply of cheap labour.<sup>19</sup>

Behind the façade, over a twenty-year period following the enactment of the 1831 legislation, around one million Africans were illegally brought to the country as slaves.<sup>20</sup> In the 1880s, most of the slaves in Brazil were people, or relatives of people, who were brought to the country after 1831 and therefore illegally. Slaveholders bypassed the law by registering the slaves as having been imported before the enactment of that legislation.

Slaves who disembarked on the coast of Brazil found no one to set them free as the law required. According to Joaquim Nabuco, the great leader of the Brazilian anti-slavery movement, ‘the only pleas on their behalf were made by British ministers and were heard in the British Parliament’.<sup>21</sup> Thus, in 1845 the British Parliament decided to enact the Aberdeen Bill, authorizing the British admiralty courts to judge and condemn any Brazilian ship involved in slave-trading.

The British action was legally justified on the basis of a treaty signed by both countries in 1826 condemning the slave trade as a form of piracy. Under huge pressure from powerful Great Britain, the Brazilian Parliament, on 4 September 1850, rushed to pass new legislation establishing harsher penalties for anyone involved with the slave trade. This law was much

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<sup>19</sup> Guy Burton, *Fooling the British, The Brazilian Way* (1 May 2004) Brazzil <<http://www.brazzil.com/2004/html/articles/may04/p106may04.htm>>.

<sup>20</sup> Ibid.

<sup>21</sup> Joaquim Nabuco, *Abolitionism: The Brazilian Antislavery Struggle (1883)* (Chicago University Press, 1977) 76.

better applied, being not merely, in this case, ‘for the English to see’. Nevertheless, in 1851 alone, more than 3,000 Africans were still illegally brought to the country as slaves.<sup>22</sup>

Unfortunately, the Brazilian government has ever since been enacting numerous laws that are just ‘for the English (or anybody else) to see’. In such circumstances, a law is enacted so as to confer the impression that authorities are willing to do something about the matter of concern, while in practice nothing is done at all. The Brazilian Constitution actually has many such formal provisions, which are only ‘for the English to see’.

One of them is Article 196, which declares the following: ‘Health is a right of every citizen and a duty of the state, which shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery’. In practice, public hospitals in Brazil are overcrowded, understaffed, badly equipped, and poorly maintained. ‘They often provide indifferent care and more than occasionally subject patients to additional risks, such as infection from contaminated blood’.<sup>23</sup>

#### IV SUBORDINATION OF LAW TO SOCIAL STATUS

Brazil is a nation suffering from a substantial lack of commitment to legality. Although the law recognises that the individual citizen has a vast number of ‘fundamental’ rights, such rights are often trumped by the more

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<sup>22</sup> Richard Graham, *Britain and the Onset of Modernization in Brazil: 1815–1914* (Cambridge University Press, 1968) 164.

<sup>23</sup> Page, above n 17, 179–80. For more examples of constitutional rights that are currently violated in Brazil, see Augusto Zimmermann, ‘Constitutional Rights in Brazil: A Legal Fiction?’ (2007) 14 (2) *Murdoch University Law Review* 28–55.

non-egalitarian, authoritarian structure of the Brazilian society. One of the reasons for the violation of these rights is impunity, a critical factor contributing to the declining faith in the rule of law.<sup>24</sup> Indeed, Brazilians often say that there is only one ‘law’ which is always respected when you are rich or have ‘powerful’ friends: *a lei da impunidade* (the law of impunity).

In fact, most of what really happens in a country like Brazil lies outside the statute books and law reports. There is a very sharp contrast between, on the one hand, statutes and the written texts of the constitution, and, on the other hand, the daily life as demonstrated in the dealings between individuals and public authorities.<sup>25</sup> As such, Brazil is a typical example of a country where the ‘laws’ of the society can easily overrule the laws of the state.<sup>26</sup> Socially speaking, the former can be far more institutionalised than the latter, which means that state law can easily be undermined by the lack of connection between its formal precepts and observed behaviour.<sup>27</sup>

Due to the extent to which positive laws are not always respected in Brazil, Roberto DaMatta, an anthropology professor at Notre Dame University, has argued that Brazilian society is pervaded by a ‘double ethic’. Thus, in theory people seem ruled by general and abstract rules of law, but in practice they are far more regulated by unwritten social norms, which, as

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<sup>24</sup> William C. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (London: Praeger) 76.

<sup>25</sup> Eder, Phanor J. *Law and Justice in Latin America* (New York: New York University Press, 1937) 57.

<sup>26</sup> Roberto DaMatta, ‘Is Brazil Hopelessly Corrupt?’ in R M Levine and J J Crocitti (eds), *The Brazil Reader: History, Culture, Politics* (Duke University Press, 1999) 296.

<sup>27</sup> Guillermo O’Donnell, ‘Illusions about Consolidation’ in L Diamond, M F Plattner, Y Chu, and H Tien (eds), *Consolidating the Third Wave Democracies: Themes and Perspectives* (The Johns Hopkins University Press, 1997) 46.



DaMatta states, ‘promulgate and protect the ethic of privilege and those who act on it’.<sup>28</sup> Accordingly, ways around the state law can be eventually obtained through a range of factors related to conditions of wealth, social status, and ties of family and friendship.<sup>29</sup>

The non-legal rules of Brazilian society are based on historical and cultural precedents which have led to social practices in which some individuals can easily regard themselves as being above the law.<sup>30</sup> In contrast to the rule-of-law tradition in countries such as Australia and the United States, social relations in Brazil are established according to the more informal and deeply relational rules of society itself. Such rules are based on society’s unwritten practices, and are key contributors to the subversion of the rule of law, fostering corruption and distorting the normal delivery of public services as prescribed by state law.

The greatest fear of any Brazilian is that of eventually becoming an isolated citizen. The isolated citizen is an inferior individual who is reduced to the condition of being merely ‘under’ the law. Brazil’s society stresses direct relations based on personal liking as opposed to formal relations. ‘Personal liking is above the law’.<sup>31</sup> Therefore, people without the necessary ability to develop such relationship ties are regarded as inferior citizens. They have ‘only’ the law on which to depend, whereas a person with ‘good’

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<sup>28</sup> DaMatta, above n 26, 296.

<sup>29</sup> Roberto DaMatta, *Carnivals, Rogues, and Heroes: An Interpretation of the Brazilian Dilemma* (University of Notre Dame Press, 1991) 187–8.

<sup>30</sup> Roberto DaMatta, ‘The Quest for Citizenship in a Relational Universe’ in J D Wirth, E O Nunes, and T E Bogenschield (eds), *State and Society in Brazil: Continuity and Change* (Westview, 1987) 317.

<sup>31</sup> José Honório Rodrigues, *The Brazilians: Their Character and Aspirations* (University of Texas Press, 1967) 57.

friends can also obtain any ‘special’ treatment from the state and other institutions of prestige.

A phrase that is typically applied by people who expect such special extra-legal treatment is *Você sabe com quem está falando?* (‘Do you know whom you are talking to?’). It is often used by all those who wish to somehow disobey formal rules, and as such can be applied to a vast range of situations. A common application is when a police officer is trying to apply a fine for a parking infringement. In such a case, it is the officer himself who risks being punished if he tries to enforce the law.<sup>32</sup> Another phrase is *filhinhos de papai* (the father’s dear sons), an expression which implies nepotism and abuse of influence.<sup>33</sup>

Basically such phrases are adopted when someone is trying to impose their will on other individuals, and the law. It is not so much that the person declaring exemption from the law in question necessarily views it as being wrong or unfair; it is just that he believes the law does not apply to a person like him. To obey it would be beneath him. The premise is that he possesses the privilege of being ‘more equal’ than others, and so exercises his prerogative to ignore the law with impunity and utter arrogance.

In Brazil, social status is far more important than legal protection, because law is generally perceived as not being necessarily applied to everyone. Unlike a typical American citizen who would use the law to protect himself against any situation of social adversity, a Brazilian citizen would instead appeal to his social status; respecting the law in his country implies a condition of social inferiority and disadvantage that renders one subject to

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<sup>32</sup> José Murillo de Carvalho, *Pontos e Bordados: Escritos de História e Política* (Universidade Federal de Minas Gerais, 1998) 135.

<sup>33</sup> Robert M Levine, ‘How Brazil Works’ in Levine and Crocitti (eds), above n 26, 406.

it.<sup>34</sup> The fact that many people often consider themselves above the law may be a legacy of the institution of slavery infecting contemporary Brazilian society. According to Joseph A Page:

There are... societal ills that can be traced at least in part to slavery. For example, the slave owner could do as he pleased with his slaves without having to answer to anyone for the consequences of his actions. The master-slave relationship replicated the medieval relationship between Portuguese king and his subjects, and it came to define the link between the powerful and the powerless in Brazil... Indeed, a sense of being above the law became a prerogative of the nation's haves. The notion of impunity – the avoidance of personal responsibility – became deeply ingrained in Brazilianness and has proved a barrier to development.<sup>35</sup>

As can be seen, one explanation for the devaluation of legality in Brazilian society is the legacy of slavery. This hypothesis posits that slavery may have contributed to a low value being placed on compliance with legal rules. While slavery was abolished more than a century ago, in May 1888, a master-slave mentality may still permeate Brazil's social relations. This sort of mentality, explains history professor José Murilo de Carvalho, is responsible for the mixed nature of the Brazilian individual which he describes in the following terms:

Master and slave live together inside him. When occupying positions of power he exhibits the arrogance of a master, when outside power he oscillates between servility and rebelliousness. A true citizen conscious of his [legal] rights and mindful of the rights of others did not develop... This

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<sup>34</sup> Carvalho, above n 32, 277–8.

<sup>35</sup> Ibid 235.

cultural trait may help to explain the persistence of [social] inequality whose major victims are the descendents of the former slaves.<sup>36</sup>

If the powerful uphold the law only when it suits them, other members of society will endeavour to do the same. In an important survey conducted by DaMatta in the mid 1980s, citizens in Brazil were asked how they would classify a person who obeys the law. The common answer was that such a person must be an individual of 'inferior' social status. But when asked about a wealthy person who wishes to obey the law, the common answer to this situation was that this person is a *babaca* (fool). DaMatta concluded from his empirical research that in Brazil, 'compliance with law conveys the impression of anonymity and great inferiority'.<sup>37</sup> Hence, the idea that laws should be applied indiscriminately clashes with deeply rooted values in Brazilian society.

On the other hand, it is universally known in Brazil that some bureaucratic 'inconveniences' can only be solved through the extra-legal 'favours' provided by public servants in state agencies. Indeed, part of the importance given to relationship ties stems therefore from the failure of the bureaucratic sector to work satisfactorily. State agencies can, of course, work quite well, but only for those with the right connections.<sup>38</sup> Brazilians, therefore, have needed to place a stress on direct personal relations that are based upon liking rather than on the formalities of the law. As the late historian José Honório Rodrigues observed, in Brazil, 'personal liking is

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<sup>36</sup> José Murillo de Carvalho, *The Struggle for Democracy in Brazil* (University of Port Harcourt, 2000) 8.

<sup>37</sup> DaMatta, above n 30, 317.

<sup>38</sup> Charlotte I Miller, 'The Function of Middle-Class Extended Family Networks in Brazilian Urban Society' in M L Margolis and W E Carter (eds), *Brazil: Anthropological Perspectives: Essays in Honor of C Wagley* (Columbia University Press, 1979) 136.

above the law'.<sup>39</sup> And so the familiar Brazilian maxim: '*Para os amigos tudo, para os indiferentes nada, e para os inimigos a lei*' (For my friends, everything; for strangers, nothing; for my enemies – the law!)<sup>40</sup>

## V THE 'JEITO' – INSTITUTIONAL BYPASS OF LAW

American historian Robert M Levine, director of Latin American Studies at the University of Miami, has made the interesting comment that Brazilians are a kind of people who 'pride themselves on being especially creative in their array and variety of gambit suitable for bending rules'.<sup>41</sup> In fact, they have so much pride in it that they have elevated the bending of legal norms to the status of a highly prized institution: the *jeito*.

This term can be roughly translated as a 'knack' or a 'clever dodge'. *Jeito*, explains Page, 'is a rapid, improvised, creative response to law, rule, or custom that on its face prevents someone from doing something'.<sup>42</sup> It always involves a conscious act of breaking formal rules so as to 'personalise a situation ostensibly governed by an impersonal norm'.<sup>43</sup> According to sociologist Fernanda Duarte:

[Jeito]... is inherently personalistic. It requires a certain type of 'technique' involving the conscious use of culturally valued personal attributes (eg: a smile, a gentle, pleading tone of voice); it seeks short-term benefits; it is explicitly acknowledge and described by Brazilians as part of their cultural

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<sup>39</sup> Ibid 57.

<sup>40</sup> DaMatta, above n 30, 319.

<sup>41</sup> Robert M. Levine, *Jeitinho Land* (January 1998) Brazzil  
<<http://www.brazzil.com/blajan98.htm>>.

<sup>42</sup> Page, above n 17, 10.

<sup>43</sup> Ibid.

identity... So deeply entrenched is this practice in Brazil that it has become intertwined with constructions of Brazilianness.<sup>44</sup>

One must become fully aware of the reality of *jeito* in order to properly understand the Brazilian legal system. Whereas the bending of legal rules for the sake of expediency occurs, to a certain degree, in any country of the world, Brazil has curiously institutionalised it. The institution of *jeito* is, therefore, the uniquely Brazilian way of achieving a desired result amid the adversities of the formal legal system.

The social mechanism known as *jeito* can be adopted in many legal and non-legal situations. A *jeito* can be applied, for instance, when the queue in a bank is too long and a person argues that he cannot wait for his turn. Lawyers can also apply it in the form of a 'favour' (legal or illegal) requested to court employees. Finally, a *jeito* can also be granted by a public inspector who condones the failure of a company to comply with a statutory provision which is somehow considered to be uneconomic, unjust or unrealistic.

Because of the many instances in which *jeito* can be applied, the bypassing of legal norms has become more the rule rather than the exception in Brazil. In fact, the bending of laws bears no stigma in the country if it acts as a solution to unfair laws or absurdities of bureaucracy. *Jeito* means, in this situation, figuring out a fair solution over such inconveniences, acting as a tool by which people can avoid the many obstructions and barriers the convoluted legal system places in their path. It can be seen society as a

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<sup>44</sup> Fernanda Duarte, 'The Brazilian Jeitinho as a Structural Fix: A 'Snapshot' from an Urban Sustainability Partnership Program' (Paper presented at the X APROS International Colloquium, Oaxaca, Mexico, 7–10 December 2005) 3–4 <<http://aeo.uami/apros/papers/043.pdf>>.

‘fair’ solution in the face of the unreasonable barriers created by the highly complex and convoluted legal system.<sup>45</sup> As Rosenn argues:

The *jeito* may be considered a way of temporizing to avert, or at least postpone, civil strife. By preserving the façade of legitimacy in the face of rapid social and economic change, the *jeito* has been invaluable in enabling the Brazilian system to operate without violent conflict.<sup>46</sup>

Although *jeito* has such understandable justifications, it nevertheless produces quite undesirable consequences. There is no doubt that a system that features such an endemic and astonishing level of informality is obviously inimical to the generation of the rule of law. As Rosenn points out, [o]nce the principle that officials and private citizens may reinterpret or ignore laws they deem overly restrictive or unwise is condoned, its limitation is extremely difficult. Unjust, discriminatory law enforcement and the breakdown of legitimacy may well be the result’.<sup>47</sup> Indeed, when Brazilians simply ignore laws they deem restrictive or unfair, ‘unjust discriminatory law enforcement and breakdown of legitimacy may well be the result’.<sup>48</sup> The cost of the constant resort to *jeito* is therefore widespread disregard for the Brazilian legal system.<sup>49</sup>

Of course, such a reality of *jeito* tends to favour the wealthier and more powerful elements of Brazil’s society. Although anybody can request a *jeito*, one might deduce that a rich person has obviously more *jeito* than a poor person, in the sense that it is far easier to obtain a *jeito* if one can

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<sup>45</sup> John Linarelli, ‘Anglo-American Jurisprudence and Latin America’ (1996) 20 *Fordham International Journal* 50, 7.

<sup>46</sup> Rosenn, above n 1, 548.

<sup>47</sup> *Ibid* 545.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid* 544.

somehow reward the person who is providing it.<sup>50</sup> Moreover, *jeito* is often entwined with corruption, because ‘some civil servants become aware of a law’s uneconomic and unjust aspects only after their palm has been greased’.<sup>51</sup> Bribery is indeed the common recourse to *jeitos* not otherwise provided by personal acquaintance.<sup>52</sup> According to Robert M Levine:

*Jeitos* fall halfway between legitimate favours and out-and-out corruption, but at least in popular understanding they lean in the direction of the extralegal. Favours, in addition, imply a measure of reciprocity, a courtesy to be returned. One never pays for a favour, however; but a *jeito*, which is often granted by someone who is not a personal acquaintance, must be accompanied by a tip or even a larger payoff.<sup>53</sup>

## VI CONCLUSION

This article is a basic attempt to explain relevant aspects of Brazil’s society and legal culture. It focused on explaining how the rules of society can differ remarkably from what one may have supposed had he, or she, simply looked at the statute books. Whereas, in all countries, we can observe gaps between law and social practices, the circumvention of laws in the country is so extensive that it has become institutionalised by means of *jeito*.<sup>54</sup> It is impossible therefore to understand the obstacles facing the realisation of the rule of law in Brazil if we confine ourselves to a purely legalistic and less sociological analysis of the country’s legal system.

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<sup>50</sup> Carvalho, above n 32, 322.

<sup>51</sup> Rosenn, above n 1, 516.

<sup>52</sup> Levine, above n 33, 403.

<sup>53</sup> Levine, above n 41.

<sup>54</sup> John C Reitz, ‘How to do Comparative Law’ (1998) 46 *American Journal of Comparative Law* 67, 630.



# SHORT ESSAYS

# **THE ASYMMETRY OF THE SEPARATION OF POWERS DOCTRINE IN AUSTRALIA**

MOLLY GREENFELD\*

## **I INTRODUCTION**

The separation of powers doctrine is a fundamental principle of law that maintains that all three organs of government remain separate. This requires that the judiciary, the executive and the legislature all remain distinct from each other to ensure that the different arms of government do not encroach upon each other. The quote that this essay will be addressing is whether the separation of powers doctrine has been compromised to such an extent that it no longer exists. This essay will critically address this by firstly defining the separation of powers doctrine and examining the history of the separation of powers doctrine. Also this essay will show the degree to which the doctrine has been compromised. Although the doctrine has been compromised to an extent, it still upholds the vital and necessary principles that protect the rights of the people from an abuse of power by the government.

## **II DEFINITION**

The doctrine of the separation of powers is a vital principle in constitutional law. The separation of the judiciary, executive and legislature is constructed through the *Commonwealth of Australia*

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*Constitution Act* ('the Constitution').<sup>1</sup> The separation of powers doctrine requires that each arm of government should be separate and not exercise the powers or functions of the others.<sup>2</sup> The Australian government does not strictly comply with the separation of powers doctrine because the legislature and the executive are not completely separated.<sup>3</sup> Australia maintains a system of responsible government, which upholds the principle that the executive be responsible to the legislature,<sup>4</sup> yet Ministers are members of both the legislature and the executive.<sup>5</sup> Additionally, the legislature may confer power and delegate legislation to the executive government.<sup>6</sup> The essential element of the doctrine is that the judiciary be completely separate from the executive and from the legislature.<sup>7</sup> There are two key principles of the doctrine that are set out in the Constitution. Firstly, federal judicial power may only be vested in a Court that is defined as per Chapter III of the Constitution.<sup>8</sup> Secondly, a court that is defined in Chapter III cannot be vested with non-judicial powers.<sup>9</sup> A Ch III Court is described in the Constitution as the High Court of Australia and 'such other

<sup>1</sup> *Constitution* ss 1, 61, 71.

<sup>2</sup> Alexander Hamilton, James Madison and John Jay, *The Federalist: A Collection of Essays, Written in Favour of the New Constitution, as Agreed upon by the Federation Convention September 17, 1787* (J & A McLean, 1788).

<sup>3</sup> *Victorian Stevedoring and General Contracting Co v Dignan* (1931) 46 CLR 280.

<sup>4</sup> *Constitution* ss 5, 58.

<sup>5</sup> Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1.

<sup>6</sup> *Victorian Stevedoring and General Contracting Co v Dignan* (1931) 46 CLR 280; *Radio Corp Pty Ltd v Commonwealth* (1938) 59 CLR 170.

<sup>7</sup> *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 540-1.

<sup>8</sup> *New South Wales v Commonwealth* (The Wheat Case) (1915) 20 CLR 54; *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

<sup>9</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270.

federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction'.<sup>10</sup> The two criteria that determine whether a court will be considered as a Ch III court are that the court maintains life tenure for its justices<sup>11</sup> and that the courts predominant function is judicial.<sup>12</sup>

### III HISTORY

Baron de Montesquieu was one of the earliest and most prominent theorists to develop the separation of powers doctrine.<sup>13</sup> Montesquieu advocated for a complete separation of powers as this would 'safeguard against the centralisation of power in the hands of a single individual or institution.'<sup>14</sup> This doctrine aimed to protect individuals' rights from a tyrannical government exercising power that should be maintained in the separate organs of government.<sup>15</sup> In the US there is a complete separation of the powers of government,<sup>16</sup> while the UK has a compromised separation between the legislature and the executive.<sup>17</sup> Although Australia has formed its government on the UK, the framers of the Constitution also looked to

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<sup>10</sup> Constitution s 71.

<sup>11</sup> Constitution s 72; *Waterside Workers' Federation of Australia v JW Alexander* (1918) 25 CLR 434.

<sup>12</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

<sup>13</sup> Baron de Montesquieu, Thomas Nugent (ed), *The Spirit of Laws* (A & G Ewing, 1752).

<sup>14</sup> Above n 5, 2.

<sup>15</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1

<sup>16</sup> *Springer v Government of the Philippine Islands* (1928) 277 U.S. 189, 277.

<sup>17</sup> Above n 5, 2.

the US system when drafting the Constitution.<sup>18</sup> At a Commonwealth level, the doctrine of the separation of powers is entrenched in the Constitution.<sup>19</sup> However, at a state level there is no legislative inclusion of the separation of powers into state Constitutions.<sup>20</sup> Since the High Court decision of *Kable v Director of Public Prosecutions (NSW)*<sup>21</sup> there has been an inclusion of the doctrine in the states. The High Court held that as a state court may exercise federal judicial power,<sup>22</sup> there should be no distinction between federal courts exercising federal judicial power and state courts exercising federal judicial power.<sup>23</sup> A recent decision of the High Court has upheld this view of state courts conforming to the doctrine.<sup>24</sup> This will be discussed in more detail below in context of how the doctrine has been compromised. It should be noted that any court that does not exercise any federal judicial power is not subject to the separation of powers doctrine.<sup>25</sup>

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<sup>18</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275; *Attorney-General v The Queen* (1957) 95 CLR 529, 540.

<sup>19</sup> *Constitution* ss 1, 61, 71.

<sup>20</sup> *Building Construction Employees' and Builders Labourers' Federation (BLF) v Minister for Industrial Relations* (1896) 7 NSWLR 372; *Constitution Act 1902* (NSW); *Constitution of Queensland 2001* (Qld); *Constitution Act 1934* (SA); *Constitution Act 1934* (Tas); *Constitution Act 1975* (Vic); *Constitution Act 1889* (WA).

<sup>21</sup> (1996) 189 CLR 51.

<sup>22</sup> *Constitution* s 77(iii).

<sup>23</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 115 (Gummow J).

<sup>24</sup> *South Australia v Totani* (2010) 242 CLR 1.

<sup>25</sup> *Love v Attorney-General (NSW)* (1990) 169 CLR 307.

#### IV HAS THE DOCTRINE BEEN COMPROMISED?

The two key principles of the separation of powers doctrine is that Ch III courts cannot be vested with non-judicial power and that federal judicial power can only be vested in a Ch III court.<sup>26</sup> It is these principles that, if compromised, can lead to an abuse of power.<sup>27</sup>

##### A *Chapter III Courts exercising non-judicial power*

If a Ch III Court exercises non-judicial power then the separation of powers doctrine will be violated. The principle of ‘Judicial Independence’ states that if the judiciary starts exercising administrative functions then its independence will be negated.<sup>28</sup> The independence of both federal and state courts is an integral part of protecting and implementing the rule of law.<sup>29</sup> This essay will discuss the compromise of this principle in relation to state and federal courts.

Judicial power has been defined by a number of sources as a number of different functions.<sup>30</sup> However there are several common features that indicate that judicial power is being exercised. These are that the power exercised is directed at settling controversies,<sup>31</sup> the power is exercised to

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<sup>26</sup> *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

<sup>27</sup> *Polyukhovich v Commonwealth* (1991) 172 CLR 501, (Deane J).

<sup>28</sup> Hon Marilyn Warren, ‘Does Judicial Independence Matter?’ [2011] (150) *Victorian Bar News* 12, 14.

<sup>29</sup> *Ibid* 15.

<sup>30</sup> *Huddart Parker and Co v Moorehead* (1909) 8 CLR 330, 357 per Griffith C; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361.

<sup>31</sup> *Re Judiciary Act 1903-1920 and Navigation Act 1912-1920* (1921) 29 CLR 257.

determine rights, liberty or property,<sup>32</sup> and the body that exercises the power reaches a conclusive decision.<sup>33</sup> If a Ch III court<sup>34</sup> exercises power that is non-judicial in nature then this will be in violation of the separation of powers doctrine and the Constitution.<sup>35</sup>

The states do not have an explicit separation of powers in their respective Constitutions. The High Court decided there is now an inclusion of state courts that exercise federal judicial power into the doctrine,<sup>36</sup> as state courts are part of an integrated system of which the federal courts are the peak.<sup>37</sup> *Kable*<sup>38</sup> held that state courts that are vested with federal judicial power are not able to be given non-judicial power by the State Parliament that would be incompatible with their exercising of the federal judicial power. However since this decision the High Court has determined that there will only be an incompatibility between the state vesting power and a courts exercise of federal judicial power in a few select circumstances.<sup>39</sup> These circumstances are: where state legislation attempts to alter or interfere with the working of the federal judicial system established by Chapter III; or

<sup>32</sup> *Re Cram; Ex parte Newcastle Wallsend Coal Pty Co Ltd* (1987) 163 CLR 117, 148149; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (Tasmanian Breweries Case)* (1970) 123 CLR 361; *R v Quinn; Ex parte Consolidated Foods Corp* (1977) 138 CLR 1.

<sup>33</sup> *Shell Co of Australia Ltd v Federal Commissioner of Taxation (Shell Co Case)* (1930) 44 CLR 530; *Huddart Parker and Co v Moorehead* (1909) 8 CLR 330; *Brandy v Human Rights & Equal Opportunity Commission (Brandy's Case)* (1995) 183 CLR 254.

<sup>34</sup> See above Part II.

<sup>35</sup> *Constitution* s 71.

<sup>36</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

<sup>37</sup> *Constitution* ss 77(iii), 73(ii); Hon Richard French, 'Executive toys: Judges and non-judicial functions' (2009) 19 *Journal of Judicial Administration* 5, 6.

<sup>38</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

<sup>39</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

where state legislation vests power on state courts that affects their capacity to exercise federal jurisdiction invested under Chapter III impartially and competently.<sup>40</sup> This decision has been upheld by a recent High Court case.<sup>41</sup> Parliaments are able to vest the courts that are exercising federal judicial power with non-judicial powers so long as the powers do not undermine their institutional integrity.<sup>42</sup> The state courts are still independent in their judicial decision making process as this principle requires that the courts maintain ‘substantial discretion’ when deciding a matter.<sup>43</sup>

Federal courts have always been maintained with a stricter separation of powers principle.<sup>44</sup> This is expressly stated in the Constitution,<sup>45</sup> entrenched in common law<sup>46</sup> and has also been upheld on appeal by the Privy Council.<sup>47</sup> Yet, over the years some exceptions have arisen which have enabled Ch III courts to be vested with non-judicial power.<sup>48</sup> These exceptions are when a:

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<sup>40</sup> Ibid, 5989.

<sup>41</sup> *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 338.

<sup>42</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 592 (Gleeson CJ).

<sup>43</sup> Ibid.

<sup>44</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)* (1956) 94 CLR 254.

<sup>45</sup> *Constitution* ss 1, 61, 71.

<sup>46</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)* (1956) 94 CLR 254.

<sup>47</sup> *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529.

<sup>48</sup> *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144; *R v Davison* (1954) 90 CLR 353; *Hilton v Wells* (1985) 157 CLR 57.



1. Court exercises power that is incidental to the execution of judicial power;<sup>49</sup>
2. Superior court enacts rules of procedures;<sup>50</sup> or
3. Justice of a federal court exercises non-judicial power in their personal capacity (*persona designata*).<sup>51</sup>

In *Queen Victoria Memorial Hospital v Thornton*<sup>52</sup> the High Court held that non-judicial powers that were exercised not as independent functions, but as incidents in the exercise of judicial power, was an acceptable use of non-judicial power by a Ch III court.<sup>53</sup> Also, although it is predominantly a legislative function, the High Court has held that superior courts may use non-judicial power in order to establish rules of procedure to govern conduct.<sup>54</sup> Lastly the Commonwealth Parliament may vest non-judicial functions on a Justice of a Ch III court if the function is conferred on them as an individual rather than in their capacity as a Judge.<sup>55</sup> However no non-judicial function that is not incidental to a judicial function can be conferred without the judge's consent and no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power.<sup>56</sup>

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<sup>49</sup> *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144.

<sup>50</sup> *R v Davison* (1954) 90 CLR 353.

<sup>51</sup> *Hilton v Wells* (1985) 157 CLR 57.

<sup>52</sup> (1953) 87 CLR 144.

<sup>53</sup> *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151.

<sup>54</sup> *R v Davison* (1954) 90 CLR 353, 369.

<sup>55</sup> *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348.

<sup>56</sup> *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Grollo v Palmer* (1995) 184 CLR 348, 3645.

## B *Federal Judicial Power exercised by a non-Chapter III Court*

This principle is expressly stated in s 71 of the Constitution and provides that only federal jurisdiction shall be given to Ch III courts. It provides that the High Court, federal courts and any other court the parliament vests with federal jurisdiction (for example state courts) shall be the only courts to exercise federal judicial power.<sup>57</sup> The purpose of this principle is to separate the exercising of judicial power from the exercising of non-judicial power.<sup>58</sup> Isaacs J stated that the defining feature of Ch III courts is that they exercise judicial power that is completely independent and impartial.<sup>59</sup> If the main functions of a court are non-judicial, then vesting that court with federal judicial power will be invalid even if the court is established on the same basis as that of a Ch III court.<sup>60</sup> The definition of a Ch III court is listed above.<sup>61</sup> In 1915 the High Court determined that only Ch III courts could exercise federal judicial power when they found that the creation of the Interstate Commission was invalid due to the judges holding only a seven year tenure.<sup>62</sup> The High Court again upheld this principle when they found that vesting federal judicial power in the Arbitration Court was unconstitutional.<sup>63</sup> In *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)*<sup>64</sup> and *Attorney-General (Cth) v The*

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<sup>57</sup> Constitution s 71.

<sup>58</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)* (1956) 94 CLR 254, 269.

<sup>59</sup> *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54.

<sup>60</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)* (1956) 94 CLR 254; *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529.

<sup>61</sup> See above Part II.

<sup>62</sup> *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54.

<sup>63</sup> *Waterside Workers' Federation of Australia v JW Alexander* (1918) 25 CLR 434.

<sup>64</sup> (1956) 94 CLR 254.

*Queen*<sup>65</sup> the High Court and Privy Council held that judicial power of the Commonwealth is invalid if it is not exercised in a Ch III court. This principle has been upheld on various occasions by the High Court over the past 50 years.<sup>66</sup>

However there are several exceptions to this principle. Firstly the Federal Parliament can vest judicial power in a military tribunal that is not considered a Ch III court without those powers becoming unconstitutional.<sup>67</sup> This is due to the view that although the military tribunals are vested with judicial power, they are not exercising the judicial power of the Commonwealth.<sup>68</sup> Secondly courts may exercise minor administrative functions that are essentially administrative functions but quasi-judicial in nature.<sup>69</sup> These decisions are valid due to the requirement that they are subject to judicial control/review.<sup>70</sup> Lastly s49 of the Constitution provides that both houses of Parliament may determine whether contempt of parliament has been committed.<sup>71</sup> This is to promote efficiency as it gives Parliament the power to govern its own affairs and

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<sup>65</sup> (1957) 95 CLR 529.

<sup>66</sup> *Seamen's Union of Australia v Matthews* (1956) 96 CLR 529; *R v Spicer; Ex parte Builders Labourers' Federation* (1957) 100 CLR 277; *Western Australia v Commonwealth* (1995) 183 CLR 373; *Sue v Hill* (1999) 199 CLR 462.

<sup>67</sup> *Lane v Morrison* (2009) 239 CLR 230; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

<sup>68</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.

<sup>69</sup> *Harris v Caladine* (1991) 172 CLR 84.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Constitution* s 49; Above n 5, 5.

establishes power to deal with persons who may interfere with the functioning of Parliament.<sup>72</sup>

## V CONCLUSION

The separation of powers doctrine is entrenched in the Constitution. It provides checks and balances on the Government of the day by ensuring that each arm of government remains separate and distinct from each other. In Australia the separation of powers doctrine is asymmetrical, with the legislative and executive arms of government becoming quite compromised. However the main principle of the separation of powers doctrine is that the judiciary remain completely distinct from the other two arms of government. In Australia the judiciary has to an extent been compromised, especially at a state level. The High Court has often protected the separation of powers doctrine from an encroachment by the government and has provided a long precedent of doing so. However even if compromised to a small extent, the separation of powers doctrine will always remain in acting force to protect individual rights and liberties as can be seen through many High Court decisions and, most importantly, because it is expressed in the Constitution.

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<sup>72</sup> *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

## THE RISE OF LEGAL POSITIVISM IN GERMANY: A PRELUDE TO NAZI ARBITRARINESS?

KENNY YANG\*

### I INTRODUCTION

The paper will first look at the rise of legal positivism that left the door ajar for Nazi arbitrariness to enter the system, and how in adopting a separation of ‘is’ and ‘ought’ approach to the law, it left the German legal profession little theoretical resources to resist such arbitrariness. The paper will then juxtapose a hypothetical: whether natural law might have offered better theoretical resources to resist such arbitrariness and conclude with a brief reflection of the dangers of such a strict separation of ‘is’ and ‘ought’ to legal analysis if we are to learn from history and wish to avoid a repeat of the atrocities of the Nazi system.

### II LEGAL POSITIVISM: THE SEPARATION THESIS

#### A *The ius and lex divide*

Legal positivists believe that the question of what the law *is* separate from, and must be kept separate from, the question of what the law *ought to be*.<sup>1</sup> Legal positivism is thus distinguished by two claims: that the law is

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<sup>1</sup> Brian Bix, *Jurisprudence Theory and Concept* (Sweet & Maxwell, 2<sup>nd</sup> ed, 1999) 31.

separable from its substantive morality and that there is no necessary link between law and morality.<sup>2</sup> Evinced in Hart's recognition rule, the 'master test for legal validity',<sup>3</sup> it 'points to the separation of the identification of the law from its moral evaluation, and the separation of statements of what the law is from statements about what it should be'.<sup>4</sup> In the words of John Austin:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not 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...<sup>5</sup>

Additionally, Hans Kelsen's '*reine Rechtslehre*', or 'pure theory of law', describes the law and attempts to eliminate from the object of this description everything that is not strictly 'law'.<sup>6</sup> He proposes 'freeing the science of law from alien elements'.<sup>7</sup> This 'pure' theory of law then may be studied without reference to political, moral or sociological notions. Legal positivism is study the science of law as separate and independent from morality and notions of ethics.<sup>8</sup> Law (*lex*) does not have any necessary connection with justice (*ius*) and accordingly, what *is* can be distinguished

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<sup>2</sup> David Richards, 'Terror and the Law' (1983) 5 *Human Rights Quarterly* 171, 172; Lloyd L Weinreb, 'Law As Order' (1978) 91 *Harvard Law Review* 909, 909.

<sup>3</sup> Jonathan Crowe, *Legal Theory* (Thompson Reuters, 2009) 52.

<sup>4</sup> H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 (4) *Harvard Law Review* 593, 618; Bix, above n 1, 36.

<sup>5</sup> John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press: 1995) 157.

<sup>6</sup> Ibid 52.

<sup>7</sup> Crowe, above n 3, 36; Hans Kelsen, *The Pure Theory of Law Pt II* (1935) 51 *Law Quarterly Review* 1.

<sup>8</sup> Steven J Burton, 'Ronald Dworkin and Legal Positivism' (1987) 73 *Iowa Law Review* 109, 114.

from what *ought to be*. By separating the ‘is’ from the ‘ought’ in legal analysis, positivists have expelled morality and ethics from jurisprudence.<sup>9</sup>

### B *The Rise of Legal Positivism in Germany*

Prior to the influence of legal positivism in Germany, the *ius* and *lex* divide was less pronounced. Indeed as Radbruch noted, the study of law in Germany was once under the curriculum title ‘The Law of Nature’,<sup>10</sup> reflecting its inseparability from justice and morality. While the exact historical origins of legal positivism are open to debate,<sup>11</sup> it is ‘rooted in the empiricist interpretation of the scientific revolution’.<sup>12</sup> The nineteenth century saw a series of significant events such as the French revolution and the scientific and industrial developments in Europe at the time, notably under the influence of the ‘Darwinian Age’.<sup>13</sup> Technological, economic and scientific progress saw a human endeavour to pursue enlightenment through a scientific, objective approach. In light of this, the natural law, seemingly based on a subjective, ‘mystical’ morality entered hibernation (until its resurgence marked by the Nuremburg principles) as it was set

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<sup>9</sup> Michael Dawkins, *Social Darwinism in European and American thought, 1860-1945* (Cambridge University Press, 1997) 90, cited in Augusto Zimmermann, *Legislating Evil: The Philosophical Foundations of the Nazi Legal System* (2010) 13 *International Trade and Business Law Review* 221, 232. Though Hans Kelsen was himself expelled from his position at the University of Cologne.

<sup>10</sup> J M Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 2007) 379.

<sup>11</sup> Crowe, above n 3, 29. In retrospect, traces of positivism can be seen in Greek and Roman philosophy, see Mark Tebbit, *Philosophy of Law: An Introduction* (Routledge, 2005) 15.

<sup>12</sup> Mark Tebbit, *Philosophy of Law: An Introduction* (Routledge, 2005) 15.

<sup>13</sup> E Hambloch, *German Rampant: A Study in Economic Materialism* (Duckworth, 1939) 14.

aside in favour of legal positivism, an approach that seemed objective, discernable and therefore more appropriate.

### III THE FREE LAW MOVEMENT

A discussion of the rise of legal positivism in Germany would not be complete without a word on the Free Law Movement that emerged from the German School of Historical Law. While not entirely aligned with the school of legal positivism, it did somewhat assist in the demise of natural law by firing the first shots against it. The German School of Historical Law,<sup>14</sup> based on the work of Friedrich Carl von Savigny and Gustav Hugo, emphasised the historical limitations of the law and stood in opposition to natural law.<sup>15</sup> Savigny approached law as an expression of the convictions of a specific people.<sup>16</sup> Law according to him, was not grounded in universal principles, but in a organic, growing consciousness of the spirit of the people, the *Volksgeist*, which adapts itself to the evolving needs of society. This translated into the idea that the state can be defined as a political organism comprising many legal agreements between smaller entities.<sup>17</sup>

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<sup>14</sup> The Historical School of Law lead the framework for the German conceptual jurisprudence *Begriffsjuriprudenz* (which considered social, economic, moral, political or religious considerations irrelevant to jurisprudence) and later *Gesetzpositivismus* (legal positivism), Walter Ott and Frankzika Buob, 'Did Legal Positivism Render German Jurists Defenceless During the Third Reich?' (1993) 2 *Social and Legal Studies* 91, 95.

<sup>15</sup> Ibid.

<sup>16</sup> Augusto Zimmermann, *Legislating Evil: The Philosophical Foundations of the Nazi Legal System* (2010) 13 *International Trade and Business Law Review* 221, 232.

<sup>17</sup> J Seitzer and C Thornhill, 'An Introduction to Carl Schmitt's Constitutional Theory: Issues and Context', in Carl Schmidtt, *Constitutional Theory* (Duke University Press, 2008) 12.



This subsequently resulted in a disinterest in individual rights in favour of ‘the sovereignty of the state’.<sup>18</sup>

However, in asking for the legal system to respect particular habits of a people, and to examine the law from a historical approach, the historicist thesis eventually resulted in a form of legal and moral relativism.<sup>19</sup> As Leo Strauss noted, the problem with historicism ‘is that all societies have their ideals, cannibal society no less than civilised ones...If principles are sufficiently justified by the fact that they are accepted by a society, the principles of cannibalism are as defensible or sound as those of civilised life’.<sup>20</sup> This thus found fertile ground for radical Nazi justification of heinous laws.

Finally, the German School of Historical Law in some ways paved the way to legal positivism as it led to a school of jurists whose work culminated in a form of positivism.<sup>21</sup> It was hoped that this new positivist approach to law could assist in building a new national legal system to unify the politically fragmented nation.<sup>22</sup> This approach of ‘law is law’<sup>23</sup> therefore was predominant in Germany before the Nazi take-over.<sup>24</sup>

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<sup>18</sup> Abraham Kuyper, *Lectures on Calvinism* (Hendrickson, 2008) 75.

<sup>19</sup> Kelly, above n 10, 324.

<sup>20</sup> Leo Strauss, *Natural Right and History* (Chicago University Press, 1965) 3.

<sup>21</sup> Kelly, above n 10, 324.

<sup>22</sup> Ibid.

<sup>23</sup> Thomas Mertens, But was it law? (2006) 7 *German Law Journal* 191, 192.

<sup>24</sup> Ibid; James E Herget, *Contemporary German Legal Philosophy* (University Of Pennsylvania Press, 1996) 1.

#### IV POSITIVISM AND ITS ROLE IN DISARMING GERMAN JUSTICE AND LEGITIMISING NAZI AUTHORITY

There are of course, a number of other factors which could be attributed to the legal profession's lack of resistance against Nazi authority. Müller contends that the German legal profession's inherent 'loyalty to state leadership'<sup>25</sup> found a feeling of obligation to the Nazi government authority.<sup>26</sup> It has also been suggested that a number of German legal professionals, dissatisfied with liberalism at the time of the Nazi's rise to power, already supported them in different ways.<sup>27</sup> As Kaufmann wrote, when the National Socialists intruded upon basic rights, the only audible sound was applause.<sup>28</sup>

These factors aside though, it is hard to deny that legal positivism, in its strict insistence on the division of law and morality, permitted the legal profession to rationalise to themselves and others their interpretation and application of laws that they might have, upon reflection, considered to be grotesque.<sup>29</sup> Sufficed to say, while legal positivism may not have been the sole cause in the German legal profession's lack of resistance, it nonetheless is a relevant one.

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<sup>25</sup> Markus Dirk Dubber, 'Judicial Positivism and Hitler's Injustice' (1933) 93 *Columbia Law Review* 1807, 1811-1811.

<sup>26</sup> Though it should be noted that Muller's argument does not explain why the same judges that applied eugenics law after 1933 had not felt the same sense of loyalty to the Weimar Republic, See Markus Dirk Dubber, 'Judicial Positivism and Hitler's Injustice' (1933) 93 *Columbia Law Review* 1807, 1811-1811.

<sup>27</sup> Arthur Kaufmann, 'National Socialism and German Jurisprudence from 1933 to 1945' (1988) 9 *Cardozo Law Review* 1629, 1634.

<sup>28</sup> Ibid 1635.

<sup>29</sup> Markus Dirk Dubber, 'Judicial Positivism and Hitler's Injustice' (1933) 93 *Columbia Law Review* 1807, 1811-1825-1826.

### A *Disarming German Justice*

In insisting on the validity of law independent of its moral content,<sup>30</sup> or indeed to a higher order, positivism held that it was ‘not for legal scholars to be concerned with right and wrong or good and bad, but merely to clarify, conceptualize and explain the authoritative legal precepts’.<sup>31</sup> Arguably, this ‘unwillingness to enquire into the morality of law by judges, lawyers and legal scholars led to an easy capture of the legal system by the Nazis and facilitated its modification to meet evil Nazi goals’.<sup>32</sup>

There is the question as to whether German legal professionals acquiesced to Nazi authority for fear of their lives. This is conceivable, but it has been also suggested that this obedience to even arbitrary laws of the Nazi regime is not so much a lack of legal conscience or cowardice,<sup>33</sup> but an inherited self-understanding that one’s own conscience or discretion should neither feature in the understanding of law nor affect its outcome.<sup>34</sup> Rice contends that had the legal profession not embraced the rigid form of positivism, but denounced Nazi injustices based on the traditional principles of natural law, the Nazis may not have found it so easy to gain support. This however, was not the case and as most of the German legal profession were strict

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<sup>30</sup> James E Herget, *Contemporary German Legal Philosophy* (University Of Pennsylvania Press, 1996) 1.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid 2.

<sup>33</sup> Markus Dirk Dubber, ‘Judicial Positivism and Hitler’s Injustice’ (1933) 93 *Columbia Law Review* 1807, 1811-1817 cited in Richard A Posner, *Overcoming Law* (Harvard University Press, 1995) 146.

<sup>34</sup> Peter Caldwell, ‘Legal Positivism and Weimar Democracy’ (1994) 39 *American Journal of Jurisprudence* 273, 275.

legal positivists,<sup>35</sup> they were accordingly disarmed by the very principle they were so eager to embrace.<sup>36</sup>

## B *Legitimising Nazi Authority*

According to D'Entrèves, 'adherence to positivism on part of jurists under fascist, Nazi, and collaborating governments has often been adduced to explain their readiness to acquiesce to the decree of those regimes without regard for broader considerations of right'.<sup>37</sup> Burton notes that to the positivist, an evil legal system can be still be treated as legal systems without in any way implying they have moral value, while the non-positivists would struggle in maintaining such are legal systems at all.<sup>38</sup>

If, as Kelsen proposes, laws are valid not by virtue of the substantive content, but in reference to being enacted by the proper legal authority, then a law which can be properly enacted by the state must not be disobeyed or rendered invalid, even if such laws are immoral.<sup>39</sup> According to Hart, a morally iniquitous law under which a husband's alleged traitorous statements about Hitler, denounced his wife, and sentenced to

<sup>35</sup> Steizer and C Thornhill, 'An Introduction to Carl Schmitt's Constitutional Theory: Issues and Context', in C Schmidt, *Constitutional Theory* (2008) 10.

<sup>36</sup> Charles Rice, 'Some Reasons for a Restoration of Natural Law Jurisprudence' (1989) 24 *Wake Forest Law Review* 539, 567.

<sup>37</sup> Alessandro Passerin D'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (Transaction, 2009) xiv.

<sup>38</sup> Steven J Burton, 'Ronald Dworkin and Legal Positivism' (1987) 73 *Iowa Law Review* 109, 114.

<sup>39</sup> R A Hughes, G W G Leane and A Clarke, *Australian Legal Institutions: Principles, Structure and Organisation* (Lawbook, 2003) 32.

death, was still law.<sup>40</sup> Arguably, this ‘master test for legal validity’<sup>41</sup> would have deemed Hitler’s laws valid as they met the ‘conventional criteria’ agreed upon and accepted at the time.<sup>42</sup>

In the eyes of legal positivism, the validity of law is seen as a result of its authority, properly enacted, absent moral considerations.<sup>43</sup> Its attempt to separate law and morals, while normatively attractive, was analytically weak and it not only offered no theoretical legal resource for the people to resist Nazi rule, it may even have played some role in legitimizing it.

### C *The Recantation of Radbruch*

Gustav Radbruch,<sup>44</sup> who was himself a supporter of positivism prior to World War II,<sup>45</sup> later renounced positive law,<sup>46</sup> blaming it for failing to

<sup>40</sup> See H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 (4) *Harvard Law Review* 593, See also Lon Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1958) 71 *Harvard Law Review* 630, 653-654.

<sup>41</sup> Crowe, above n 3, 52

<sup>42</sup> H O Pappé, ‘On the Validity of Judicial Decisions in the Nazi Era’ (1960) 23(3) *The Modern Law Review* 260, 262; Markandey Katju, ‘The Hart-Fuller Debate’ (2001) *PL Web Journal* 1.

<sup>43</sup> R A Hughes, G W G Leane and A Clarke, *Australian Legal Institutions: Principles, Structure and Organisation* (Lawbook, 2003) 32; Hans Kelsen, *The Pure Theory of Law Pt II* (1935) 51 *Law Quarterly Review* 1, 17 [29].

<sup>44</sup> For a further examination of Radbruch’s pre and post war theories see Frank Haldmann, ‘Gustav Radbruch vs Hans Kelsen: A Debate on Nazi Law’ (2005) 18(2) *Ratio Juris* 632, Stanley L Paulson, ‘Radbruch on Unjust Laws: Competing Earlier and Later Views?’ (1995) 15 *Oxford Journal of Legal Studies* 489 and Gustav Radbruch, ‘Five Minutes of Legal Philosophy’ (1945) *Oxford Journal of Legal Studies* 13.

<sup>45</sup> Sanne Taekma, *The Concept of Ideals in Legal Theory* (Kluwer Law International, 2003) 63.

<sup>46</sup> Peter Caldwell, ‘Legal Positivism and Weimar Democracy’ (1994) 39 *American Journal of Jurisprudence* 273, 274; Matthew Lippman, ‘Law, Lawyers and Legality in the Third Reich: The Perversion of Principle and Professionalism’ (1997) 11 *Temple International and Comparative Journal of Law* 199, 200.

provide an intellectual defence against arbitrary state power<sup>47</sup> and acknowledging that ‘the doctrine that the law was whatever a statute said had rendered German justice helpless when confronted with cruelty and injustice once those wore statute vestures.’<sup>48</sup> Radbruch subsequently saw a revival of belief in transcendent law by which evil positive laws may be condemned, as evinced in his later publication of *Rechtsphilosophie*.<sup>49</sup> In the aftermath of the war, Germany and the world realised the dangers of the expulsion of ethics and metaphysics from the understanding of law. Accordingly, the Nuremberg Principle,<sup>50</sup> recognising this, stated that individuals have ‘a duty to disobey laws which are clearly recognisable as violating higher moral principles.’<sup>51</sup>

## V A HYPOTHETICAL: COULD THE NATURAL LAW HAVE PROVIDED BETTER TOOLS TO RESIST NAZI ARBITRARINESS?

### A *lex iniusta non est lex*

Charles Rice proposes that it would be interesting to speculate what might have been the German profession’s response had it adopted a resounding

<sup>47</sup> Matthew Lippman, ‘Law, Lawyers and Legality in the Third Reich: The Perversion of Principle and Professionalism (1997) 11 *Temple International and Comparative Journal of Law* 199, 200.

<sup>48</sup> Kelly, above n 10, 379.

<sup>49</sup> Ibid; Gustav Radbruch, *Rechtsphilosophie* (1950).

<sup>50</sup> Rodger 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) 385 *Michigan State Law Review* 401.

<sup>51</sup> G 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* (Butterworths, 1996) 147.

rejection of Nazi arbitrariness based on principles of the natural law.<sup>52</sup> It is often taken for granted that the law can be criticised on moral grounds.<sup>53</sup> It is to the natural law that one can turn to obtain the basis of this understanding. Unlike legal positivism, the theory of natural law can be described as laws that are more than the mere affairs of human convention or agreement,<sup>54</sup> and must conform to some permanent, higher standard of justice and morality.<sup>55</sup> Cicero speaks of a ‘Supreme Law which had its origins ages before any written law’,<sup>56</sup> and articulates of the ‘foolish notion in the belief that everything is just which is found in the customs or laws of nations’.<sup>57</sup> Cicero however, acknowledges that ‘many pernicious and harmful measures are constantly enacted among peoples which do not deserve the name of law’.<sup>58</sup> Similarly, St Thomas Aquinas describes natural law as being related to natural human inclinations, such as a natural inclination to be good<sup>59</sup> and highlights that where human law no longer

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<sup>52</sup> Rice, above n 31.

<sup>53</sup> Bix, above n 1, 62.

<sup>54</sup> Henry B Veatch ‘Natural Law Dead or Alive?’ (1978) 1 *Literature of Liberty: A Review of Contemporary Liberal Thought* 17; See Jonathan Crowe, *Legal Theory* (Thompson Reuters, 2009) 13 and Brian Bix, *Jurisprudence Theory and Concept* (Sweet & Maxwell, 2<sup>nd</sup> ed, 1999) 63, which discusses the debate as to whether these elements of the natural law is derived from a divine or religious nature or one that can be attained through right reason of the common good. While theologians such as Augustine and Thomas Aquinas certainly had a profound influence on the natural law, its tradition can be traced to the time of Ancient Greek Philosophers. See also Hugo Grotius, *Prolegomena De Jure Belli ac Pacis*, (F W Kelsey, trans, Liberal Arts Press, 1957) 6 for a ‘secular’ theory of natural law.

<sup>55</sup> Crowe, above n 3, 10-22.

<sup>56</sup> M T Cicero, *De Legibus* Pt I. 6. 18-19.

<sup>57</sup> M T Cicero, *De Republica* 3.31-43

<sup>58</sup> M T Cicero, *De Legibus*, Part II, 5, 13

<sup>59</sup> Kelly, above n 10, 144.

reflected the natural law, then ‘it is no longer a law but a perversion of law’.<sup>60</sup>

Perhaps most illustrative of this point however, is St Augustine of Hippo’s analogy with criminal gangs and kingdoms, where he noted the similarities between the two in creating rules emanating from an entity in a position of authority. According to Augustine, the only difference between the law and a set of rules observed by criminal gangs is that the former properly reflect the demands of justice, whereas the latter does not.<sup>61</sup> These theories view the law as a concept inseparable from morality and justice,<sup>62</sup> and its underlying notion is that what naturally *is*, *ought to be*.<sup>63</sup>

This regard to a higher standard of justice and morality offers a safeguard to the unjust laws proposed by man. ‘An unjust law’, in the words of St Augustine, ‘would not seem to be a law at all’.<sup>64</sup> Natural law lays down the foundations for morality in law and sets forth the standards of universal justice of the eternal law that man-made laws should reflect in order to be ‘true law’. The unjust laws offered by the Nazis, not reflecting these higher standards would be nothing more than the rules of a criminal gang,<sup>65</sup> exploiting others for their own benefit, and need not, *prima facie*, be

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<sup>60</sup> T Aquinas, *Summa Theologiae*, Pt II-I, Question 95, Article 2.

<sup>61</sup> Jonathan Crowe, *Legal Theory* (Thompson Reuters, 2009) 23; St Augustine of Hippo, *The City of God*, Book III Para 28.

<sup>62</sup> Crowe, above n 3, 10; Michael D Bayles, *Hart’s Legal Philosophy: An Examination* (Kluwer, 1992) 116.

<sup>63</sup> Henry B Veatch ‘Natural Law Dead or Alive?’ (1978) 1 *Literature of Liberty: A Review of Contemporary Liberal Thought* 17 (emphasis added).

<sup>64</sup> Crowe, above n 3, 24.

<sup>65</sup> *Ibid.*



obeyed.<sup>66</sup> Natural law provides the theoretical resource for us to ‘confidently make, if not always to prove, spontaneous statements like “that is not fair” or “that is unjust”’.<sup>67</sup> It provides, in short, the tools required to resist arbitrariness. It might have, as Rice suggests, have offered a more resounding tool for the German legal profession in resisting the evil laws of the Nazis. It could have perhaps allowed Germany to see what the Nazis truly were, in St Augustine’s analogy – a criminal gang and its laws as such should be rejected as true law.

## VI CONCLUSION

In proposing a rigid separation of ‘is’ and ‘ought’ from legal analysis, positivism appears to have promoted the expulsion of ethics and metaphysics from jurisprudence.<sup>68</sup> This strict distinction not only saw the laws of the Nazi regime as valid, but lead to an unwillingness to enquire into the morality of law and an inherited self-understanding that one’s own conscience or discretion should neither feature in the understanding of law nor affect its outcome. The Nazi’s cruelty, upon donning the vestures of statutes, rendered German justice helpless. Legal positivism not only offered no theoretical legal resource for the German legal profession to resist Nazi arbitrariness, it may have assisted in legitimizing Nazi rule.

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<sup>66</sup> Crowe, above n 3, 24. Brian Bix, *Jurisprudence Theory and Concept* (Sweet & Maxwell, 2<sup>nd</sup> ed, 1999) 64.

<sup>67</sup> R S White, *Natural Law in English Renaissance Literature* (Cambridge University Press, 2006) 3.

<sup>68</sup> Michael Hawkins, *Social Darwinism in European and American Thought 1860-1945* (1997) 90 cited in Augusto Zimmermann, *Legislating Evil: The Philosophical Foundations of the Nazi Legal System* (2010) 13 *International Trade and Business Law Review* 221, 233.

## HANS Kelsen AND THE ROLE OF RELIGION IN NATURAL LAW DOCTRINE

ROBERT A PANEV\*

### I INTRODUCTION

Kelsen, one of the leading European legal theorists of the Twentieth Century is said to have outlined and strongly criticised the tradition of natural law theorising.<sup>1</sup> However, in his work ‘The Natural-Law Doctrine Before the Tribunal of Science’, we find him arguing as follows:

[a]t a higher stage of religious evolution, when animism is replaced by monotheism, nature is conceived of as having been created by God and is therefore regarded as a revelation of his all powerful and just will. If the natural-law doctrine is consistent, it must assume a religious character. It can deduce from nature just rules of human behavior only because and so far as nature is conceived of as a revelation of God’s will, so that examining nature amounts to exploring God’s will. As a matter of fact, there is no natural-law doctrine of any importance which has not a more or less religious character.<sup>2</sup>

According to other followers of the natural-law doctrine natural law is the eternal law by which God providentially governs the created order. In this

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<sup>1</sup> Robert George, *Kelsen and Aquinas on the Natural-Law Doctrine*, Thomas International Project <[http://www.thomasinternational.org/projects/step/essays/george\\_000.htm#\\_ftnref1](http://www.thomasinternational.org/projects/step/essays/george_000.htm#_ftnref1)>.

<sup>2</sup> Hans Kelsen, ‘The Natural-Law Doctrine Before the Tribunal of Science’ (1949) 2(4) *The Western Political Quarterly* 138.

sense the natural-law doctrine can be conceived as having a ‘religious character’.

This essay examines Kelsen’s statement by drawing on references from a number of philosophical and scholarly thoughts to address the extent to which the natural-law doctrine has in essence a religious character.

The International Encyclopedia of the Social Sciences defines natural law (Latin: *lex naturalis*) as a system of law which is determined by nature and thus universal. Further to its universal application natural law has also been described as:

[t]he natural law, or law of nature, given to Adam, ... concentered with him, written on his heart, ... in the hearts of all men, and even of the Gentiles; ... which if not by some means lulled asleep, ... excuses men from blame when they do well, and accuses them, and charges them with guilt when they do ill.<sup>3</sup>

Natural law theories have profoundly influenced the laws of many nations as well as the development of English common law.<sup>4</sup> In fact:

Christianity has played an enormously important role in the origins and development of modern constitutionalism. Indeed, Christian principles are enshrined in the most significant documents in Western legal history,

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<sup>3</sup> John Gill, *A Complete Body of Doctrinal and Practical Divinity* (The Baptist Standard Bearer, 1989) 312.

<sup>4</sup> Sir William Blackstone, *Commentaries on the Laws of England in Four Books* (Lippincott Co, 1893) vol 1, Online Library of Liberty <[http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=2140&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=2140&Itemid=27)>.

including the English Bill of Rights (1689) and the American Declaration of Independence (1776).<sup>5</sup>

Empathically, this essay argues that natural law and in particular its religious character, is the governing force of all human laws. Consequently, its importance has been recognised and embraced by governments and legislators throughout the centuries, both in the pre and post Anno Domini periods.

As a moral law, engraved in the mind and conscience of man, ‘the natural-law [doctrine is] the status of all the fundamental principles of right and justice’.<sup>6</sup> Thus, it is not surprising that ‘[a]s a matter of fact, there is no natural-law doctrine of any importance which has not a more or less religious character’.<sup>7</sup>

## II NATURAL LAW DOCTRINE, ITS IMPORTANCE AND ITS RELIGIOUS CHARACTER (BACKGROUND)

The origins of natural law doctrine lie in Ancient Greece.<sup>8</sup> Many Greek philosophers embraced the idea of natural law to the point where it played an important role in forming many aspects of the Greek government. This idea was subsequently used by philosophers such as St Thomas Aquinas,

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<sup>5</sup> Augusto Zimmermann, ‘God, Locke and Montesquieu: Some Thoughts Concerning the Religious Foundations of Modern Constitutionalism’ (2010) 1 *Western Australian Jurist* 1.

<sup>6</sup> William H Halverson, *A Concise Introduction to Philosophy* (Random House, 1981) 357.

<sup>7</sup> Kelsen, above n 2.

<sup>8</sup> John Maurice Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992).

Thomas Hobbes, Hugo Grotius and John Locke in the development of natural law theory treatises of their own.

These philosophers used natural law as a basis for criticising and reforming positive laws (man-made laws), arguing that positive laws, which are unjust under the standards of natural law are legally inferior.

### III NATURAL LAW DOCTRINE, ITS IMPORTANCE AND ITS RELIGIOUS CHARACTER (5<sup>TH</sup> CENTURY BC - 13<sup>TH</sup> CENTURY AD)

Eternal laws of supernatural origin are mentioned in the famous verses of Sophocles' *Antigone* (449-460). In this literature the king forbids the burial of a man fallen in the attack of Thebes. However, Antigone, the sister of the fallen man 'is impelled by piety to disobey; she puts earth on the body lying exposed on the plain, and is arrested'.<sup>9</sup>

When asked why she disobeyed Antigone reasoned that the immutable unwritten laws of heaven override the laws of mortal man. This literature reveals the idea that the Greeks believed in something that transcends man-made laws; something that might be classified as natural law.

Plato argues that there is a natural order of virtues which become the standard for man-made laws. Aristotle, in his *Rhetoric*, speaks of 'the law according to nature' as being an unchangeable law common to all men. Stoicism identifies natural law with God. It believes that, if rational beings comply with it, it will govern their conduct. Stoicism's natural law teaching subsequently affected Roman law.

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<sup>9</sup> Ibid 20.

Cicero, in *De Legibus*, states that justice and law derive their origin from the Gods. Accordingly, natural law obliges us to contribute to the general good of the society and that man-made statutes may be ‘wicked and unjust’.<sup>10</sup> He further states that:

[t]here is in fact a true law ... which ... applies to all men and is unchangeable and eternal ... To invalidate this law by human legislation is never morally right, ... It will not lay down one rule at Rome and another at Athens ... But there will be one law ... binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter and its sponsor.<sup>11</sup>

Aquinas believes that ‘the natural law is nothing else than the rational creature's participation in the eternal law’.<sup>12</sup> This eternal law is said to be God’s wisdom, and as such, it is the directive norm of all movement and action.

When God resolved to give existence to His creatures He resolved to ordain and direct them to an end.<sup>13</sup> It is God who leads men towards what is good, instructs them by law and, assists them by His grace. Thus, human laws that are in conflict with the natural law do not have the force of law.

Accordingly, a human law is valid only insofar as its content conforms to the content of the natural law: ‘every human law ... if in any point it

<sup>10</sup> Francis Barham, *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Laws* (Edmund Spettigue, 1841) vol 2, Online Library of Liberty <[http://oll.libertyfund.org/index.php?option=com\\_content&task=view&id=747&Itemid=284](http://oll.libertyfund.org/index.php?option=com_content&task=view&id=747&Itemid=284)>.

<sup>11</sup> Francis W Coker, *Readings in Political Philosophy* (The Macmillan Company, 1938) 151.

<sup>12</sup> Thomas Aquinas, *Summa Theologica*, Question 91, Article 2, New Advent <<http://www.newadvent.org/summa/2091.htm>>.

<sup>13</sup> Blackstone, above n 4.

deflects from the law of nature, it is no longer a law but a perversion of law'.<sup>14</sup> Clearly then the natural law, and in particular its religious character, played an important role in the development of man-made laws throughout this period.

#### IV NATURAL LAW DOCTRINE, ITS IMPORTANCE AND ITS RELIGIOUS CHARACTER (13TH TO 18TH CENTURY AD)

Fortescue believes that the supreme importance of the law of God and of nature 'profoundly influenced the course of legal development in the following centuries'.<sup>15</sup> Sandoz in commenting on Fortescue's statement notes that 'the historically ancient and the ontologically higher law - eternal, divine, natural - are woven together to compose a single harmonious texture in Fortescue's account of English law'.<sup>16</sup>

Coke's discussion of natural law appears in his report of the Calvin's Case (1608). In this case the judges found that the allegiance of the subject is due unto the King by the law of nature; the law of nature is part of the law of England; the law of nature was before any judicial or municipal law; and the law of nature is immutable.<sup>17</sup>

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<sup>14</sup> William P Baumgarth and Richard J Regan, *Aquinas On Law, Morality and Politics* (Hackett Publishing Company, 2<sup>nd</sup> ed, 2002).

<sup>15</sup> Harold Dexter Hazeltine, 'General Preface: The Age of Littleton and Fortescue' in Sir John Fortescue (ed), *De Laudibus Legum Anglie* (Cambridge University Press, 1949) 1, 28.

<sup>16</sup> Ellis Sandoz (ed), *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (University of Missouri Press, 1993) 7.

<sup>17</sup> Steve Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke* (Liberty Fund, 2003) vol 1, 19597.

Grotius, in his influential work on international law *The Law of War and Peace* states that '[n]atural law is the dictate of right reason ... natural law is universal, unchangeable, and supreme'.<sup>18</sup> Grotius, in fact, believes that '[t]he law of nature is so immutable that it cannot be changed even by God himself'.<sup>19</sup> Hobbes, in the *Leviathan* writes: '[a] law of nature, *lex naturalis*, is a precept or general rule, found out by reason ...'.<sup>20</sup> Thus, the law of nature is a 'dictate of reason'.<sup>21</sup> Locke concurs and states that those who transgress the law of nature have renounced 'reason, the common rule and measure God hath given to mankind'.<sup>22</sup> Moreover, the law given to Adam to govern his actions and those of his descendants, was 'the law of reason'.<sup>23</sup>

Blackstone agrees and says that:

[t]his law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.<sup>24</sup>

Simonton concurs and states that 'proceedings in our Courts are founded upon the law of England, and that law is founded upon the law of nature

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<sup>18</sup> Francis William Coker, *Readings in Political Philosophy* (University Press of the Pacific, 2002) 411.

<sup>19</sup> *Ibid* 412.

<sup>20</sup> Edwin A Burt, *The English Philosophers from Bacon to Mill* (Random House, 1939) 163.

<sup>21</sup> *Ibid* 173–4.

<sup>22</sup> John Locke, *The Second Treatise on Civil Government* (The Classics Club, 1947) 79–80.

<sup>23</sup> *Ibid* 101.

<sup>24</sup> Blackstone, above n 4, 41.



and the revealed law of God. If the right sought to be enforced is inconsistent with either of these, the English municipal courts cannot recognise it'.<sup>25</sup>

According to Dworkin, when deciding difficult cases, judges resort to moral principles that do not derive their legal authority from man-made laws.<sup>26</sup> In *Riggs v Palmer*<sup>27</sup> neither statutes nor case law governing wills expressly prohibited a murderer from taking his victim's will. The court, however, declined to award the defendant his gift under the will simply because it would be wrong to allow him to profit from such a grievous wrong. Hence, Dworkin argues that the legal authority of standards in cases like *Riggs* cannot be acquired from positive laws, but rather, a justification can only come from the natural law.<sup>28</sup>

Consequently, natural law served as authority for legal claims and rights in many judicial decisions, legislative acts, and legal pronouncements.<sup>29</sup> In fact, Clinton argues that the U.S. Constitution rests on a common law foundation and that the common law in turn, rests on a classical natural law foundation.<sup>30</sup> Thus, the natural law and in particular its religious character, played an important role in the development of man-made laws throughout this period.

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<sup>25</sup> John W Simonton, 'On the Origin and Nature of Law' (1902) 11(4) *Yale Law Journal* 203.

<sup>26</sup> Ronald M Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 40.

<sup>27</sup> (1889) 115 NY 506.

<sup>28</sup> Dworkin, above n 26.

<sup>29</sup> John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* (University of Wisconsin Press, 1986) 90–1.

<sup>30</sup> Robert Lowry Clinton, *God and Man in the Law: The Foundations of Anglo-American Constitutionalism* (University Press of Kansas, 1997).

## V THE FUTURE OF NATURAL LAW

Natural law jurisprudence is currently undergoing a period of reformulation. Even so natural law became the bedrock for the English common law system and the U.S. Constitution. Without doubt it will continue to play a vital role in the development of governance principles of many societies. According to Singh ‘natural law ... continue[s] to play a key role in the development of international law’.<sup>31</sup>

Natural law and its religious and ethical considerations will continue to play a vital role in governing the morality of man and, in the process, resume directing the development of future man-made laws. Simonton eloquently states that ‘[e]thical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live’.<sup>32</sup>

## VI CONCLUSION

This essay demonstrates that the religious character of natural law has guided the development of human laws in many aspects. One such example is the English common law system - the bedrock of Western jurisprudence. The following account of Zimmermann’s own assessment of the importance of natural law doctrines in the development of man-made laws provides a compelling evidence of this: ‘[i]n the earlier stages of its historical development, from the 13th century to the 18th century, the English common law rested almost entirely upon a religious conception

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<sup>31</sup> Prabhakar Singh, ‘From Narcissistic Positive International Law to Universal Natural International Law: The Dialectics of Absentee Colonialism’ (2008) 16(1) *African Journal of International and Comparative Law* 5682.

<sup>32</sup> Simonton, above n 25, 207.

that looked to a higher law as the basis for judicial decisions'.<sup>33</sup> Moreover, Ratnapala and Moens state that '[e]very modern charter of rights has been derived directly or indirectly from natural law ... doctrines. Many constitutions, including the American, owe great debts to natural law'.<sup>34</sup>

As a moral law, engraved in the mind and conscience of man, 'the natural-law [doctrine is] the status of all the fundamental principles of right and justice'.<sup>35</sup> Thus, it is not surprising that 'there is no natural-law doctrine of any importance which has not a more or less religious character'.<sup>36</sup>

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<sup>33</sup> Augusto Zimmermann, 'The Law of Liberty: Natural Law Roots of Western Constitutionalism' (2011) 15 *International Trade and Business Law Review* 432, 441.

<sup>34</sup> Suri Ratnapala and Gabriel A Moens, *Jurisprudence of Liberty* (LexisNexis, 2<sup>nd</sup> ed, 2011) 7.

<sup>35</sup> Halverson, above n 6.

<sup>36</sup> Kelsen, above n 2.

# BOOK REVIEWS

**BOOK REVIEW:**  
**MICHAEL KIRBY – A PRIVATE LIFE – FRAGMENTS,**  
**MEMORIES, FRIENDS<sup>1</sup>**

GABRIËL A MOENS

Since his retirement from the High Court in 2009, the Hon Justice Michael Kirby has been the subject of a full-length biography and a television documentary.<sup>2</sup> Justice Kirby has now published a memoir. This book is essentially a compilation of interesting events in Kirby's life, which collectively document his quest for homosexual law reform from the 1950s to the present. Each chapter of the memoir, which is preceded by an appropriate vignette, is a self-contained story that recounts his involvement in this quest. After reading the memoir, I decided to write this review because the experiences and ruminations of a highly distinguished jurist are germane to the development and maintenance of a cohesive and just society.

I have known Michael Kirby for a long time. Although he might not remember it, he and I were two of the ten people who in 1982 attended the funeral of Professor Ilmar Tammelo who had taught Kirby at the University of Sydney Faculty of Law in the 1960s. Kirby was always most gracious in his dealings with me and supported my attempts to make a contribution to scholarly life as a lawyer and academic in Australia. One expects nothing

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<sup>1</sup> Michael Kirby, *A Private Life: Fragments, Memories, Friends* (Allen & Unwin, 2011).

<sup>2</sup> A J Brown, *Michael Kirby: Paradoxes and Principles* (Federation Press, 2011); *Michael Kirby: Don't Forget the Justice Bit* (Directed by Daryl Dellora, Film Art Media, 2010).

else from a truly gifted and admirable person such as Michael Kirby. He kindly wrote the Foreword to my book *Commercial Law of the European Union* (Springer, 2010) which I co-authored with Adjunct Professor John Trone.

In his memoir, Kirby vividly describes the discrimination suffered by homosexuals in the Australia of the 1950s, 1960s and 1970s. I found his discussions of life in 1950s Sydney especially interesting because it covered a time when I was not in Australia, but growing up in Belgium. As is often the case with any form of discrimination, the climate in which gay people were expected to live was horrendous. There was a societal expectation that they would pretend to be heterosexual and would not reveal the reality of their homosexuality. Statute books often criminalised homosexual conduct. Furthermore, when Kirby was a youngster, the police in New South Wales waged a campaign to discredit gay people, fired on by an intolerant Commissioner of Police.

In Australia, statutes that criminalised homosexual behaviour between consenting adults in private were only wholly expunged from Australian statute books following the *Nicholas Toonen case*.<sup>3</sup> Toonen was a gay activist who lodged a complaint with the United Nations Human Rights Committee in 1991. He alleged that his right to privacy under Article 17 of the *International Covenant on Civil and Political Rights*<sup>4</sup> had been violated by Tasmania's criminalisation of homosexual conduct between consenting adults in private. The Committee decided that Article 17 of the Covenant had indeed been violated. Following the Committee's decision, the

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<sup>3</sup> (1994) 112 ILR 328.

<sup>4</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Commonwealth passed a law overriding Tasmania's criminal statute.<sup>5</sup> It is not my purpose in this short review to consider the constitutional issues associated with the Toonen case, including the extent to which the Commonwealth Parliament is authorised to pass laws to implement decisions taken by international bodies, which in itself is a contentious constitutional issue. I merely refer to the Toonen case to indicate that it finally succeeded in destroying the 'don't ask, don't tell' mentality which existed in Australia for most of the twentieth century.<sup>6</sup>

As from chapter 2, Kirby describes in a warm, gentle, yet serious manner his precarious journey in Australia and overseas as a homosexual man. Every chapter details a different aspect of this journey. In chapter 2, he discusses the 1957 Wolfenden report<sup>7</sup> in the United Kingdom which recommended that 'homosexual behaviour between consenting adults in private should no longer be a criminal offence' (p 26). He focuses on the contribution made by Alfred Kinsey, a Professor at the University of Indiana in Bloomington, who from 1948 courageously undertook a study on male sexual behaviour to ascertain what actually occurs during human sexual conduct. Kirby is highly flattering of both Kinsey and Wolfenden, describing each of them as 'a child of the enlightenment' (p 32). In his view, 'Each in his different way contributed to the advancement of the human condition' (p 32). In chapter 3, Kirby recounts his loneliness and desperation at not being able to express his sexual awakening during his youth. He tells the story of seeing the film *East of Eden* (starring James

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<sup>5</sup> *Human Rights (Sexual Conduct) Act 1994* (Cth).

<sup>6</sup> The phrase 'Don't Ask, Don't Tell' famously originated in the United States. That policy has now been repealed. See *Don't Ask, Don't Tell Repeal Act of 2010*, Pub L No 111-321, 22 December 2010, 124 Stat 3515.

<sup>7</sup> *Report of the Departmental Committee on Homosexual Offences and Prostitution*, Cmnd 247.

Dean) a total of 24 times. It was an obsession that was to last until 2000 when Kirby visited Dean's birthplace, the small village of Fairmount, Indiana.

Chapter 4 offers an insight into Kirby's private life. He discusses how he met his long-time partner, Dutchman Johan van Vloten at a bar in the Rex Hotel, in Kings Cross, Sydney. In his narrative, Kirby reveals that his relationship with van Vloten was preceded by a first love affair with a Spanish man, named Demo. Kirby describes how he responded positively to a call from Demo to spend a weekend with him in Melbourne, after he and Johan had moved in together. He feigned surprise that Johan was still there in the Sydney apartment when he returned from Melbourne (p 83). In my view, this was the most candid comment in the memoir because it provides readers with unprecedented access to Justice Kirby's private life.

In chapter 5, Kirby discusses his visit in 2000 to Riverview College, a prestigious Catholic Jesuit college in Sydney where he spoke about the topic of homophobia, which generated a lot of comment in the media. Chapter 6 details Kirby's visit to Zambia, a strongly anti-gay country, even though 1 out of 6 Zambians suffered from HIV infection. His speech to the highest judicial officers of Zambia was certainly a courageous effort to highlight the scourge of AIDS. In chapter 7, he recounts a visit to the Salvation Army which had invited him to a social justice conference in 2007, withdrawn the invitation and finally re-invited him once again. The penultimate chapter tells the story of his visit to the Indian fort city of Bassein where he met Prince Manvendra, who had outed himself as a homosexual in India 'where most of the politicians and leaders are still silent' on this issue (p 183).



This book is very well written, eminently readable and most interesting. In fact, once you start reading the memoir, it is ‘unputdownable’ – a horrible and unpardonable word that expresses a delightful experience. I had expected his memoir to deal with the numerous legal achievements of Justice Kirby during his illustrious career as a judge. But, in essence the book focuses on Kirby’s quest to seek homosexual law reform in Australia and throughout the world. Kirby himself dispels the idea that his memoir is an autobiography. Indeed, he clearly indicates in the Introduction that his memoir does not constitute an autobiography because it does not deal with his career ‘as a practising lawyer, in university bodies, the Council for Civil Liberties, the Australian Law Reform Commission, the courts and international agencies’ (p ix).

Nevertheless, in telling his stories, he occasionally reveals how his attitudes towards societal events and reforms impacted upon his judicial role. He reminds us that, in essence, a judge is the product of his own experiences and that any pretence that the law is wholly objective is a chimera. He reveals in the Introduction the influence on him of his ‘great teacher’ (p x) Julius Stone, who taught his students ‘that judges and lawyers had to be very aware of the impact on their minds and values of their life’s experiences’ (p x). Of course, Stone’s observation is certainly a controversial description of the judicial role of judges because the view that ‘judicial experience and values were, and should be immaterial to case outcomes’ (p x) is still firmly implanted into the DNA of the legal profession. All of these issues are worthy of sustained scholarly discussion in Australia, a message which was communicated to me soon after my arrival in Australia in 1975 when I became the last full-time research assistant to Professor Stone.

The memoir’s pivotal point comes at page 91 where Kirby states:

The slow process of reform in relationship recognition has been a persistent feature of successive governments, Coalition and Labor, in Australia over the past decade. Whilst so many countries have leapt ahead to 'open up' marriage to same-sex couples, Australian governments have refused even to contemplate civil union or civil partnership. ... This is a humiliating and outrageous denial of civic equality. According recognition in matters of pensions, money and material things is good and fitting. But denying equality in a matter that concerns the dignity and respect due to precious long-term relationships is hurtful, and against society's interest. Money is not enough. Dignity, recognition and acceptance are precious in their own right.

A review of homosexual law reform throughout the world reveals that the realm of private morality or immorality is not the law's business. Kirby's view of same-sex marriage is presumably based on the utilitarian principle that society's interests are served by increasing the total amount of satisfaction of its members. In contrast, a social conservative believes that, although same-sex and heterosexual marriages may be functionally equivalent from a utilitarian point of view, same-sex marriage violates the moral law, as bequeathed to humanity by the Bible. A social conservative would not be swayed by the many references in the memoir to the power of science which, according to Kirby, has overhauled the arguably immature messages of the Bible. Hence, for social conservatives it is unlikely that 'when the simple scientific truths are placed alongside the words of scripture understanding will follow' (p 164).

In his memoir, Kirby does not chide the Gay and Lesbian Mardi Gras which is held annually in Sydney every March. In 2000, the Mardi Gras was condemned by the Catholic and Anglican Archbishops of Sydney because it 'was a horrible spectacle of eroticism that promoted a homosexual "lifestyle"' (p. 97). To my mind, the Mardi Gras may be

criticised not because it promotes a homosexual lifestyle, but because of its public display of eroticism and promotion of hedonism as a lifestyle. In doing so, it detracts from the cause of sexual reform in Australia that Kirby seeks to promote for the gay community by emphasising hedonism over personal responsibility and stability.

I attended the launch of Kirby's memoir in Perth. In his lively and spirited talk, Kirby suggested that, although he has been actively involved in homosexual law reform, he is a 'traditional' sort of person, whose aim is certainly not to start a world revolution. It is a sentiment that is also expressed in his memoir where he proffers the view that 'in fundamentals I am a little conservative' (p 190). However, in actively denouncing discrimination on the ground of sexual orientation, he may well have made a lasting, progressive and positive contribution to Australian society.

I noticed one mildly amusing mistake in the memoir. Justice Kirby states that everyone had told him that his 'German accent was good. No, it was superb – almost native' (p 75). His teacher used to say that he had a 'natural feeling' for the German language, which is expressed in German as *Sprachgefühl*. But, unfortunately, the impact of the teacher's assertion is somewhat weakened by the incorrect spelling of the word as *Sprachtsgefühl*.

In short: this memoir comes highly recommended because it provides readers with an unprecedented insight into one of the great legal minds of Australia and documents, by way of self-contained stories, Kirby's and Australia's quest for openness and greater equality.

**BOOK REVIEW:**  
**DAVID FLINT – MALICE IN MEDIA LAND<sup>1</sup>**

GABRIËL A MOENS

In early 2005 I was asked to launch David Flint's *Malice in Media Land* in Perth. The launch was held at the Acacia Hotel in Northbridge on Tuesday, 19 April 2005. My remarks have remained unpublished until now. However, when rereading my remarks at the end of 2011, I decided that the message communicated so eloquently in this book still resonates with people today. Hence, I am delighted to publish my comments in *The Western Australian Jurist* for the purpose of enabling a greater number of people to acquaint or reacquaint themselves with this important and perennial book.

Professor Flint, Mr Chairman, Ladies and Gentlemen

I am very pleased to have been invited to launch *Malice in Media Land* written by Professor David Flint. It is an honour to launch this book because it passionately, yet rationally, discusses the importance of freedom of expression and a responsible media for Australia. On a more personal level, I am delighted to promote this book because I have known David for a long time, indeed since the early 1980s and, at various times, I have been his colleague or collaborator.

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<sup>1</sup> David Flint, *Malice in Media Land* (Freedom Publishing Australia, 2005).

*Malice in Media Land* compellingly describes how the media has dismantled and limited the right of Australian people to freedom of expression. Yet, freedom of expression is essential to the healthy functioning of democracy in this country. But before I say more about this remarkable book, I would like to highlight some of the achievements of its author, Professor David Flint.

Measured by any standard, David's career has been as remarkable as it has been prominent and controversial. For those of you who may not know about his achievements, I like to mention that David has been the Dean and Professor of Law at the University of Technology, Sydney, Chairman of the Australian Press Council, Chairman of the Australian Broadcasting Authority, and National Convenor of the Australians for Constitutional Monarchy, to name only a few of his functions. David, in his long and distinguished career, always had the courage to publicly discuss controversial and sensitive issues without fear or favour, even if it meant that he would be ridiculed by the elite, which he so eloquently discusses in his previous book *The Twilight of the Elites*.<sup>2</sup> I believe that courage to speak your mind is an outstandingly rare characteristic in any person, but even more so in high achievers, who are prominent in public life. Indeed, most people appointed to important positions lack the courage to criticise the weaknesses of governments and institutions. Once appointed, they immediately speak the language of the appointing authority. These people often become ineffectual, not because they are naturally ineffectual, but because the perceived or real importance and social recognition associated with their positions acts as an impediment to criticising entrenched, yet odious, practices. David's courage, richly evidenced by his decision to

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<sup>2</sup> David Flint, *The Twilight of the Elites*, (Freedom Publishing Australia, 2003) (Foreword by Tony Abbott).

write and then publish *Malice in Media Land* tells you a lot about the strength of his character. However, it is sad that in this society, courageous and imaginative people are often ridiculed by the elite, who impose their usually leftwing and liberal views on Australia. David Flint himself has been called a “Cockalorum”, which means a ‘self important little man’. This should not worry us; in fact it increased my active English-language vocabulary, but it indicates that the elites often attack the person, not the arguments developed by that person.

The elite are policy-makers and trendsetters who are usually found in the media, politics, universities, and even in the judiciary. They are the people who want to open our borders to asylum-seekers brought here by people-smugglers. They are the people who want to replace our constitutional Monarchy by an ill-defined and untested Republic. They actively facilitate the dissolution of Australia by advocating the adoption of a treaty by Australia with our indigenous population. Often, these are the people who favour ‘social engineering’ legislation, such as pro-euthanasia legislation and same-sex marriage. In short, they want to overturn the values and institutions upon which the prosperity of this country is based.

As mentioned before, those of us, like Professor Flint, who question the received wisdom of the elite, are likely to be ridiculed. An example, involving Professor Flint, will suffice to make this point. In 2002, the XVI<sup>th</sup> Congress of the International Academy of Comparative Law was held at the University of Queensland and I was the President of the Organising Committee, whose job it was to organise this important bilingual event. I was assisted by an Advisory Board, consisting of judges and University officials, the members of which provided advice (but did not make decisions) on who should be invited as keynote speakers. I had invited David to be one of the keynote speakers. The Media and the Law

was obviously a most important issue at the time, as it is now, and David graciously accepted my invitation. However, at one of the subsequent meetings of the Advisory Board, two prominent Queensland judges, whose names I need not reveal here, objected in the most strenuous, obnoxious and derogatory manner to the selection of David. Their objection was based on their unequivocal hostility to everything David had accomplished or said in the past. The attack on his character was vitriolic, to say the least. I always expected judges to be dispassionate, respectable, fair and impartial members of a relatively conservative profession. The judges referred to him as ‘that man’. This inevitably reminded me of Bill Clinton’s reference to ‘that woman’. If ‘that man’ is invited, they said, ‘we will have nothing to do with the Congress and we will actively campaign against it’. I was incredibly shocked and ashamed, I was ambushed, but more importantly, a good man was effectively prevented from participating in the Congress. The blow to freedom of expression, however, was the greatest casualty of this incident.

This book, *Malice in Media Land*, reveals Professor Flint’s concern for the preservation of freedom of expression. He agrees that a responsible, effective and unbiased media has a most important role to play in the preservation, and indeed promotion, of freedom of expression. David discusses this theme in a logical and rational manner, which makes his ideas amenable to all those who are interested in public affairs and the future of this country. As Professor Flint correctly argues in his book, the media, and the elites in general, do not tolerate differences of opinion, but instead hate or disregard all views, which are incompatible with their agenda. The media embraces a philosophy of paternalism, which involves attempts to impose their views on the silent majority. To paraphrase Mike Secombe, although the media may not regard all those who disagree with

them to be stupid, most stupid people are certainly those who entertain views that are different from those of the elite media.

Professor Flint's book is about freedom of speech and the role and the impact of the media in this country. He accurately describes and analyses the importance of freedom of expression. He discusses the extent to which freedom of expression is implied in our Constitution. He deals admirably with attempts to impose on Australians the use of gender-free non-sexist language, reform of Australia's defamation law, the impact on freedom of expression of religious vilification laws. David argues that the demonstrable paternalism of the elite stifles freedom of expression, and therefore prevents legitimate discussion in our society of the great issues of our time. He accurately describes how this climate has lead to self-censorship in that many people, who would otherwise be able to contribute to society, find it convenient and safer to keep quiet. That in itself is dangerous, because it deprives society of a variety and diversity of views, which therefore cannot be tested in the market place of ideas. Instead, the media imposes their ideology or philosophy on the people of Australia. It focuses on rights, or selected rights of some preferred classes; yet they hardly mention obligations. I would think that even at my own University, it would not be wise to publicly develop arguments against some issues, like same-sex marriage, or the ordination of women, even though the Catholic Church has clearly stated views on these issues.<sup>3</sup>

In his book, David highlights the fact that many journalists do no longer report, but offer opinions, and therefore the distinction between the reporting of facts, on the one hand, and comment or analysis becomes blurred.

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<sup>3</sup> At the time of the launch, Professor Gabriël Moens served as Head and Professor Law at the University of Notre Dame Australia.



Ladies and Gentlemen, this book should be read very widely. *Malice in Media Land* offers the reader an excellent overview and analysis of important events that are taking place in Australia today. Those who have an interest in good government, responsible media or merely want a compelling analysis of recent events in Australia, for example, the media campaign against Dr Hollingworth, the Governor-General, the children overboard affair, the frenzy with which the media attacks people and denigrates the right to property, should read this book. It also offers seven (7) principles of good broadcasting, which, in my opinion, should be studied closely in our schools of journalism.

I commend this book to all of you. You will find that it is a well written, balanced and rational discussion of issues related to good government, freedom of expression and a responsible media.