

THE WESTERN AUSTRALIAN JURIST

Volume 4

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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/>

WALTA members are strongly encouraged to join the ASLP.

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, 3rd ed. The fifth volume of The Western Australian Jurist is due to be published in September 2014. Contributions should be submitted on or before 1 July 2014.

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CONFERENCE PAPERS

*From the Threats to Freedom of Speech Conference, held at Murdoch
University, Australia on 12–13 October 2012*

THREATS TO FREEDOM OF SPEECH

AUGUSTO ZIMMERMANN AND MICHELLE EVANS

This special edition of *The Western Australian Jurist* contains a selection of papers from the *Threats to Freedom of Speech* conference. Organised by Dr Augusto Zimmermann and Dr Michelle Evans, together with Mr Andrew Pickford, a Senior Research Fellow at the Mannkal Economic Education Foundation, the conference took place at the Herbert Smith Freehills Lecture Theatre at Murdoch University on 12–13 October 2012. The Mannkal Economic Education Foundation sponsored the event.

Western societies are seeing a gradual erosion of freedom of speech, the causes of which are varied and often done under the pretences of good intentions or security concerns. This very successful conference looked at the history, symptoms, causes and unintended consequences of this assault, and highlighted remedies available to policy makers and the broader public to protect the freedom of speech, so to avoid the path to tyranny and oppression.

Religious vilification laws, Julian Assange and Wikileaks, the Finkelstein Inquiry into the Australian media, and freedom of speech under a bill of rights were amongst the topics debated at the *Threats to Freedom of Speech* conference. More than 100 people attended the important event, with speakers and panellists including Dr Augusto Zimmermann, Dr Michelle Evans, Professor Jürgen Bröhmer, Lorraine Finlay, Associate Professor Joseph Fernandez, The Hon Christian Porter MLA, Professor James Allan, Mr Stephen Hurworth, The Hon Nick Goiran MLC, and

keynote speaker Chris Berg, author of *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*.

The contributors to this volume make a strong case for freedom of speech. In the first article of this special issue of our journal, Professor James Allan presents a spirited denunciation of a constitutional bill of rights not protecting, among other rights, free speech. Professor Allan also highlights issues surrounding judicial interpretation and the potential for judicial activism.

Our second article is written by Associate Professor Joseph Fernandez. He discusses the UK's phone hacking scandal and arguing against the then Finkelstein Inquiry's proposal for a 'super regulator' of the Australian media. This article examines, among other things, the origins and nature of the Independent Media Inquiry, the problem the inquiry was seeking to address, and ultimately, the report's recommendations for legislative reform and the reform initiative's ultimate demise.

The next article by the Hon Nick Goiran MLC discusses the role of parliament in protecting free speech. This article looks into whether the parliament can have a meaningful role in protecting the freedom. In particular, Goiran discusses the role of Australian state parliaments in protecting free speech and in limiting it when considered justified by other public interests.

Our last article in this series is written by Dr Augusto Zimmermann. Dr Zimmermann discusses religious vilification laws, arguing that rather than promoting harmony and tolerance among religious groups, they are susceptible to abuse by extremist groups to silence criticism of their beliefs. These laws, according to him, may become a permanent way for

individuals to silence debate by claiming that they, rather than their beliefs, are being attacked.

We hope that the *Threats to Freedom of Speech* conference stimulates further debate and scholarship in this important area. We would like to thank the Mannkal Economic Education Foundation for their sponsorship and support. It is our hope that you may find this selection of papers both enlightening and interesting, and that they encourage thought and debate on the important issue of protecting free speech.

FREE SPEECH IS FAR TOO IMPORTANT TO BE LEFT TO UNELECTED JUDGES

JAMES ALLAN^{*}

Abstract

In this paper the author will begin by setting out the core philosophical basis for supporting very few limits indeed on a person's scope to speak his or her mind in a successful democracy. This will involve a short description of the John Stuart Mill, utilitarian defence of free speech – the position largely rejected by Ray Finkelstein in his Media Council Report.

The author will then turn to set out how a bill of rights works, be it a constitutionalised one or a statutory one. He will mention the Canadian, New Zealand, United Kingdom, United States and State of Victoria models. He will argue that, in essence, when you buy a bill of rights all you are buying are the line-drawing social policy decisions of the unelected judiciary, decisions that without such an instrument would be made by the elected legislators.

The bulk of the paper will then argue that the bills of rights of Canada, New Zealand, the UK and Victoria have not 'given freedom of speech a hefty leg-up', as one Australian legal commentator has claimed. Victoria is no better off in terms of scope to speak your mind than any of the 5 Australian States without a bill of rights and in some ways is worse off. The United Kingdom looks the worst of any of these jurisdictions on free speech matters, and certainly far worse than Australia, without a national bill of rights. And Canada has extensive hate speech laws.

The author will run through some of the bill of rights decisions of the unelected judges in these jurisdictions on free speech matters and then argue that free speech is far too important to be left to the Leevesons, Finkelsteins, and unelected judges, who anyway do a terrible job on that front (outside the United States). In a healthy, vibrant democracy free speech is a matter for all the voters. They are the ones that need to ensure there is as much scope as possible to hear unpopular views.

*

Garrick Professor of Law, University of Queensland.

Indeed the author will finish by noting the very close connection between the main ground for valuing democracy and the above ground for valuing lots and lots of free speech.

I INTRODUCTION

My title tells you the core thing you need to know about this talk and my position on free speech and bills of rights. Ensuring lots and lots and lots of scope for people to speak their minds in a vibrant democracy is something I strongly support and value very highly. However, entrusting the issue to a committee of ex-lawyers so they can read through the runes of the vague, amorphous moral abstractions in a bill of rights – so they can take the five words ‘Right to Freedom of Expression’ and then consult the findings of the courts in Canada, the UK, Europe, New Zealand, though on this one rarely the US, before also consulting a few treaties and conventions, then their own moral sensibilities, perhaps a bit of Ronald Dworkin’s best fit Herculean interpretive theory, and maybe even do all this while together secretly chanting the magical words ‘Right to Free Speech’ while ‘Kumbaya’ is being hummed in the background – is not something I support.

Don’t forget. These top judges are taking this radically indeterminate¹ moral rule that has been translated into the language of rights² (‘the right to free speech’) and they are deciding the scope of that entitlement; what limits on it are thought reasonable; how it interacts with other enumerated rights – none, or no more than one, of which is absolute; and usually

¹ Or in Hartian terms, a laid down rule with a rather massive ‘penumbra of doubt’. See, eg, HLA Hart, *The Concept of Law* (Oxford University Press, 1961) 119.

² Because analytically speaking rights (normally ‘others must’ claims) are correlated with duties and linked together by the concept of rules. So any right can be translated into the language of rules, through this enervates the emotional oomph and sense of entitlement.

these days interpreting it on the basis of ‘living tree’³ type interpretive theory. Such a theory holds that the words themselves can remain exactly the same but – apparently in order to avoid being locked in by the drafters’ and framers’ and enactors’ understandings of the words’ meaning – that the meaning of those rights can grow and alter and shift and change as these top judges more or less see fit (meaning you, exchange one sort of being locked in for another, namely the views of a handful of judges).⁴

What is the effect of all that? It is that when you buy a bill of rights, be it a constitutionalised or statutory model, you are simply buying the views of the unelected judiciary instead of the views of the elected legislators. When you move from the Olympian heights of disagreement-finessing moral abstractions down into the quagmire of specifics, of day-to-day social policy line-drawing where nice, smart, well-informed people simply disagree – so you move from revelling in the emotive comfort of the phrase ‘right to freedom of expression’ down to making tough, debatable real life line-drawing calls when it comes to desirable campaign finance rules, or defamation regimes, or whether and how to have hate speech laws – my strong view is that elected legislators do better than judges. In other words, you can be a strong supporter of plenty of scope for citizens to speak their minds, as I am, and also be strongly against bills of rights, as I also am.

Or to put it more bluntly, free speech is too important, far too important, to be left to the judiciary. Indeed there is a fundamental connection

³ See Jim Allan, ‘The Curious Concept of the “Living Tree” (or Non-Locked-In) Constitution’ in G Huscroft and B Miller (eds), *The Challenge of Originalism* (Cambridge University Press, 2011), 179–202.

⁴ I make this argument at length in James Allan, ‘The Three “R’s” of Recent Australian Judicial Activism: *Roach*, *Rowe* and (No)’Riginalism’ (2012) 36 *Melbourne University Law Review* 743.

between the bases for supporting democracy and democratic decision-making, on the one hand, and the bases for thinking near-on wide open free speech is the way go to in such societies, on the other. In both instances there is a core level trust in the abilities of your fellow citizens, both to choose their representatives and also to hear, evaluate and assess information and speech.

If the preponderance of one's fellow citizens in a vibrant, long-established democracy such as Australia really are too gullible, too feeble-minded, too prone to succumb to the passions of the moment when they hear Holocaust deniers, or sarcastic denouncers of allegedly misdirected affirmative action benefits, or glitzy *ad hominem* TV election ads, or really almost any of the scenarios that fall under the aegis of hate speech laws, if – to put the point succinctly – most Australians simply cannot be trusted to hear such speech, then I cannot see on what basis they can be trusted to vote.

In the rest of this talk I want to do four things. Firstly, I will take you ever so briefly through what I think is the most convincing and powerful ground for valuing lots of free speech, the John Stuart Mill, utilitarian basis. Many of you will be well acquainted with that rationale so I will be quick. Secondly, I will run through how a bill of rights works, again very briefly. I am not at all sure as many of you will be acquainted with the mechanics of these instruments, but I will nevertheless still be brief. Thirdly, and this is a crucial component of this talk, I will argue that judges do not deliver the goods when it comes to free speech (at least not outside the US). They are not to be trusted with something this important and abdicating such an issue to them is a big mistake. So I will run through a bit of case law from Canada and the UK. I will have a look to see if the State of Victoria – the only Australian State with a bill of rights

– scores better or worse than the others on free speech grounds (hint: it's worse there). I will note that it is judges and ex-judges such as Leveson and Finkelstein who seem keen to disparage the abilities of your average citizen and who think what those citizens can hear needs to be filtered. I will even read out a few quotes from Ray Finkelstein's Report that should make any free speech adherent doubt that this issue should ever be left in the hands of judges. And then I will finish by reminding you again of the close connection between the reason why the Millian desire *not* for an absolute, unfettered scope for all to speak their minds, but rather for more such scope than other outlooks and rationales allocate – with Mill's fundamentally optimistic premises about the capacities of ordinary citizens to perceive the best answer from amongst the cauldron of competing views – is closely connected to what I take to be the strongest argument for democracy, which you may not be surprised to hear is likewise a utilitarian, Benthamite, Millian one.

II WHY VALUE FREE SPEECH?

Here is the famous reason given by John Stewart Mill:

The peculiar evil of silencing the expression of opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more those who hold it. If the opinion is right, they are deprived of the opportunity to exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.⁵

In essence, then, the point to having lots of free speech is to ensure that views we dislike, find distasteful, and even despise get an airing. Anyone

⁵ John Stuart Mill, *On Liberty* (Modern Library, first published 1859, 2002 ed) 18–19.

can be in favour of allowing speech he likes. But allowing others to hear what you agree with accomplishes next-to-nothing; it delivers no good consequences, at least none other than allowing adherents of this view to feel good about themselves, to feel puffed-up and self-righteous.

No, the value in lots of scope for people to speak their minds is so that we can hear views we dislike and think wrong. It is hearing those views that has such good long-term consequences for society. It creates a cauldron of competing views where over time the idiotic ones will be found out. We'll get closer to truth than when government overseers (and that includes judges) are in place to tell us what we can hear.

Here is how the late Christopher Hitchens summarises the general Enlightenment views of Mill and Voltaire and Milton. Hitchens says:

It's not just the right of the person who speaks to be heard, it is the right of everyone in the audience to listen, and to hear. And every time you silence someone you make yourself a prisoner of your own action because you deny yourself the right to hear something. In other words, your own right to hear and be exposed is as much involved in all these cases as is the right of the other to voice his or her view.⁶

There you have it. That, in brief, is the Millian and utilitarian case for lots of free speech. It rests on a core level optimism about the abilities and capacities of one's fellow citizens (which is an obverse way of saying that those who subscribe to it do *not* see themselves as morally and intellectually superior beings who need to restrict what their poor, benighted fellow citizens can hear and read). But of course most of you

⁶ Christopher Hitchens (Debate delivered at Be It Resolved: Freedom of Speech Includes the Freedom to Hate, Hart House, University of Toronto, 15 November 2006). Hitchens argued the affirmative position.

will be well acquainted with that rationale so I will move on to outline, again briefly, how bills of right work.

III WHAT A BILL OF RIGHTS DOES NOT DO

Here is how bills of rights work. These instruments enumerate a series of moral abstractions in the language of rights. They set out a list of vague, amorphous, indeterminate rights-entitlements, all emotively charged and appealing, that operate at such a high level of abstraction that they finesse disagreement. You find more or less the same sort of substantive civil political rights in them all.⁷ There will be a right to freedom of expression, to freedom of religion, to freedom of association, to a fair trial, to unreasonable searches and seizures, and more.

Of course, there is always the half-hint with bills of rights that these entitlements are absolute, or almost absolute, when in fact a moment's thought tells you such guarantees cannot be absolute. You cannot say anything at all, for example, even in the US. You cannot counsel murder. You cannot deal in child pornography. The hint of absoluteness, however attractive, is a mirage.

And that tells you the key fact about bills of rights. They increase power at the point-of-application because these rights that are articulated up in the Olympian heights of disagreement-finessing moral abstractions need to be given detailed content down in the day-to-day quagmire of real life social policy line-drawing. And down there people who can all agree with the amorphous abstraction (say, 'right to a fair trial') will disagree massively amongst themselves on what that abstraction entails. So in a

⁷ The vast preponderance of bills of rights are post-World War II. You get some outlying enumerated rights in very old bills of rights like America's; say the right to bear arms. Even its right to property is rare in more modern bills of rights.

UK example related to the above ‘right to a fair trial’, the legislature passed a Bill to reduce slightly what sort of cross-examination questions could be put to a rape complainant. But the judges disagreed and had a different opinion.⁸ And with a bill of rights in place, even the UK’s statutory version, the judges’ views prevailed.

So what a bill of rights does is that it increases judicial power at the expense of the elected legislature’s power. It enervates democracy. Under the simplistic sloganeering of ‘Don’t You Want Your Rights Protected’ obfuscations, unelected judges make a whole lot more important social policy decisions.

In Canada and the US this enhanced judicial power flows from the fact their bills of rights are entrenched in the constitution and so judges have a power to invalidate, to strike down, any statutes and laws they – the judges – happen to believe are inconsistent with any of the enumerated rights. It is a mighty power and for partisans of democracy, like me, the judges use that power mightily often.

By contrast, in the United Kingdom and New Zealand, and indeed the State of Victoria here in Australia, they have statutory bills of rights (which, of course, is not overly surprising in the first two of these jurisdictions which lack written constitutions). Here, there is no judicial power to strike down the legislature’s laws. Instead, judicial power is augmented by means of a reading down provision (or a ‘do everything you possibly can to read all other statutes in a manner that you judges consider to be a rights-respecting’ way) and a Declarations power provision.⁹ With the former the UK judges sometimes seem to think

⁸ *R v A (No 2)* [2001] UKHL 25.

⁹ I outline elsewhere in detail how these provisions greatly increase judges’ power. See James Allan, ‘Statutory Bills of Rights: You Read Words in, You Read

virtually any reading of other statutes – however wrong or however much not intended by Parliament – is okay.¹⁰ And with the latter the empirical record in the UK (and Canada for that matter with its somewhat analogous section 33 override or notwithstanding clause) is that the judges' views always win out, every single time without exception, to the extent that the Oxford legal academic, and keen bill of rights supporter, Aileen Kavanagh, thinks (approvingly in her case) that judges in the UK are now functionally as powerful as US ones.¹¹

And that, in brief, is what any justiciable bill of rights does. It transfers power to judges. So if you buy one of these instruments you are in essence largely just buying the future views of judges instead of sticking with the future views of elected legislators.

IV THE JUDGES DON'T DELIVER THE FREE SPEECH GOODS

Let us now move to the heart of this talk, my claim that judges operating a bill of rights do not deliver the goods when it comes to free speech; outside the US they are far too inclined to opt for so-called 'reasonable limits' on speech, or for other rights-articulated values and interests; and hence that this abdication of the protection of free speech to the judges carries with it bad long-term consequences, not least by seeming to absolve the elected legislators from having themselves to be protectors of free speech.

Words out, You Take Parliament's Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 108–26; James Allan, *The Vantage of Law* (Ashgate, 2011).

¹⁰ See *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, which has been repeatedly affirmed.

¹¹ See, eg, Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009).

We can start our survey of how judges¹² fail to deliver the free speech goods by turning to my native Canada and its hate speech laws. At the national level Canada has *Canadian Human Rights Act*, RSC 1985, c H-6, s 13 that deals with speech ‘that is likely to expose a person to hatred or contempt’ (‘Section 13’). Of course even a passing acquaintance with the Mark Steyn-*Macleans* magazine saga in Canada would suffice to show that this Section 13 hate speech law there can have, and does have, a significant effect on free speech. It stifles it! It diminishes what people can say, not least by means of the ‘chilling effect’ of the mere threat of being dragged before some trumped-up human rights commission where the complainant has every single dollar of his or her legal costs paid for by the taxpayer while the accused – the party alleged to have transgressed these hate speech provisions – has to pay his or her own way, which in the case of Steyn and *Macleans* was over \$2 million in legal costs. So even if, at the end of the day, you win (as Steyn did), you lose.

What has the Supreme Court of Canada made of this Section 13 when holding it up against the *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’) and its ‘freedom of expression’ right (*Canadian Charter of Rights and Freedoms* s 2)? Well, in *Canada (Human Right Commission) v Taylor*,¹³ a 5–4 majority decision, the top Canadian court upheld the constitutionality of the Section 13 regulation of what was considered hate speech under which civil remedies are available aimed at compensating complainants and discouraging speakers outside the criminal law. In brief, the majority

¹² And on this issue of ensuring lots and lots of scope for people to speak their minds under the aegis of a ‘right to freedom of expression’ I am explicitly exempting US judges and US case law. Of course the US judges fall down on a good many of the other rights provisions. And their gainsaying powers – when well used and when not well used – still seriously enervate democracy.

¹³ [1990] 3 SCR 892 (‘*Taylor*’).

held that Section 13 infringed the freedom of expression guarantee but that this infringement was justifiable under *Canadian Charter of Rights and Freedoms* s 1, the abridging provision. Dickson CJ for the majority pointed to such factors as the reduced worth of hate speech, the fact the remedies were civil (not penal) in nature and the importance of the goal of protecting minorities in arguing that the Section 13 free speech infringement was justified. What we can take from this *Taylor* decision is that the *Charter*, or more accurately put ‘the interpretation of some vague, amorphous rights guarantee and equally indeterminate reasonable limits provision’ by a majority of the then top Canadian judges, did nothing to extend freedom of speech.

If you dislike Section 13 the judges let you down. If you like Section 13 they ended up adding nothing to the equation. Or rather they added nothing other than what follows from the assumption that the answer to all political disputes can be (and should be) found by vetting laws against constitutionalised rights provisions (as interpreted by a committee of ex-lawyers), an assumption open to serious doubt.¹⁴ And one that makes it harder to repeal such legislation once the top judges, even on a 5–4 basis, have given it a tick of being in accord with what (they happen to think, by majority vote) are people’s timeless, transcendent fundamental rights.

Now I know that *Saskatchewan Human Rights Commission v Whatcott*¹⁵ has been argued at the Supreme Court of Canada, with the decision due in the not too distant future. And this *Whatcott* case involves a constitutional challenge to Saskatchewan’s *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 14(1)(b) hate speech law, on the basis that it

¹⁴ See, eg, Adam Tomkins ‘In Defence of the Political Constitution’ (2002) 22 *Oxford Journal of Legal Studies* 157, 170.

¹⁵ [2013] SCC 11 (*Whatcott*).

infringes the *Canadian Charter of Rights and Freedoms* s 2 freedom of expression and/or freedom of religion guarantees, and so is implicitly asking the top judges there to reconsider, and over-rule, *Taylor*.

But in the meantime the elected legislature, at least at the national level, has made the point moot. A private member's Bill has been passed through Canada's lower house of Parliament, the House of Commons, repealing Section 13. The Bill is now before the wholly unelected upper house Senate – I kid you not, this Canadian Senate is an unelected body full of placemen and party hacks with the odd Olympic gold medallist or top novelist or scientist thrown in to dilute the embarrassment – and this Canadian Senate never, ever vetos (or in most cases does) anything. So this Bill soon will pass. Canada's awful Section 13 national hate speech law will be removed the way it should be – by the elected legislature, not by the courts.¹⁶

I could go on also to point out that the *Canadian Charter of Rights and Freedoms* has done very, very little to expand the scope to speak one's mind in the context of the defamation law regime there.¹⁷ But instead let us cross the Atlantic and see what the bill of rights there has added to free speech.

And what we see is that again the judges fail to deliver the free speech goods. Again, they add nothing, save to take these issues out of the legislature and, by pseudo-legalising them, put them ultimately in the hands of the courts (which then fail to deliver the free speech goods).

¹⁶ But note that once a precedent like *Taylor* is in place, repeal by the legislature becomes, if anything, more difficult. Such precedents have a tendency somewhat to lock in legislation.

¹⁷ I do make that argument, though, elsewhere. See James Allan, 'The View From Down Under: Freedom of the Press in Canada' (2012) 58 *Supreme Court Law Review* 147.

The UK has a statutory bill of rights, the *Human Rights Act 1998* (UK) c 42 ('HRA'), which incorporates the *Convention for the Protection of Human Rights and Fundamental Freedoms*¹⁸ ('ECHR'). ECHR art 10 guarantees 'the right to freedom of expression', which is detailed to include the 'freedom ... to ... impart information and ideas without interference by public authority'. So what happened when a litigant relied on this right when the BBC refused to televise the ProLife Alliance Party's election broadcast that contained graphic images of aborted fetuses?

Just as in Canada with hate speech laws, the UK House of Lords judges, by majority (4:1), held that the right to free speech under the *HRA* and *ECHR* would *not* override the legally mandated taste and decency obligations governing the content of all programmes that a broadcaster may screen.¹⁹ In the end, and after much litigation, the bill of rights and judges added nothing, siding with the legislation's goal of not offending over the free speech concern to allow a political party's election broadcast that was factually accurate and relevant to a lawful policy on which its candidates would be standing for election.²⁰

Or we can move from the UK back home to look at free speech concerns in the only State in Australia with a bill of rights, namely Victoria. Take the first two years of operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), Victoria's statutory bill of rights. And consider media suppression orders or 'gag orders' handed down by the

¹⁸ Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010).

¹⁹ *R v British Broadcasting Corporation, Ex parte Prolife Alliance* [2003] 2 All ER 977.

²⁰ This is the point made by the dissenting Lord Scott.

courts during that period, because imposing limits on what the press can report is surely a worry (to put it as kindly as is humanly possible) for those of us who favour lots of scope for people to be free to speak their minds. And to provide some context compare the number of such gag orders made in Australia's only bill of rights State to the number made in that same period in New South Wales, without a bill of rights and with almost 2 million more inhabitants.²¹

Here are the numbers. Between 2006–2008 in Victoria there were 627 gag orders made and in New South Wales there were 54 gag orders made.²² In other words, the State with 30 per cent more people and no bill of rights issued less than a tenth (a mere 8.6 per cent) as many suppression orders against the media reporting what it deemed needed to be reported. And the State issuing nearly 12 times as many of these gag-the-press orders was the one that had a bill of rights and that had an explicit *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15 right to freedom of expression provision. The ambitions of bill of rights supporters should be made of sterner stuff (however much they are all honourable men and women).

Having had a look at some free speech bill of rights outcomes in Canada, the UK and Victoria, let me finish this section by reminding you that with a bill of rights in place it will be the unelected judges who will be deciding the scope to be granted to freedom of expression, what limits on this right are reasonable, how this right is to be balanced against the other

²¹ In June of 2010 Victoria's population was approximately 5.55 million and New South Wales's was approximately 7.24 million.

²² See Chris Merritt, 'Judges Get Message on Suppression Orders' *The Australian* (online), 22 November 2010 <<http://www.theaustralian.com.au/media/judges-get-message-on-suppression-orders/story-e6frg996-1225958007311>>.

enumerated rights, and which interpretive approach to the instrument as a whole to adopt.

So the general philosophical attitude to free speech that the judge brings to these tasks will matter. In Australia and the UK we have had two judges²³ running important inquiries into media regulation. For those who are insouciant, or even optimistic, about handing more free speech decision-making powers to unelected judges – the inevitable effect, as I have argued, of a bill of rights – perhaps it might help for me to quote retired Federal Court Judge Ray Finkelstein’s own words from his public inquiry into media regulation²⁴ (*Finkelstein Report*) that reported on 28 February 2012. In the course of recommending a new regulatory body, a ‘News Media Council’, funded by government and whose decisions would ultimately be enforceable by punitive sanctions, Finkelstein in chapter two rejects and criticises the John Stuart Mill defence of great scope for free speech that I set out above. Indeed Finkelstein is highly sceptical (even condescending) of the capacities of ordinary citizens to evaluate what they hear and to engage in debates in which truth ultimately prevails.

There is real doubt as to whether these capacities are present for all, or even most, citizens and, even if they are, both speakers and audiences are often motivated by interests or concerns other than a desire for truth – including, of course, the desire to make money and personal, political and religious motivations.²⁵

²³ In Australia it was an ex-judge.

²⁴ R Finkelstein, Report to Minister for Broadband, Communications and the Digital Economy, *Independent Inquiry into the Media and Media Regulation*, 28 February 2012 (*Finkelstein Report*).

²⁵ Ibid 30.

Yuck! What patronising tosh! One wonders why ordinary citizens are allowed to vote on this world view. And of course the whole point of the proposed 'News Media Council' is made abundantly clear by Finkelstein. It is to restrict speech, as he explicitly states.

It could not be denied that whatever mechanism is chosen to ensure accountability speech will be restricted. In a sense, that is the purpose of the mechanism.²⁶

Personally, I don't want judges anywhere near my free speech. Give me the democratic process any day. For all its admitted sins, it is the least bad option going, and far preferable to the judges.

V FREE SPEECH AND DEMOCRACY

Contrary to Mr Finkelstein's outlook, the Millian support for abundant free speech rests on a fundamentally optimistic view about the capacities of ordinary citizens, and their ability (on average, over time) to discern the best or least bad or closest to truth answer from amongst the cauldron of competing views that have been expressed, even where some are offensive, snide and manipulative. For Mill, and me, there is no super-elite in society with better moral antennae, more reliable reasoning and sifting skills, purer motivations, and all the rest of the justifications employed to support aristocracy throughout the ages (and not infrequently, at least implicitly, to support oversight by today's aristocrats, the judges).

And of course it is exactly and precisely that same confidence in one's fellow citizens that underpins support for democracy. It is a trust that on average, over time, the majority will get things right, will do better than

²⁶

Ibid 52.

any sub-set of judicial or other unelected overseers – which, unsurprisingly, is the Benthamite / Millian argument in favour of democracy. It is the belief that this sort of decision-making has the best long-term consequences; that it delivers the goods, better than any other.

I am much of Mill's and Bentham's views on both these issues. I support abundant scope for free speech. I also support untainted democratic decision-making over the souped-up role given to judges under a bill of rights.

Let me conclude by reminding you of something that the American legal philosopher Lon Fuller, way back in 1949, put into the mouth of his fictional Justice Keen in his famous mock-hypothetical 'The Case of the Speluncean Explorers'.²⁷ This judge, responding to the ever present temptation for top judges to fix up what *they see* as the moral and rights-related failings of the elected legislature, argues for resisting that temptation. Good long-term consequences flow from leaving these hard, difficult issues (including, I might add, ensuring lots and lots of scope for free speech) with the people and their elected representatives.

Now I know that the line of reasoning I have developed in this opinion will not be acceptable to those who look only to the immediate effects of a decision and ignore the long-run implications of an assumption by the judiciary of a power of dispensation ... But I believe that judicial dispensation does more harm in the long run than hard decisions. Hard cases [where judges follow the clear intention of the elected legislature despite the presumed rights-related deficiencies that entails for the case at hand] may even have a certain moral value by bringing home to the people their own responsibilities toward the law that is ultimately their creation, and

²⁷ Lon Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616.

by reminding them that there is no principle of personal grace that can relieve the mistakes of their representatives.²⁸

I am much of Justice Keen's mind, and more so still when certain enthusiasts present bills of rights as all-purpose, pre-packaged principles of grace that can (in some mysterious, ineffable way) relieve the mistakes of their elected representatives. As with much else – no, even more than with anything else – free speech is far too important to be left to unelected judges.

²⁸

Ibid 636–7.

THE FINKELSTEIN INQUIRY: MISCARRIED MEDIA REGULATION MOVES MISS GOLDEN REFORM OPPORTUNITY

JOSEPH M FERNANDEZ*

*Laws are generally found to be nets of such a texture,
as the little creep through,
the great break through, and the middle-sized are alone entangled in.*¹

Abstract

The Australian media's nervous wait for the outcome of media regulation reform initiatives came to an abrupt and ignominious end in March 2013 as the moves collapsed. The Federal Government withdrew a package of Bills at the eleventh hour, when it became apparent that the Bills would not garner the required support in parliament. These Bills were preceded by two major media inquiries – the Convergence Review and the Independent Media Inquiry – culminating in reports released in 2012. The latter initiative contained sweeping reform recommendations, including one for the formation of a government-funded 'super regulator' called the News Media Council, which the media generally feared would spell doom especially for those engaged in the 'news' business. This article examines the origins of the Independent Media Inquiry; the manner of the inquiry's conduct; what problem the inquiry was seeking to address; the consequent recommendations; and ultimately, the manoeuvres for legislative action and the reform initiative's demise. This article concludes that the Independent Media Inquiry was flawed from the outset and that it missed a golden opportunity for effecting reform, the need for which even the media acknowledged.

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¹ William Shenstone and Robert Dodsley, *The Works in Verse and Prose of William Shenstone, Essays on Men, Manners and Things*, (1764) vol 2, 151.

I INTRODUCTION

It is not unusual nor is it entirely objectionable for governments to regulate the media. For all the protestations proponents make about the sanctity of the freedom of speech ideal, it is often not acknowledged that freedom of speech is not absolute and that just as much as there is a public interest in safeguarding freedom of speech, on occasion, countervailing public interests demand that freedom of speech should yield to such interests. These countervailing public interests are sometimes protected through regulatory intervention. Australian media regulation has traditionally comprised a trinity of regulation, co-regulation and self-regulation. The previous occasion on which the Australian media experienced sustained regulatory encroachment came about in the period post-September 11, which triggered a variety of measures aimed at safeguarding national security. In that case, the impact on the media was incidental in the sense that legislative measures that were introduced were not primarily media-specific but rather a part of a general exercise to address national security concerns. The media in their roles as gatekeepers of news and information, as self-proclaimed vanguards of freedom of speech and as self-appointed watchdogs on government, is especially well equipped to articulate its resistance to encroachments or threats of encroachments on freedom of speech generally. As it became apparent that the 2012 reviews would serve as a springboard for new legislative measures that could impact heavily on the media's activities, the Australian media went into overdrive to register its stout opposition. Regulation and freedom of speech are uneasy bedfellows. Media regulation impacts directly on freedom of speech, a core value in any democratic society. Regulation is also the media's nemesis because the media's *raison d'être* and fortunes rest heavily on

being unfettered. In 2011 a precipitation of several factors put media regulation high on the Australian government's agenda and ignited a push for stricter media regulation. One ignition factor was the 'phone hacking scandal', which led to media inquiries in the United Kingdom, including the Leveson Inquiry. Those inquiries exposed a litany of ethical and legal breaches by the British media.² The other ignition factor was a perception, mostly at Australian Federal Government level and in the Australian Greens party, that the Australian media too was culpable of transgressions and needed to be restrained. The Federal Government established the Independent Media Inquiry (referred to in the article as the Finkelstein Inquiry, named after the head of the inquiry, former Federal Court judge, Ray Finkelstein QC), to supplement the work of another review – the Convergence Review. At its base these inquiries were aimed at ensuring that media regulation keeps apace with contemporary needs. Advances in communications technology were rightly recognised as having rendered some aspects of the prevailing regulatory framework obsolete, not least of all because of the inconsistent approaches taken across the different media platforms. This created a variety of conundrums for the government, the regulators, media outlets and news media consumers. Longstanding tolerance of self-regulation by the media came under fresh scrutiny. The thrust for regulatory reform emanating through the Convergence and Finkelstein reviews were juxtaposed with another relevant, but unrelated development a few years earlier – the concerted media crusade mounted by Australia's Right to

² See Culture, Media and Sport Committee, UK House of Commons, *News International and Phone-hacking: Eleventh Report of Session 2010–12*, (2012), vol 1, [2], which refers to 'three separate inquiries into press standards'. See also Lord Justice Brian Leveson, Report to UK Parliament, *An Inquiry into the Culture, Practices and Ethics of the Press*, 29 November 2012.

Know Coalition to remove burgeoning officially imposed impediments to the media's ability to perform its proper role.

II ORIGINS, OBJECTS, AND METHODS OF THE FINKELSTEIN INQUIRY

The Minister for Broadband, Communications and the Digital Economy, Stephen Conroy on 14 September 2011 announced the establishment of the Independent Media Inquiry. The terms of reference were:

- (a) the effectiveness of the current media codes of practice in Australia, particularly in light of technological change that is leading to the migration of print media to digital and online platforms;
- (b) the impact of this technological change on the business model that has supported the investment by traditional media organisations in quality journalism and the production of news, and how such activities can be supported, and diversity enhanced, in the changed media environment;
- (c) ways of substantially strengthening the independence and effectiveness of the Australian Press Council, including in relation to online publications, and with particular reference to the handling of complaints; and
- (d) any related issues pertaining to the ability of the media to operate according to regulations and codes of practice, and in the public interest.³

³ Department of Broadband, Communications and the Digital Economy, 'Independent Inquiry into Media and Media Regulation' (Issues Paper, 28 September 2011) <http://www.dbcde.gov.au/__data/assets/pdf_file/0004/139837/Independent_Media_Inquiry_Issues_Paper.pdf> 7.

Two themes emerged from the Minister's announcement and related comments. One favoured media independence and freedom. The other leaned towards increased control over the media. In respect of the former – the favouring of media independence and freedom – the Minister, in his official statement when announcing the inquiry, stated: 'A healthy and robust media is essential to the democratic process.'⁴ The Minister added:

The Australian Government believes it is incumbent upon Government to ensure regulatory processes and industry structures are sufficiently strong to support the continuation of a healthy and independent media that is able to fulfil its essential democratic purpose, and to operate in the public interest.⁵

Despite this profession of a commitment to fostering a healthy and robust media, however, no reference or commitment was made to these ideals in the Finkelstein Inquiry's terms of reference. Given the potential enormity of the impact of regulatory moves on freedom of speech, whether directly or incidentally, it ought to have been reflected more acutely in the terms of reference and the concomitant measures that were proposed. In respect of the second theme, it is arguable that the third and fourth items in the terms of reference manifested a control imperative.⁶ Substantially strengthening the independence and effectiveness of the self-regulatory entity, the Australian Press Council, in relation to the handling of complaints would necessarily translate into substantially increased control even if ostensibly that control were to be exercised for the greater good of society. Furthermore, it is not unknown for publishers to be

⁴ Senator Stephen Conroy, 'Government announces independent media inquiry' (Media Release, 14 September 2011).

⁵ Ibid.

⁶ See Department of Broadband, Communications and the Digital Economy, above n 3, 7 (emphasis added).

critical of the Australian Press Council for allegedly exceeding its brief. In one recent manifestation of this malaise, a major publishing group abandoned its membership of the Council to establish its own regulatory entity.⁷ The group's head, WA Newspapers group editor-in-chief said the Press Council had 'drifted further and further from its original goal of promoting freedom of the press and the essential element of adjudicating complaints' and of moving towards 'a culture of control, coercion and punishment'.⁸ Another major publisher, News Limited, has expressed similar views.⁹ Notions of 'independence' and 'effectiveness', however, are value laden and, as will shortly be seen, raised questions in the particular context of the Minister's remarks accompanying the inquiry's launch. Other indicators of the 'control' theme lay elsewhere in the terms of reference. For example, the inquiry was to look into – the 'effectiveness of the current media codes of practice in Australia',¹⁰ and the media's ability 'to operate according to regulations and codes of practice'.¹¹ In his media remarks accompanying the announcement of the Finkelstein Inquiry, the Minister referred to 'accountability' in the media, to the need for accountability to be pursued through the Press Council, to ways of increasing the Press Council's powers, and to the view held by some that the 'Press Council is not doing its job' to the extent that 'there'd be a lot of laughing' in response to the question 'what do you

⁷ Angela Pownall, 'Seven West Media Quits Press Council', *The West Australian* (Perth), 5 April 2012, 4.

⁸ Bob Cronin, 'Independent Press Paramount', *The West Australian* (Perth), 13 April 2012, 21. See also Bob Cronin, 'Rule Out Disney Empire', *The Australian* (online), 16 April 2012 <<http://www.theaustralian.com.au/media/rule-out-disney-empire/story-e6frg996-1226327204539>>.

⁹ 'Press Council Ventures Too Far From Its Brief' (Editorial), *The Weekend Australian* (Sydney), 1–2 June 2013, 21.

¹⁰ Department of Broadband, Communications and the Digital Economy, above n 3, 7.

¹¹ Ibid.

think of the Press Council'.¹² The Minister 'congratulated' the Press Council for recently having 'higher findings in favour of complainants'.¹³ The Minister also said: 'The Press Council, for many, many years, has usually been seen as a fairly toothless tiger'.¹⁴ While the Minister refused to be drawn into explicitly supporting one side of the argument or the other, read in context, the Minister appeared to lean towards greater control over the media. The Minister's lauding of the 'higher findings in favour of complainants' assumes that the Press Council's efficacy rested on the number of complaints it *upheld*. In other words, the more complaints it upheld the more it would indicate the Press Council's efficacy. Such a position is flawed for the rule surely must be that the adjudicator must base its findings entirely on the merit of the complaint and not aim for any preconceived outcomes either favouring or rejecting complaints. As such, it would be entirely conceivable that higher findings *not* favouring complainants should not deny the Press Council the right to be deemed as performing independently and effectively in relation to the handling of complaints. Likewise, the Minister's singling out of a particular offender (*The Daily Telegraph*) indicated a degree of bias on the Minister's part and one that he conceded to be 'a personal opinion'.¹⁵

If the professed media freedom and independence imperative seen above was taken into account the terms of reference would have had to include a

¹² Minister for Broadband, Communications and the Digital Economy, *Minister Stephen Conroy announces the Independent Media Inquiry* (14 September 2011) Media Centre – Minister Speeches <http://www.minister.dbcde.gov.au/conroy/media/speeches/2011_-_minister_speeches/Minister_Stephen_Conroy_announces_the_Independent_Media_Inquiry>

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

consideration of the state of media freedom in this country generally and whether any measures were warranted, for example, to address the concerns articulated by the media. Such concerns are well catalogued, for instance, in the following works: (a) a report commissioned by the Australia's Right to Know Coalition comprising major Australian media organisations;¹⁶ (b) and the annual Press Freedom Reports published by the Media, Entertainment and Arts Alliance.¹⁷ To illustrate the media's concerns, the chair of the Independent Audit into the State of Media Freedom in Australia, Irene Moss, wrote as follows in a letter accompanying the report:

The audit's examination and resulting observations should ring alarm bells for those who value free speech in a democracy. While Australia is generally accepted as a land of freedom and compares well internationally on many fronts on civil rights, this should not be taken for granted. What the audit can observe is that many of the mechanisms that are so vital to a well-functioning democracy are beginning to wear thin. Their functioning in many areas is flawed and not well maintained.¹⁸

¹⁶ Independent Audit into the State of Free Speech in Australia, (Report, Australia's Right to Know Coalition, 31 October 2007).

¹⁷ See, eg, Mike Dobbie (ed) 'Power, Protection & Principles: The State of Press Freedom in Australia 2013' (Report, Media, Entertainment & Arts Alliance, 2013); Jonathan Este (ed) 'Kicking at the Cornerstone of Democracy: The State of Press Freedom in Australia 2012' (Report, Media, Entertainment & Arts Alliance, 2012); Jonathan Este, Flynn Murphy and Lizzie Franks, 'Public Good, Private Matters: The State of Press Freedom in Australia 2011' (Report, Media, Entertainment & Arts Alliance, 2011); Jonathan Este (ed), 'Progress Under Liberty: The State of Press Freedom in Australia 2010' (Report, Media, Entertainment & Arts Alliance, 2010).

¹⁸ Letter regarding the Independent Audit of the State of Free Speech in Australia from Irene Moss to Australia's Right to Know Coalition c/o John Hartigan, 31 October 2011.

The Media, Entertainment and Arts Alliance in its Press Freedom Report in the year in which the Minister announced the Independent Media Inquiry noted as follows:

More than a year after the Australian Law Reform Commission reported on more than 500 separate pieces of legislation containing secrecy clauses, its recommendations have yet to be followed. This must be addressed, as a matter of urgency.¹⁹

Other factors similarly contributed to the eventual collapse of the regulation reform enterprise primarily because of doubts as to the inquiry's very legitimacy. Two such factors may be briefly disposed of here. One was the apparent nexus between what has been widely described as the 'phone hacking scandal' in the United Kingdom. Another was the influence on the debate from the Australian Greens. The inquiry's proximity to inquiries in the United Kingdom arising from the 'phone hacking scandal' prompted a perception that those events were the catalyst for this inquiry even though nothing in the conduct of Australian journalists suggested that such an inquiry was warranted in Australia. The Federal Secretary of the Media, Entertainment and Arts Alliance Chris Warren noted:

The *News of the World* phone-hacking scandal was the catalyst for this inquiry – perhaps a little unfairly as there is no evidence that Australian journalists are slipshod or devious when it comes to journalistic ethics. Apart from a handful of cases, Australian

¹⁹ Jonathan Este, Flynn Murphy and Lizzie Franks, 'Public Good, Private Matters: The State of Press Freedom in Australia 2011' (Report, Media, Entertainment & Arts Alliance, 2011) 3.

journalists tend to be pretty scrupulous about how they go about their business.²⁰

The Prime Minister Julia Gillard initially expressed the view that News Limited, the Australian publishing arm of media proprietor Rupert Murdoch's Australian newspapers, had 'some hard questions' to answer over its Australian operations.²¹ The Prime Minister later retreated from that position.²² Indeed, the Independent Media Inquiry report would subsequently note that it was 'not suggested that News Limited, the Australian subsidiary of News Corporation, had engaged in similar practices' as its UK counterpart *News of the World*. Such has been the magnitude of the UK events that several arrests have been made and senior media executives have been charged in court.²³ The then Australian Greens leader and senator, Bob Brown, also featured prominently in the debate, if not altogether becoming a key influence. Mr Brown, writing in 2012, claimed credit for prompting the Australian inquiry: 'After a campaign from the Australian Greens, on 14 September 2011 the Australian Government established an independent inquiry into

²⁰ See Chris Warren, 'How Do You Solve a Problem Like the Media' (2012) 69 *Walkley Magazine* 14.

²¹ Ben Packham, 'Julia Gillard Says News Ltd Has Questions to Answer in Wake of UK Scandal', *The Australian* (online), 20 July 2011 <<http://www.theaustralian.com.au/business/in-depth/julia-gillard-says-news-ltd-has-questions-to-answer-in-wake-of-uk-scandal/story-e6frgago-1226098227102>>.

²² Matthew Franklin, 'Julia Gillard Backs News Ltd Action on Phone-Hacking Scandal', *The Australian* (online), 16 August 2011 <<http://www.theaustralian.com.au/national-affairs/julia-gillard-backs-news-ltd-action-on-phone-hacking-scandal/story-fn59niix-1226115585071>>.

²³ Lisa O'Carroll, 'Andy Coulson Pleads Not Guilty To Phone-Hacking Charges', *The Guardian* (online), 6 June 2013 <<http://www.guardian.co.uk/uk/2013/jun/06/andy-coulson-pleads-not-guilty-phone-hacking>>. Former News International chief executive Rebekah Brooks has also been charged with offences relating to her time in the publisher's service. As to arrests see: Adam Sherwin, 'Six Former News of the World Journalists Arrested in Hacking Inquiry', *The Independent* (online), 13 February 2013 <<http://www.independent.co.uk/news/uk/crime/six-former-news-of-the-world-journalists-arrested-in-hacking-inquiry-8492757.html>>.

the Australian media.’²⁴ He recommended that a new body, a News Media Council, be established ‘to set journalistic standards for the news media in consultation with the industry, and handle complaints made by the public when those standards are breached.’²⁵ Mr Brown’s interest in the matter was influenced by his own experiences in relation to some sections of the Australian media. He singled out the Murdoch media, whom he accused of not being balanced and of ‘doing a great disservice to this nation in perhaps the most important debate of the century so far, which is how we tackle climate change’.²⁶ In the course of those remarks he described the Murdoch press as the ‘hate media’.²⁷ Those remarks have been described as an ‘ad hominem attack on the Murdoch press’.²⁸ The Greens deputy leader Christine Milne expressed similarly critical views about the Murdoch press, accusing it of ‘extreme’ bias in relation to the climate change debate in *The Australian* newspaper, in particular, and spoke of the relevance of the nexus between the UK phone hacking scandal and a ‘truly overdue’ inquiry into the media in Australia.²⁹ The origins of the Independent Media Inquiry therefore lay on loose foundations and it was on course to encounter strong resistance. As bluntly stated by the head of the news establishment that bore the brunt of

²⁴ Bob Brown, *The Facts About the Media Inquiry* (7 March 2012) Greens MPs <<http://bob-brown.greensmps.org.au/content/news-stories/facts-about-media-inquiry>>.

²⁵ Ibid.

²⁶ Tom Cowie, ‘News’ Revenge: Editorial Pages Rain Down on Brown’s Crusade’, *Crikey* (online), 19 May 2011 <<http://www.crikey.com.au/2011/05/19/brown-brands-news-the-hate-media-in-presser-salvo/>>.

²⁷ Michelle Grattan, ‘Pushed To The Limit, Bob Goes In Guns Blazing’, *The Sydney Morning Herald* (online), 22 May 2011 <<http://www.smh.com.au/opinion/politics/pushed-to-the-limit-bob-goes-in-guns-blazing-20110521-1exil.html>>.

²⁸ Denis Muller, ‘Bob Brown’s Misjudged Attack on the Murdoch “hate media”’, *The Conversation* (online), 24 May 2011 <<http://theconversation.edu.au/bob-browns-misjudged-attack-on-the-murdoch-hate-media-1442>>.

²⁹ ABC Television, ‘Q&A Goes to Hobart’, *Q&A*, 25 July 2011 (Christine Milne) <<http://www.abc.net.au/tv/qanda/txt/s3272239.htm>>.

the Greens criticism: ‘The inquiry started life as a witch-hunt by the Greens and has morphed into a fairly narrow look at a mixed bag of issues ostensibly focused on print journalism.’³⁰ Mr Ray Finkelstein, in his report, set out the origins of inquiry by referring to: (a) the UK phone-hacking scandal that prompted the Leveson Inquiry; (b) the calls in Australia for a similar inquiry, including calls by the leader of the Australian Greens for an inquiry (to canvass, among other things: whether publishers should be licensed; and whether a ‘fit and proper person’ test should be applied for media ownership); and concerns expressed by ‘several politicians and others’ that certain sections of News Limited’s newspapers were biased in their reporting on issues such as climate change and the National Broadband Network.³¹ While the heading under which Mr Finkelstein set out these factors was ‘Origins of the inquiry’, the manner in which he set out these factors did not expressly state that these factors in fact constituted the inquiry’s origins. On a strict interpretation, these ‘origins’ were not really origins, per se, but random factors that preceded the establishment of the inquiry. It is safe to conclude, however, that despite the absence of express attribution of the inquiry’s establishment to these factors, these factors were in fact key causal elements. The apparent nexus between the UK phone-hacking scandal and the Australian inquiry is an extremely tenuous one given the gaping chasm between the circumstances in the two jurisdictions. The conditions in Australia were far removed from those that gave rise to the UK inquiries. Keeble and Mair sum up the UK circumstance aptly:

³⁰ James Chessell, ‘Press Council Happy, but Wants More Funds’, *The Australian* (Sydney), 15 September 2011, 8 quoting then News Limited chairman and chief executive John Hartigan.

³¹ R Finkelstein, Report to Minister for Broadband, Communications and the Digital Economy, *Independent Inquiry into the Media and Media Regulation*, 28 February 2012, [1.4]–[1.6] (*Finkelstein Inquiry Report*).

The scale of outrages practised on significant numbers of citizens include, above all else, wanton invasions of privacy through phone hacking, deceit, disguise and sometimes robbery; the giving over of most space in the most popular newspapers to the trivial, ignoring that which is significant in the world; the construction of wholly or partly fictional narratives; the at least implicit blackmailing of politicians with threats of exposure if they prove ‘unhelpful’. All of this has been contained within an attitude which assumed immunity from legal or other challenge, because of the immense power which mass readerships was assumed to bring.³²

On the above premise – that the UK events could not have served to justify an Australian inquiry – the ensuing steps towards an inquiry in Australia, while exuding an attempt to conduct an inquiry grounded in well-conceived objectives and forensic methods of inquiry were tainted even before it began. This can be illustrated by a close look at one aspect of the inquiry – its mode of conduct in so far as submissions is concerned – and that is considered next.

III CONDUCT OF THE INQUIRY

In examining an aspect of the mode of the inquiry’s conduct, one preliminary matter bears addressing. Mr Finkelstein in his report set out the mode of the inquiry’s conduct after observing that the terms of reference were ‘not as broad as had been called for’.³³ He identified two examples of matters he would have liked covered but could not address. ‘For example’, it was not within his remit to investigate whether there should be restrictions on foreign ownership of the press, nor was he required to investigate whether there should be changes to the law

³² Richard Lance Keeble and John Mair (eds), *The Phone Hacking Scandal: Journalism on Trial* (Arima, 2012) 2.

³³ *Finkelstein Inquiry Report*, above n 31, [1.7].

relating to press ownership.³⁴ This raises the question – if these were just two examples of terms of reference that were not as broad as had been called for, what else might he have considered appropriate to investigate but was unable to? In setting out to tap input into the inquiry Mr Finkelstein contacted many publishers, editors, academics and others inviting them to make submissions and in some instances sought information on specific topics and he also conducted public hearings.³⁵ One aspect of the feedback gathering, however, merits scrutiny because it gave the exercise an aura of extensive public consultation. The report, as will be seen below, referred to a substantial body of previous polling showing adverse public perceptions of media standards and performance, covering about 45 years. The inquiry's own feedback gathering, however, raises questions. The report states that submissions were received from some 11,000 persons and organisations. Of this, 10,600 were short submissions (500 words or less) and of the total number of submissions, about 9600 were facilitated through an advocacy group, Avaaz.³⁶ These submissions used a text prepared by Avaaz, which describes itself as 'the campaigning community bringing people-powered politics to decision-making worldwide'.³⁷ The text's phrasing included the following words:

In your findings, *I urge you to demand* a limit on media concentration and an adequately funded public interest media in Australia, call for a 'fit and proper person test' for the use of public airwaves...³⁸

³⁴ Ibid.

³⁵ Ibid [1.10] and [1.12].

³⁶ Ibid [1.11] and Annexure D.

³⁷ Avaaz, *Home Page* (2013) <<http://www.avaaz.org/en/>>.

³⁸ *Finkelstein Inquiry Report*, above n 31, Annexure D (emphasis added).

The demands for a limit on media concentration and for the introduction of a ‘fit and proper person test’, however, fell outside the inquiry’s terms of reference and to that extent the value of that feedback was undermined. As the Finkelstein Report itself noted ‘[r]elatively few submissions explicitly addressed a number of issues specifically identified in the inquiry’s terms of reference’.³⁹ Only 25 of the submissions dealt with the industry’s codes of conduct; the effectiveness and independence of the Australian Press Council (34 submissions); and the impact on the industry of the emergence of online media (five submissions). Of the 447 submissions that explicitly called for action to strengthen the regulatory regime or enforcement arrangements, only 65 submissions provided detailed options for improvement of self-regulatory arrangements, of which only 34 explicitly identified the Australian Press Council (the country’s main grouping representing newspaper publishers). By engaging in an exercise that harnessed advocacy – at best advocacy of a robust kind and at worst of a crude kind – the Finkelstein Inquiry in effect engaged in the very practices some of the agitators for the inquiry had indicted the media of, including that of imbalance and of biased self-advocacy.⁴⁰ To be sure, the Finkelstein Inquiry itself affirmed that ‘there is nothing wrong with newspapers having an opinion and advocating a position, even mounting a campaign. Those are the natural and generally expected functions of newspapers.’⁴¹

IV WAS THERE A PROBLEM AND WHAT WAS IT?

A rudimentary component of any reform initiative lies in identifying the problem needing to be addressed. Given the apparent influence of the

³⁹ Ibid (emphasis added).

⁴⁰ See Bob Brown, Submission, *Independent Inquiry into Media and Media Regulation*, 2.

⁴¹ *Finkelstein Inquiry Report*, above n 31, [4.37].

Australian Greens, as seen above, on the establishment of the inquiry, it is worth keeping in view the Greens' definition of the problem. This may be seen in then Senator Bob Brown's submission to the inquiry. That submission does not conveniently or clearly set out its definition of the issues or problems underpinning the inquiry. The following list of issues, however, may be teased out from the submission: (a) the journalism profession's ethics are, in important aspects, undermined; (b) the public esteem for the news media is depressed; (c) the concentration of ownership is corrosive of the fabric of Australian democracy; (d) current cross-media rules have limited scope and do not apply to a range of platforms; and (e) the media is owned by the wealthy and media proprietors are often involved in other business activities which may expose them to conflicts of interest with their media outlets.⁴² Of these, only the first two items can be viewed as addressing the inquiry's terms of reference. Importantly, save random references to alleged media lapses, the submission does not provide clear evidence supported by cogent argument for the claim that the profession's ethics are in important aspects undermined.

In examining the inquiry proper, the starting point would be to locate its definition of the issues or problems deserving attention. This is the function usually served by an Issues Paper. Mr Finkelstein released the Issues Paper on 28 September 2011 identifying the 'principal issues that would be considered'.⁴³ The scope of the Issues Paper was, in turn, purportedly determined by distilling from the terms of reference released earlier (21 September 2011). In other words, the scope of the Issues

⁴² Brown, above n 40.

⁴³ *Finkelstein Inquiry Report*, above n 31, [1.9].

Paper was confined to the terms of reference announced by the Minister. On this point, Mr Finkelstein states in his report:

After considering the terms of reference I thought it appropriate to *distil from them and explain* what would be some of the principal issues that would be considered. To that end I prepared and on 28 September 2011 published an Issues Paper in which *those issues were set out*. The Issues Paper was not intended to be a comprehensive list of the topics to be dealt with, but it contained some of the most important.⁴⁴

Two important points can be made about the references above to the ‘issues’. First, strictly speaking, the terms of reference announced by the Minister did not expressly identify any issues or problems. Rather, they identified the matters that the inquiry should address. It is worth restating the terms limb by limb: (a) the effectiveness of the current media codes of practice in Australia; (b) the effectiveness of the codes particularly in light of technological change leading to the migration of print media to digital and online platforms; (c) the impact of technological change on the media’s business model; (d) the independence and effectiveness of the Australian Press Council in relation to online publications and in relation to the handling of complaints; and (e) any related issues pertaining to the media’s ability to operate according to regulations and codes of practice, and in the public interest. None of these terms explicitly identified a problem or issue. They merely identified matters that would be examined through the inquiry. The second important point concerns the very purpose of an Issues Paper. The purpose of an Issues Paper can be viewed as a means of providing ‘a preliminary look at *issues*

⁴⁴

Ibid (emphasis added).

surrounding the inquiry’.⁴⁵ As such, the Finkelstein Issues Paper ought to have identified the issue or the problem it was addressing. It failed to do this. This is what Mr Finkelstein claimed his Issues Paper was designed to do and set out his Issues Paper objective as follows:

In the course of considering the *matters* raised in the terms of reference, it will be necessary for the Media Inquiry to consider, among other *matters*, the *issues* listed below. The list of *issues* is not set out in any order of importance. Nor is the list intended to be comprehensive. The *issues* are, however, among the most important *matters* that the inquiry will consider. The Media Inquiry will be greatly assisted by any comments it will receive. It is not necessary for a respondent to deal with each and every *issue*. The Media Inquiry would in any event be assisted if persons choose to comment only on specific *issues*.⁴⁶

Leaving aside the slippage in the above description between ‘matters’ and ‘issues’ (the former, not necessarily indicative of problems, per se even when read with the terms of reference) this passage clearly evinces an intention to address issues or problems. What followed in the next seven pages of the Issues Paper, however, almost entirely comprised *questions* under various headings: access; standards; regulation; new media and business models; and support. For example, under the ‘access’ heading, after a statement referring to Justice Holmes judgment in *Abrams v United States*, 250 US 616, 624 (1919) concerning the famous ‘marketplace of ideas theory’, the Issues Paper poses five questions, including the following: whether this ‘marketplace of ideas’ theory assumes that the market is open and readily accessible; and whether there

⁴⁵ Australian Law Reform Commission, *Law Reform Process* (3 December 2012) <<http://www.alrc.gov.au/law-reform-process>> (emphasis added).

⁴⁶ Department of Broadband, Communications and the Digital Economy, above n 3.

are alternative or preferable justifications for freedom of the media.⁴⁷ No issues, as such, were expressly identified. Instead, the Issues Paper presented questions and hypotheticals (for example, '[i]f self-regulation is not an effective means of regulation, what alternative models of regulation could be adopted that would appropriately maintain freedom of the media?').⁴⁸ Notably, the Issues Paper contained no reference to 'bias', 'imbalance', 'privacy' or any of the potpourri of complaints preceding the establishment of the inquiry. This is not to say that there were no 'issues' whatsoever requiring attention, or that there was a dearth of places in which to look to find those 'issues'. Aside from the points canvassed above in relation to 'origins of the inquiry' some indication of the alleged issue or problem could be found, for instance, from the Minister's remarks when announcing the inquiry or from those identified by Mr Bob Brown (discussed above). For the sake of completeness and tidiness, however, an exercise as far reaching as this one ought to have clearly enunciated the issues or problems at hand, at the very outset and systematically pursued them through the inquiry and reporting phases. A recent and related approach to an Issues Paper that sets out the problem being addressed is evident in the Australian Communications and Media Authority's Issues Paper published ahead of a proposed far-reaching inquiry. In that Issues Paper the ACMA identifies the problem at hand as being that many of the traditional legislative mechanisms 'now struggle to respond to' technological developments and the merging of previously distinct platforms, and it refers to two further 'particularly informative' works that discuss the problem.⁴⁹ In the Finkelstein Issues Paper, far

⁴⁷ Ibid 2.

⁴⁸ Ibid 5.

⁴⁹ Australian Communications and Media Authority, 'Contemporary Community Safeguards Inquiry' (Issues Paper, June 2013) 12

from explicitly identifying the problem being addressed, the Issues Paper raised far-reaching and ambiguous questions inevitably resulting in the misdirected responses the inquiry received, consequently afflicting the Inquiry Report itself, as the following discussion illustrates.

In approaching the examination of the report's failure to properly identify the issues or problems warranting reform of media regulation, it is appropriate to focus on the relevant discussion in the Finkelstein Report. The report, covering more than 400 pages, is structured under 12 headings. They are, respectively: introduction; the democratic indispensability of a free press; newspaper industry structure and performance; *media standards*; the legal position of the media – privileges of the media, and restrictions on speech; the regulation of broadcasting; self-regulation – journalistic codes and ombudsmen; self-regulation and the press council; rights of reply, correction, and apology; theories of regulation; *reform*; and changing business models and government support (emphasis added). These headings are instructive in locating the report's identification of the problem the inquiry was ostensibly addressing. Two of the headings are of particular relevance in the present discussion because they contain some indication of 'the problem', or alleged problem. Under the *media standards* heading the report said the purpose of the section was to test the validity of 'the different assertions'.⁵⁰ These assertions, on the one hand, were the media's claim that the present accountability mechanisms were sufficient, that there was no problem with the integrity, accuracy, bias or conduct of the media that warrant further regulation, and that there is no evidence that journalists were routinely inaccurate and biased or lacked integrity or

<http://www.acma.gov.au/~media/Broadcasting%20Investigations/Media%20Release/pdf/CCSI%20issues%20paper_final%20pdf.pdf>.

⁵⁰ *Finkelstein Inquiry Report*, above n 31, [4.5].

that they ignored accepted press principles.⁵¹ The Finkelstein Report, for its part, did observe that there ‘is much to celebrate about the Australian news media’ and the report said it was ‘also clear from the evidence given by the editors and journalists who appeared before the inquiry that major Australian newspapers are staffed by people committed to their craft’ and that ‘[i]n many respects they serve the community well’.⁵² On this count then it may be said that there was no serious problem and therefore no strong justification for regulatory review or intervention. On the other hand, the report stated that there are matters of concern. The report relied on ‘a substantial body of evidence from public opinion polls about the public’s perception of media standards and performance’ covering 45 years from 1966, comprised in 21 surveys leaving to the conclusion that ‘the findings indicate significant concerns in the minds of the public over media performance’.⁵³ The report identified these concerns about the media as: (a) trust; (b) performance; (c) bias; (d) influence/power; and (e) ethics and intrusions on privacy.⁵⁴ While describing the data from the public opinion polls as ‘evidence’ the report itself expressed reservations about ‘the quality – and therefore the usefulness – of public opinion polling’.⁵⁵ It said:

[P]ublic opinion polling is dependent upon a number of factors, including the reliability, validity and fairness of the questions; the size and representativeness of the sample, and the soundness of judgment about whether people know enough about the topic to have a genuine opinion on it.⁵⁶

⁵¹ Ibid [4.1]–[4.3].

⁵² Ibid [4.6]–[4.8].

⁵³ Ibid [4.11].

⁵⁴ Ibid [4.14]–[4.74].

⁵⁵ Ibid [4.13].

⁵⁶ Ibid.

As the report itself said the public opinion polls were based on perceptions. As such, it is questionable whether such public opinion polls can properly be characterised as ‘evidence’. The term ‘evidence’ for legal purposes has been defined as consisting of the ‘testimony, hearsay, documents, things and facts which a court will accept as evidence of the facts in issue in a given case’.⁵⁷ On this definition of ‘evidence’, while hearsay constitutes one of the factors that may be taken into account, the factual imperative cannot be divorced from a consideration of ‘evidence’ – in fact, the factual imperative is prominent. Even conceding that the public opinion polls provided ‘some clear trends of public opinion’, as the report claimed, viewed against the competing evidence that the report attributed above to editors and journalists the answer to the question ‘*is there a problem?*’ must be that the answer to the question is inconclusive and therefore unsafe as a foundation for justifying legislative intervention of the scale proposed in the exercise that was afoot. The Finkelstein Report’s discussion of the five concerns about the media (items (a) to (e) above) is grounded in what the various surveys of public perception showed, and not in evidence of specific instances or data pertaining to media breaches in respect of these five topics. For present purposes it suffices to turn to another relevant discussion of ‘the problem’ in the report. And this is done next.

Under the chapter entitled ‘Reform’ the report provides a discussion under the section entitled ‘Is there a problem?’. While the report appears to identify only *two* problems, going by its references to the ‘first problem’ and ‘second problem’, a longer list of ‘problems’ may be extrapolated from the section: (a) market failure;⁵⁸ (b) the general distrust

⁵⁷ J D Heydon, *Cross on Evidence* (LexisNexis, 5th ed, 1996) 13.

⁵⁸ *Finkelstein Inquiry Report*, above n 31, [11.4]–[11.6].

of the media;⁵⁹ (c) strong evidence of problems with the reporting of political issues;⁶⁰ (d) transgressions of the fundamental principles of fairness, accuracy and balance (examples cited included bias in the reporting of government affairs, obsessive attempts to influence government policy, commercially-driven opposition to government policy, and the unfair pursuit of individuals based on inaccurate information);⁶¹ (e) the wrongful harm that the media ‘can cause’;⁶² (f) the failure of self-regulation ‘in dealing with irresponsible reporting’;⁶³ (g) problems associated with online publications including its ‘unmanaged and uncontrolled’ nature and inconsistency in applicable standards;⁶⁴ and (h) problems associated with the regulation of the broadcast news and current affairs sector.⁶⁵ That said, however, the chapter is afflicted by a lack of clarity in the identification of the alleged problems the inquiry was seeking to address. Curiously, the report accepted the *ninemsn* submission view that ‘there is no significant research that conclusively links drops in readership to specific issues of quality’.⁶⁶ Curiously also, while acknowledging the codes of ethics have improved the position in respect of ‘irresponsible reporting’ (that term warrants deeper discussion but such a task is beyond the scope of this work), the report observes that the difficulties faced by an entity such as the Press Council ‘are problems that such bodies face in many democracies’.⁶⁷ This indicates clearly that problem the inquiry was

⁵⁹ Ibid [11.7].

⁶⁰ Ibid [11.9].

⁶¹ Ibid.

⁶² Ibid [11.10].

⁶³ Ibid [11.12].

⁶⁴ Ibid [11.13].

⁶⁵ Ibid [11.14].

⁶⁶ Ibid [11.8].

⁶⁷ Ibid [11.12].

seeking to resolve was far from unique let alone one that offered easily attainable goals.

The report is also replete with assertions and unwieldy concerns. For example, the report observed that ‘the general reader is seldom in a position to know whether the information provided in a story is accurate, whether the sources quoted are reliable, and whether all the relevant facts have been interpreted objectively’.⁶⁸ Offering a solution to these dilemmas would no doubt bring great relief to society but must remain a pipe dream for reasons that are too obvious to rehearse here. Suffice to say that it would be totally unfair to lay the blame for this malaise squarely at the media’s feet. The report further asserted that while the Senate Select Committee on Information Technologies recognised problems with media regulation as long ago as April 2000, there has been ‘little improvement in the past 12 years’.⁶⁹ If such a claim as to the extent of ‘improvement’ was capable of empirical testing, it was not done in the Finkelstein Report. The report also singled out five ‘striking instances’ of media lapses in support of its claim as to the existence of a problem, that is, the following five examples constituted ‘striking instances’ of how the news media ‘can cause wrongful harm’ through unreliable or inaccurate reporting, breach of privacy, and the failure to properly take into account the defenceless in the community.⁷⁰ A closer look at these five ‘striking instances’ is appropriate as it further illustrates the weak premises upon which the report erected its case for strong regulatory intervention.

⁶⁸ Ibid [11.4].

⁶⁹ Ibid [11.15].

⁷⁰ Ibid [11.10]–[11.11].

The first alleged ‘striking instance’ cited was that of a minister of the Crown being forced to resign after the media exposed his homosexuality.⁷¹ That case, however, was disposed of by the Australian Media and Communications Authority, which found in favour of publication of the material on the grounds of ‘an identifiable public interest’.⁷² Without going into detail about the wisdom of that decision, the point that needs emphasising is that the complaint in question was processed through an existing complaints mechanism and no argument was advanced as to the adequacy or otherwise of that complaints process. The second alleged ‘striking instance’ referred to the forced resignation of a ministerial adviser following false accusations about the job performance of a chief commissioner of police.⁷³ The report fails to explain why this constituted a ‘striking instance’ of media malfeasance or why the victim was unable to obtain redress through conventional redress mechanisms if such redress was merited. The third alleged ‘striking instance’ referred to a person being wrongly implicated in the deaths of her two young children in a house fire and media coverage in her moment of grief.⁷⁴ The report fails to set out whether the victim invoked any existing complaints device and what the outcome, if any, was or even if the fault lay with the media. Such a false allegation would have been an open and shut case in which liability would be found if the transgressors did not make amends. The fourth alleged ‘striking instance’ referred to the publication of nude photographs falsely said to be of a female politician.⁷⁵ While the Finkelstein Report did not identify the politician concerned it presumably referred to the publication of purportedly nude

⁷¹ Ibid [11.11]; see also ibid [4.57].

⁷² *Investigation Report No 2431* (Unreported, Australian Communications and Media Authority, Members Chapman and Benn, 23 December 2010).

⁷³ *Finkelstein Inquiry Report*, above n 31, [11.11].

⁷⁴ Ibid.

⁷⁵ Ibid.

pictures of former One Nation leader Pauline Hanson. In that case, however, the offending publisher conceded the error and apologised to Ms Hanson and reportedly arrived at a settlement with her.⁷⁶ As such, the available and established redress mechanisms performed satisfactorily in this instance. The fifth alleged ‘striking instance’ of the media’s lapse was identified as the victimisation of a teenage girl because she had sexual relations with a well-known sportsman. The Finkelstein Report did not provide details but this presumably refers to the saga of the girl otherwise referred to as the ‘St Kilda Girl’. While the facts concerning this matter are not entirely clear and while there are suggestions that the girl herself was complicit in the publication of private material eventually some media outlets took a stand and announced that they would ‘back off’.⁷⁷ The failure here, if any, can also be attributed to the absence of clarity in the country’s privacy law – an issue that Australia’s legislatures have long grappled with and failed to properly address. The most recent initiative in this direction was shelved, according to the Commonwealth Attorney-General Mark Dreyfus, because ‘there was little consensus even amongst privacy advocates on how this legal right should be created’.⁷⁸ That aside, it is far from clear that the Australian media are inveterate privacy violators going, for instance, on complaints made to the Australian Press Council. In the 22 years to 2010, the Council received a

⁷⁶ Neil Breen, ‘Pauline: We’re Sorry, They Weren’t You’ (Editorial), *The Telegraph* (online), 21 March 2009 <<http://www.dailytelegraph.com.au/news/opinion/pauline-were-sorry-they-werent-you/story-e6frezz0-1225690416866>>; Nick O’Malley and Erik Jensen, ‘Valuable Lesson from Pauline’, *WAtoday* (online), 18 May 2009 <<http://www.watoday.com.au/national/valuable-lesson-from-pauline-20090519-bd70.html>>.

⁷⁷ Sally Jackson, ‘Sex, Lies & Ethics: Kim Duthie Story a Media Dilemma’, *The Australian* (online), 20 June 2011 <<http://www.theaustralian.com.au/media/sex-lies-ethics-kim-duthie-story-a-media-dilemma/story-e6frg996-1226078101736>>.

⁷⁸ See, for example, Chris Merritt, ‘Labor Shelves Privacy Tort Plan’, *The Australian* (online), 13 March 2013 <<http://www.theaustralian.com.au/media/labor-shelves-privacy-tort-plan/story-e6frg996-1226595931407>>.

total of 469 complaints for invasion of privacy, out of a total of 8916 complaints during that period, amounting to just over five per cent of the total complaints.⁷⁹ No breakdown is available specifically for the outcome of the privacy intrusion complaints. The general rate of complaints fully or partly upheld on adjudication by the Press Council for that period was just over eight per cent. If this ratio was applied to the statistic above for total complaints received, it would appear that over the 22-year period only 40 complaints to the Press Council for privacy intrusion were fully or partly upheld on adjudication. This is by no means intended to suggest that privacy intrusion by the media is not a matter of concern. Rather, it is meant to suggest that, on paper at least, more was needed to substantiate the Finkelstein Report's claim that breach of privacy was a matter of serious concern warranting the measures that were being recommended.

Each of the above five cited 'striking instances' were either disposed of through existing redress mechanisms or could easily have been addressed through these mechanisms. The Finkelstein Report does not explain why existing redress mechanism failed to assist the victims in these circumstances, for example, through the law of defamation or through complaints for breach of professional codes of practice.

V THE FINKELSTEIN INQUIRY RECOMMENDATIONS

The recommendation of foremost significance to the news media emerging from the Independent Media Inquiry was the establishment of a 'News Media Council' ('NMC'), loosely referred to as a 'super regulator', to oversee the enforcement of standards of the news media and

⁷⁹ Australian Press Council, '2010–2011' (Annual Report No 35, Australian Press Council, June 2012).

that this body would take over the functions of the Australian Press Council and the current affairs standards of the Australian Communications and Media Authority.⁸⁰ The NMC was to be free from the influence of the executive branch of government and a committee independent of government would appoint NMC members.⁸¹ The NMC would develop standards of conduct to govern the news media – non-binding aspirational principles and detailed standards – similar to the standards of the two peak press entities, the Media, Entertainment and Arts Alliance and the Press Council. A detailed critique of the recommendations is not possible in the present work given the breadth of the report and the extent of its reach covering the rationale for the establishment of a new regulatory entity, its composition, the manner of its appointment, the processes for handling complaints, the remedial powers, enforcement, appeals, cost of implementation and its purported benefits.⁸² A few observations might, however, be made. One concerns the ‘independence imperative’ and the related question of the proposed NMC’s composition. The inquiry clearly acknowledged that any reform of media regulation would be unsatisfactory if the regulatory mechanism was not underpinned by independence, especially from the executive branch of government.⁸³ That led the inquiry to recommend an elaborate council composition framework that, notwithstanding the inquiry’s good intentions, was fertile for challenge. Among its features was the proposal to set up a body to appoint the NMC, such a body perhaps comprising three senior academics from tertiary institutions; the NMC itself would consist of a full-time independent chair and 20 part-time members – one half of them selected from the public at large, the other half appointed

⁸⁰ *Finkelstein Inquiry Report*, above n 31, [11.44].

⁸¹ *Ibid* [11.46].

⁸² See generally, *ibid* ch 11.

⁸³ *Ibid* [11.45]–[11.46].

from the media but excluding media managers, directors and shareholders and whose candidates are nominated by the MEAA and the media, and one half comprising men and the other half women.⁸⁴ While these appointment devices bore the hallmarks of an independent appointment process and leading to an ostensibly balanced composition of the bodies entrusted with regulatory power, it would hardly escape questioning, for example, as to why senior academics should be given the role of appointing the NMC members or how these senior academics themselves would be selected given that deep divisions emerged within even the academic fraternity as to what shape regulatory reform should take.⁸⁵ It is also pertinent to query the Finkelstein Inquiry proposal to devote half the make-up of the News Media Council to media representatives given, as noted above, the weight the inquiry gave to the low public perception of the media reflected in public opinion surveys over a 45-year period. Likewise, questions could be asked as to what material improvement could result from the recommended reform if the setting of standards was carried out by an entity whose very constitution was vulnerable to scepticism. Furthermore, why should the same minimum standards of fairness and accuracy not have to apply across delivery platforms, so that some aspects were treated as platform specific, as recommended by the inquiry?

While the setting of standards should be left to the News Media Council, they should incorporate certain minimum standards, such

⁸⁴ Ibid [11.46]–[11.49].

⁸⁵ See, eg, Mark Pearson, ‘News Media Council Proposal: Be Careful What You Wish For #ausmedia #MediaInquiry #Finkelstein’, *Journlaw* (online), 3 March 2012 <<http://journlaw.com/2012/03/03/news-media-council-proposal-be-careful-what-you-wish-for-ausmedia-mediainquiry-finkelstein/>>; John Henningham, ‘State Must Not Be A Watchdog’, *The Weekend Australian* (Sydney), 17–18 March 2012, 16; Wendy Bacon, *Effective Media Accountability Does not Have to Threaten Journalists’ Independence*, (30 August 2012) <<http://www.wendybacon.com/tag/finkelstein-inquiry/>>.

as fairness and accuracy. The same standards need not apply across delivery platforms. Some aspects will need to be platform specific.⁸⁶

One particularly objectionable aspect of the inquiry's recommendations was its proscription of any freedom of speech obligation on the NMC's part, contrary to the dictates of any prudent approach towards media regulation. The inquiry stated:

The News Media Council requires clearly defined functions. It is *not recommended* that one of them be the promotion of free speech. There are ample bodies and persons in the community who do that more than adequately. The principal function of the News Media Council should be to promote the highest ethical and professional standards of journalism.⁸⁷

The recommendation directly contradicted any profession of a commitment to 'a healthy and robust media' and to an 'independent media that is able to fulfil its essential democratic purpose' as seen above in the Minister's position during the launch of the inquiry and it went against established values and principles cherished by any democratic society. In sharp contrast, in the United Kingdom, where the subject of media regulation reform has been aggressively canvassed in the wake of the phone hacking scandal and the ensuing Leveson Inquiry, sight has not been lost of the need to entrench free speech protections into any regulatory scheme. The draft royal charter on regulation, for instance, while allowing for provisions that would check against media excesses, incorporated support for the 'freedom of the press'⁸⁸ and for any code to

⁸⁶ *Finkelstein Inquiry Report*, above n 31, [11.52].

⁸⁷ Ibid [11.55] (emphasis added).

⁸⁸ UK Government, *Draft Royal Charter on Self-Regulation of the Press* (18 March 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/142808/18_March_2013_v6_Draft_Royal_Charter.pdf> 1.

‘take into account the importance of freedom of speech’.⁸⁹ Likewise the draft Bill proposed by the advocacy group that campaigned for a public inquiry into the phone hacking scandal, Hacked Off, in its draft Bill prompted by the Leveson Inquiry recommendations, proposed in its very first clause that there be a guarantee of media freedom.⁹⁰ The Bill’s preamble described it as a Bill ‘to protect the freedom and independence of the media and to provide for the process and effect of recognition of voluntary media regulators.’⁹¹ The group noted that the Bill ‘[e]shrines the freedom of the press in statute for the first time, making attempted ministerial or other state inference in the media explicitly illegal’.⁹² The Finkelstein Inquiry recommendations pertaining to the proposed media policing entity, the News Media Council, were devoid of any such commitment to freedom of speech and, as noted above, deemed this ideal a peripheral concern best left to the unidentified ‘ample bodies and persons in the community who do that more than adequately’.⁹³

VI THE COLLAPSE OF THE REFORM INITIATIVE

Almost thirteen months after the Finkelstein Report was released and after a period of relative hibernation on the report’s recommendations, the Commonwealth Government unveiled the legislative reform package. As reported by ABC Television’s *Lateline* program, the government told MPs they had eight days to decide whether to support ‘the new raft of

⁸⁹ Ibid 17.

⁹⁰ Hacked Off, *Draft Media Freedom and Regulatory Standards Bill* (2013) <<http://hackinginquiry.org/wp-content/uploads/2013/01/The-draft-Leveson-Bill-with-notes.pdf>> 1–2.

⁹¹ Ibid 1.

⁹² Hacked Off, *Hacked Off Publishes the Leveson Bill*, (6 January 2013) <<http://hackinginquiry.org/news/hacked-off-publishes-the-leveson-bill/>>. For background information on the grouping see: Brian Cathcart, *Hacked Off: What did we do? And did we win?*, (25 March 2013) Hacked Off <<http://hackinginquiry.org/debunking/hacked-off-what-did-we-do-and-did-we-win/>>.

⁹³ *Finkelstein Inquiry Report*, above n 31, [11.55].

media reforms, a take-it-or-leave-it-ultimatum'.⁹⁴ There was no mistaking the Minister's position:

[O]ur position is – and I'm going to be very clear about this – this package is not up for bartering and negotiation and things to be added on here or things to be added on there and deals and cross deals. This is – everybody's known for two years this debate's coming, everyone's known what the Convergence Review have pushed, what the Finkelstein Report recommended, all of those things have been taken in as a consideration. We're not going to be dragged around for months on this. This is a package that the Parliament fully understands and the Parliament will be in a position to make a judgment next week.⁹⁵

Upon being pressed by the *Lateline* presenter Emma Alberici as to the reason for the 'deadline of next week? Why rush it through?' the Minister responded (using the terms 'this package' and 'a bill' in the same interview) that the proposed legislation had been many years in the making, that every political party had debated it and that in essence the proposed legislation was no 'surprise to anybody'.⁹⁶ The Minister added, in response to the presenter's question, as to what the outcome would be if no agreement were reached by the deadline:

We won't be proceeding with it. That is absolutely the position. We are not going to proceed with this, we're not going to spend months and months being dragged around, negotiating this little bit

⁹⁴ ABC Television, 'Minister Says We Need New Media Laws', *Lateline*, 12 March 2013 (Emma Alberici) <<http://www.abc.net.au/lateline/content/2013/s3714134.htm>>.

⁹⁵ Ibid.

⁹⁶ Ibid.

over here or that little bit over there. It's a package; take it or leave it.⁹⁷

In the event, the package referred to six Bills comprising measures representing the Government's response to the Convergence Review and the Finkelstein Inquiry.⁹⁸ Of the six Bills, two were passed and the remaining four discharged from the Notice Paper, that is, these four were abandoned.⁹⁹ Of these four the most controversial, and the key plank of the whole exercise, was the Public Interest Media Advocate Bill 2013 ('PIMA Bill'), which was aimed at creating a new independent statutory office to perform functions under the News Media (Self-Regulation) Bill 2013. The PIMA Bill was also aimed at overseeing the 'public interest test' that was to be established in the new part 5A of the *Broadcasting Services Act 1992*.¹⁰⁰ According to the Bill's Explanatory Memorandum the Public Interest Media Advocate would be appointed by the Minister but, to protect the independence and impartiality of the role, would not be subject to the Minister's or the Government's direction in relation to the

⁹⁷ Ibid.

⁹⁸ Explanatory Memorandum, Public Interest Media Advocate Bill 2013.

⁹⁹ Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013 – among other things providing that no additional commercial TV broadcasting licences will be made available to enable a fourth commercial TV network (passed); Television Licence Fees Amendment Bill 2013 – among other things to reduce by 50 per cent the annual licence fee payable by commercial TV broadcasting licensees (passed); Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 – among other things to enable the Australian Communications and Media Authority to provide certain information to the Public Interest Media Advocate and to provide for a public interest test (discharged from Notice Paper); News Media (Self-Regulation) Bill 2013 – among other things to allow the Public Interest Media Advocate to declare a specified body corporate as a news media self-regulation body (discharged); News Media (Self-regulation) (Consequential Amendments) Bill 2013 – to provide that a news media organisation must be a member of the news media self-regulation body to qualify for the journalism exemption relating to the obtaining, keeping and disclosing of personal information (discharged); Public Interest Media Advocate Bill 2013 – providing for the creation of the independent statutory office of the Public Interest Media Advocate, and providing for the functions, appointment and terms and conditions of the PIMA (discharged).

¹⁰⁰ Explanatory Memorandum, Public Interest Media Advocate Bill 2013.

performance of its functions or the exercise of its powers. Furthermore, this measure would assist to safeguard the PIMA's role and enable it to operate at arm's length from the Government. This attempt at legislative measures to regulate the media went directly against the Convergence Review approach which 'provide[d] for direct statutory mechanisms to be considered *only after* the industry has been given the full opportunity to develop and enforce an effective, cross-platform self-regulatory scheme'.¹⁰¹ The Convergence Review report identified this approach as one of the 'key areas' in which it differed from the Finkelstein Inquiry. The Convergence Review report noted further that, as part of its initial deliberations, the review established a set of ten principles to guide its work and the 'first and most fundamental principle' was that '[c]itizens and organisations should be able to communicate freely and, where regulation is required, it should be the minimum necessary to achieve a clear public purpose'.¹⁰² Yet, the Government, without any explanation as to why it ignored this recommendation by another of its own inquiries, proceeded to introduce the above raft of Bills. It did so with undue haste couched in the language of deadlines and ultimatums and amid widespread concern that the Bills, in particular, the PIMA Bill was lacking in fundamental detail. The Opposition Communications spokesperson Malcolm Turnbull said in Parliament the Government was moving on the PIMA Bill in a manner that was 'turning this Parliament into a farce' by 'currently doing a dirty deal with various of the Independents to change the nature of the Public Interest Media

¹⁰¹ Department of Broadband, Communications and the Digital Economy, *Convergence Review: Final Report* (March 2012) <http://www.dbcde.gov.au/__data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf> 156 (emphasis added).

¹⁰² Ibid viii.

Advocate’.¹⁰³ As the deadline for a consensus on the Bills’ passage loomed a last-minute rush unfolded when it appeared that crucial support for the Bills was wavering. It transpired that, contrary to earlier expectations the Bills were not going to be considered together. As Mr Turnbull saw it, the Bills were originally going to be debated in ‘a cognate way, because they all link together’ but ‘now we have learned, just in the last few minutes, of a dramatic change’ that would leave the PIMA Bill to be debated at the very end as the last Bill on the program because the Minister was ‘still negotiating its contents’.¹⁰⁴ The attendant parliamentary chaos is reflected in the following remarks:

[W]e do not know what the PIMA is going to be, because the PIMA is defined as the Public Interest Media Advocate as established in the Public Interest Media Advocate Act 2013. Well, the Public Interest Media Advocate Bill 2013, which is the foundation of this whole exercise, is a work in progress... [E]very time you think the government have plumbed the depths of absurdity and dysfunctionality, they find a new depth to which they can sink, and that is what they are doing tonight. Now what are we debating? What is this Public Interest Media Advocate? Who is it? Who is she? Are there three? Are there five? Are they appointed for life? Do they have to be residents of a particular electorate? Are they appointed for three years or four years? What are their qualifications? We have no idea. And we have no idea because the government have no idea.¹⁰⁵

On the morning of 20 March 2013, as the events were unfolding the ABC News 24 channel was announcing ‘Federal Government sources say

¹⁰³ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2013, 2634 (Malcolm Turnbull).

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

remaining media law bills dead'. This was confirmed as true shortly afterwards.

VII CONCLUSION

The reform exercises through the Convergence Review and the Finkelstein Inquiry, as noted above, were not the first such efforts at media regulation reform. The last major exercise culminating in a Senate Committee report 13 years ago, in key respects, reached somewhat similar conclusions. In particular, that Committee found 'substantial evidence to question the efficacy of self-regulation and co-regulation in Australia's information and communications industries'.¹⁰⁶ That Committee therefore recommended that the Government establish a Media Complaints Commission 'to oversee various existing bodies and processes which currently regulate these industries'.¹⁰⁷ A legitimate conversation on media regulation remains justified at the present time. Such a conversation is one that not even the media itself is averse to. As the peak media body representing journalists observed:

[I]t is a welcome opportunity for us to take stock of self-regulation and ask how it might be enhanced. We should consider if there is a need to reform the Australian Press Council or if there is anything the government might do to support the health of the news industry in this country. *We believe the answer to both these questions is yes.*¹⁰⁸

The Alliance described the reform package as 'a missed opportunity' to recognised the real problems confronting the Australian media; to ensure the future health of Australian journalism; and that it failed to address the

¹⁰⁶ Senate Select Committee on Information Technologies, Parliament of Australia, *In the Public Interest: Monitoring Australia's Media* (2000) 127.

¹⁰⁷ Ibid.

¹⁰⁸ See Chris Warren, above n 20, 14 (emphasis added).

urgent need for investment incentives, digital training and support for alternate voices in the media landscape.¹⁰⁹ The above reform initiative, as the above discussion has demonstrated, was ill-conceived, its data-gathering effort was flawed, the recommendations were not fully grounded in reason, and the final attempt at execution through the legislative package was driven by unseemly haste and riven with confusion and ambiguity. The exercise was – put simply – a debacle. An elaborate exercise in media regulation reform came to an abrupt and ignominious end. That it did so was hardly surprising given the events and the manner in which the proponents of media regulation prosecuted their objectives. As this author noted at the outset, the Finkelstein Inquiry was ‘too flawed, and needs too much fixing to trigger real reform’.¹¹⁰ Any initiative impacting on media regulation is by nature fraught, given the high premium democratic societies place on freedom of speech. Concerns about regulatory inroads into freedom of speech are, not surprisingly, higher in the absence of constitutional safeguards for this freedom, as is the case in Australia.¹¹¹ If it is any consolation, in what is currently the world’s most fertile of arena for media reform – in the theatre of the UK’s phone hacking scandal – answers were still being sought at the time of this writing despite a detailed inquiry and

¹⁰⁹ Media, Entertainment and Arts Alliance, *The Media Reform Package: What Does It Mean For Journalists* (20 March 2013) <<http://www.alliance.org.au/the-media-reform-package-what-does-it-mean-for-journalists>>.

¹¹⁰ Joseph M Fernandez, ‘Finkelstein Inquiry Too Flawed To Lead To Real Reform’, *The Conversation* (online), 15 March 2012 <<http://theconversation.com/finkelstein-inquiry-too-flawed-to-lead-to-real-reform-5732>>.

¹¹¹ For example, see Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000).

recommendations for reform accompanied by intense public and parliamentary debates.¹¹²

¹¹² See Roy Greenslade, 'After Leveson – Is Citizen Journalism the Answer', *The Guardian* (online), 4 June 2013 <<http://www.guardian.co.uk/media/greenslade/2013/jun/04/leveson-report-media-events-conferences>>.

THE ROLE OF PARLIAMENT IN PROTECTING FREE SPEECH: FOUR VERY DIFFERENT CASE STUDIES

NICK GOIRAN^{*}

Abstract

This article discusses the vexed issue of freedom of speech. It looks into whether the parliament can have a meaningful role in protecting such freedom. This paper's focus is on the role of Australian State parliaments in protecting free speech and in limiting it when considered justified by other public interests. The author seeks to reference this to four different case studies: shield laws for journalists; the sexualisation of children; hate-speech laws and parliamentary privilege.

I INTRODUCTION

Lord Keith of Kinkel, giving judgment in the House of Lords in a case involving the serialisation by British newspapers of Peter Wright's tell-all memoir *Spycatcher*, stated as the common law approach to freedom of speech and communication:

The general rule is that anyone is entitled to communicate anything he pleases to anyone else, by speech or in writing or in any other way. That rule is limited by the law of defamation and other restrictions ... imposed in the light of considerations of public

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interest such as to countervail the public interest in freedom of expression.¹

In Australia, subject to the right to freedom of political communication held by the High Court to be implied by the provisions of the Constitution of Australia establishing a system of representative government, State Parliaments have the power to pass laws restricting freedom of speech.

The existence of an implied right to freedom of political communication in the Constitution is enunciated in *Lange v Australian Broadcasting Corporation*² ('*Lange*'). In *Lange* the High Court explicitly addressed the application of the implied right to State matters:

[T]he discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable.³

Nonetheless, subject to this restriction:

Within our legal system, communications are free only to the extent that they are left unburdened by laws that comply with the *Constitution*.⁴

¹ *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 256.

² (1997) 189 CLR 520, 561–2, 567.

³ Ibid 571–2.

⁴ Ibid 567.

II SHIELD LAWS FOR JOURNALISTS

The *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* (WA) (*‘Amendment Act’*) was passed by the Legislative Council of the Parliament of Western Australia on 12 September 2012 after having been initially introduced into the Legislative Assembly on 20 October 2011.

A *Balancing Competing Public Interests*

The *Amendment Act* addressed the need to balance the competing public interests that arise from time to time in judicial proceedings when a court is asked to compel a journalist to reveal the identity of a source. On the one hand there is a public interest in a free press that vigorously investigates and reports on all matters that affect or may be of interest to the public. On occasion journalists will receive sensitive information from informants or whistle-blowers on the condition that the informant remains anonymous. This practice can, at times, be critical in leading to public exposure of improper practices in business, politics and other realms of public life. On the other hand in both criminal and civil proceedings there can be a competing public interest that favours requiring a journalist to disclose the identity of a source.

B *Liu v The Age Co Ltd*

In the recent NSW Supreme Court defamation case of *Liu v The Age Co Ltd*⁵ (*‘Liu’*) the Court found that there was a public interest in allowing Ms Liu to be told the identity of the informants from whom The Age obtained information alleging that she made certain payments to people including Joel Fitzgibbon, who was the Minister for Defence from 2007

⁵ [2012] NSWSC 12.

to 2009 in the Rudd Government, which outweighed the public interest in allowing journalists to refuse to disclose the identity of a source. The Court was required to consider the application of the *Uniform Civil Procedure Rules 2005* made under the *Civil Procedure Act 2005* (NSW) to an application from the plaintiff, Ms Helen Liu, for an order that the defendants (The Age newspaper and three of its journalists) provide information that would assist Ms Liu to identify the informants to enable her to commence proceedings against them for defamation. The Court considered *Evidence Act 1995* (NSW) s 126B, provisions closely reflected in the new section 20C which has been inserted into the *Evidence Act 1906* (WA) by the *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* (WA).

McCallum J said in part:

In my assessment, the present case sits poised uncomfortably on the fault-line of strong, competing public interests. The position is complicated by the fact that, to a significant extent, the respective positions of the plaintiff and the defendants rest on conflicting factual contentions which cannot satisfactorily be resolved in the present proceedings.

The defendants' case is that, following lengthy and careful negotiation, they obtained documents which reveal the making of corrupt payments by the plaintiff to a Federal Member of Parliament. They contend that the documents were obtained from sources who entertain real and substantial fear of reprisal in the event that their identities are revealed, contrary to undertakings given to them by the defendants. Accepting those contentions without qualification, there would be a strong case for refusing the discretionary relief sought by the plaintiff.

Conversely, the plaintiff's case is that a person or persons conducting a vendetta against her have provided documents to journalists which have been deliberately forged or falsely attributed to her. Accepting those contentions without qualification, to refuse the relief sought would perpetuate the fraud. That would plainly be a strong reason for exercising the Court's discretion in favour of the plaintiff.⁶

The hearing of this case preceded the passage of the *Evidence Amendment (Journalist Privilege) Act 2011* (NSW), which inserted sections 126J to 126L into the *Evidence Act 1995* (NSW).

The *Evidence Act 1995* (NSW) s 126K reads as follows:

Journalist privilege relating to identity of informant

(1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to give evidence that would disclose the identity of the informant or enable that identity to be ascertained.

(2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs:

- (a) any likely adverse effect of the disclosure on the informant or any other person, and
- (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

⁶

Ibid [168]–[170].

(3) An order under subsection (2) may be made subject to such terms and conditions (if any) as the court thinks fit.

It is not clear whether the Court's decision would have been any different if these provisions had been in effect. It is worth noting, however, that the matters which a court is required to take into account were explored in *Liu* in a discussion of the considerations underlying the newspaper rule as set out by the High Court in *John Fairfax & Sons Pty Ltd v Cojuangco*.⁷

[T]he rule is one of practice, not of evidence. Secondly, although the rule rests on a recognition of the public interest in the free flow of information, the law gives effect to that recognition of the public interest by exercising a discretion to refuse to order disclosure of sources of information in interlocutory proceedings in defamation and, perhaps, other analogous actions, even though disclosure would be relevant to the issues for trial in the action. The law does not protect that public interest to the extent of conferring an immunity on the media from disclosure of its sources.⁸

The option for a court to order a journalist to disclose the identity of a source does not, of course, only arise in civil proceedings. In a criminal case the court may judge that the public interest in obtaining evidence directly from the anonymous informants about alleged crimes outweighs the public interest in protecting the anonymity of a journalist's informants.

C *The Situation in WA*

Before the passage of the Evidence and Public Interest Disclosure Amendment Bill 2011 (WA) the courts in Western Australia made

⁷ (1988) 165 CLR 346.

⁸ Ibid 356 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

decisions about these competing public interests without any specific guidance from legislation.

The new statutory provisions will direct the courts to consider very specific factors before deciding to override the presumption that a journalist is not compellable to give identifying evidence when they have promised not to disclose the identity of their source. However, ultimately the courts must still decide which interest will prevail in a particular case. Some of the matters required to be considered tend towards protecting journalists' sources, for example:

the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider;⁹

and:

the public interest in preserving the confidentiality of protected confidences and the confidentiality of protected identity information.¹⁰

However, other factors to be considered tend to favour requiring disclosure:

the probative value of the evidence in the proceeding;¹¹

the importance of the evidence in the proceeding;¹²

and:

⁹ *Evidence Act 1906* (WA) s 20C(4)(e).

¹⁰ *Ibid* s 20C(4)(j).

¹¹ *Ibid* s 20C(4)(a).

¹² *Ibid* s 20C(4)(b).

the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding.¹³

The Parliamentary Secretary responsible for the Act in the Legislative Council stated that:

[L]egislation of the kind delivered by the bill has been slow to come to Western Australia. [Professional confidential relationships protection provisions] have existed in New South Wales since 1997. Regardless, such legislation is now here. Until now, courts and tribunals have engaged in an unassisted balancing exercise between two competing philosophies when deciding whether or not to permit evidence to be adduced: the utilitarian philosophy that a court should be able to make the most judicious decision based on all the available information and the libertarian philosophy that the law should not unduly interfere with the rights and interests of individuals. This bill delivers a solution to this complex balancing exercise.¹⁴

While not disagreeing with the sentiment of this remark one ought to note that the ‘balancing exercise’ required by the conflict between competing public interests raised by cases such as *Liu* still remains a complex one, despite guidance being given to the courts by the parliaments.

III SEXUALISATION OF CHILDREN

On 24 October 2012 the Joint Standing Committee on the Commissioner for Children and Young People, pursuant to *Commissioner for Children and Young People Act 2006* (WA) s 19(1), referred to the Commissioner for Children and Young People a series of matters, insofar as they may be relevant to the sexualisation of children, for consideration, and requested

¹³ Ibid s 20C(4)(c).

¹⁴ Western Australia, *Parliamentary Debates*, Legislative Council 20 October 2011, 8437 (Michael Mischin).

the Commissioner ‘to make recommendations as to any specific actions required to be taken by the government of Western Australia in relation to these matters in order to better secure the wellbeing of children and young people in Western Australia’.

The matters referred were:

Written laws

Classification (Publications, Films and Computer Games) Enforcement Act 1996 (WA)

Criminal Code (WA) ch 25

Reports

American Psychological Association (APA), Report of the APA Task Force on the Sexualisation of Girls (2007, republished 2010)

Commonwealth Parliament, Senate Standing Committee on Environment, Communication and the Arts, Inquiry into Sexualisation of Children in the Contemporary Media (2008)

Commonwealth Parliament, Senate Legal and Constitutional Affairs References Committee, Review of the National Classification Scheme: Achieving the Right Balance (June 2011)

United Kingdom Department for Education, Letting Children Be Children: Report of an Independent Review of the Commercialisation and Sexualisation of Childhood (2011) (‘Bailey Review’)

French Parliament, Against Hyper-Sexualisation: A New Fight for Equality (March 2012)

Practices, procedures and other matters

Outdoor advertising, particularly billboards

Use of children in advertising

Marketing of sexualised products to children

Education of children.¹⁵

The two written laws referred for consideration deal with laws which prohibit the production, distribution and, in some cases, even possession, of certain publications, films or computer games including items of child pornography. These laws plainly seek to restrict freedom of communication.

A *Child Pornography and Other Child Exploitation Material*

Criminal Code (WA) ch 25 contains offences relating to ‘child exploitation material’. This is defined in *Criminal Code* (WA) s 271A to mean:

- (a) child pornography; or
- (b) material that, in a way likely to offend a reasonable person, describes, depicts or represents a person, or part of a person, who is, or appears to be, a child –
 - (i) in an offensive or demeaning context; or
 - (ii) being subjected to abuse, cruelty or torture (whether or not in a sexual context).

Child pornography is defined to mean:

material that, in a way likely to offend a reasonable person, describes, depicts or represents a person, or part of a person, who is, or appears to be a child –

¹⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 October 2012, 7735–6.

- (a) engaging in sexual activity; or
- (b) in a sexual context.

Criminal Code (WA) ss 217–220 make it an offence to involve a child in the production of child exploitation material, to produce child exploitation material, to distribute child exploitation material, and to possess child exploitation material. The restriction on the rights to freedom of expression and communication imposed by these provisions is justified by the overriding public interest in protecting children from exploitation, including being portrayed in any way as sex objects. One matter raised by these provisions is the definition of ‘child’ used. *Criminal Code* (WA) s 217A includes the following definition:

child means a person under 16 years of age.

This definition means that children aged 16 or 17 are not protected by the law from being exploited by child pornography producers and users or by those who produce or use other forms of child exploitation material.

B United Nations Convention on the Rights of the Child

The United Nations *Convention on the Rights of the Child*, (‘*Convention*’)¹⁶ which Australia ratified on 17 December 1990, defines a child to mean ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’. In Western Australia the age of majority has, since the *Age of Majority Act 1972* (WA) commenced operation on 1 November 1972, been 18 years of age. So for the purposes of applying the *Convention* in Western Australia

¹⁶ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

the relevant definition of a child is ‘every human being below the age of eighteen years’.

Convention art 34 obliges those who have ratified it ‘to protect the child from all forms of sexual exploitation and sexual abuse’ in particular by taking all appropriate measures ‘to prevent the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices, and the exploitative use of children in pornographic performances and materials’.

On 8 January 2007 Australia ratified the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (‘*Optional Protocol*’).¹⁷ The definition of a child as ‘every human being below the age of eighteen years’ in the *Convention* also applies to the provisions of the *Optional Protocol*.

Optional Protocol art 3 requires those who have ratified it to ensure that ‘producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography’ is ‘fully covered under its criminal or penal law’. ‘Child pornography’ is defined in *Optional Protocol* art 2 to mean ‘any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.’

One should not necessarily be supportive of every provision of every United Nations treaty just because it is in a United Nations treaty. Many Western Australians have concerns for the sovereignty of the Australian

¹⁷ Opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).

States under the current mode of ratification of such treaties in the context of our Federal system. This, however, is a discussion for another paper. In this case, however, it is difficult to avoid the conclusion that in seeking to extend the fullest possible protection to children the United Nations, that is to say the international community of nations, has got it right on this point.

Parliaments should certainly be aiming to be reflecting international best practice in the law protecting children from all forms of sexual exploitation and abuse, including the exploitative use of children – all children – in pornographic performances and materials. The criminal law should fully cover ‘producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography’.

As the law currently stands in Western Australia it fails to do so. There is a major gap in the protection of children from exploitation in child pornography. The law on child pornography and other forms of child exploitation material in Western Australia fails to give any protection to children aged 16 or 17.

C *Other Australian Jurisdictions*

Western Australia has fallen behind other Australian jurisdictions in the comprehensiveness and reach of its laws to protect children from this form of exploitation. *Crimes Act 1958* (Vic) s 67A defines a minor for the purpose of child pornography offences as ‘a person under the age of 18 years’. *Crimes Act 1900* (ACT) Dictionary defines a child as ‘a person who has not attained the age of 18 years’. This definition applies to that Territory’s child pornography offences. *Criminal Code Act* (NT) s 1 defines a child as ‘a person who is not an adult’ and an ‘adult’ as ‘a

person of or over the age of 18 years'. This definition applies to that Territory's child exploitation material offences. *Criminal Code Act 1924* (Tas) s 1A defines 'child exploitation material' to mean 'material that describes or depicts, in a way that a reasonable person would regard as being, in all the circumstances, offensive, a person who is or who appears to be under the age of 18 years engaged in sexual activity, or in a sexual context, or as the subject of torture, cruelty or abuse (whether or not in a sexual context)'. Commonwealth's *Criminal Code Act 1995* (Cth) s 473.1 defines 'child abuse material' and 'child pornography material' with reference to 'a person, who is, or appears to be, under 18 years of age'. On the basis of the above statutory references, it is clear that a majority of Australian jurisdictions have given effect to international best practice by protecting all children – including those aged 16 or 17 – from being abused by child pornographers while Western Australia, along with New South Wales, Queensland and South Australia, lag behind.

D *Definition of Child in Other Criminal Offences*

One objection that may be raised to the proposition to define a child for the purposes of child pornography and other child exploitation material offences as a person under 18 years of age is that some of the Western Australian *Criminal Code* (WA) offences against a child only apply to children under the age of 16 years. The argument is that if a child aged 16 or 17 can consent to participate in a sexual act with another person then a child aged 16 or 17 should also be held capable of consenting to be depicted in pornography. This argument assumes that pornography is merely another form of sexual activity and that children aged 16 or 17 do not need any more protection from being exploited by pornographers than adults.

In this context it is worth noting that Western Australian criminal law does acknowledge that children aged 16 or 17 do need special protection from sexual exploitation. *Criminal Code* (WA) s 322 covers sexual offences by a person against a child ‘of or over the age of 16 years’ who ‘is under his or her care, supervision, or authority’. The law recognises that in these circumstances children aged 16 or 17 need protection from sexual exploitation by those who have them under their care, supervision or authority.

The *Prostitution Act 2000* (WA) defines a child as ‘a person whose age is less than 18 years’. The law recognises that while a child aged 16 or 17 is held to be capable of consenting to sexual intercourse children of this age still need special protection from being exploited by prostitution.

The *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) defines a minor as a person ‘who is under 18 years of age’. It prohibits the sale or supply of pornographic items such as Category 1 or Category 2 restricted publications and R18+ or X18+ films to minors. It is an offence for any person to exhibit an X18+ film in the presence of a minor even in a private place. Of course any publication or film that contained pornographic or other exploitative depictions of children aged 16 or 17 would be classified Refused Classification or RC under the National Classification Scheme. It would then be an offence under Western Australia’s *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) to possess the item. In fact *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) s 81 already makes it an offence to possess a copy of a film that would, if classified, be classified RC. This means it is already an offence to possess any film that contains pornographic or other exploitative depictions of a child aged 16 or 17.

Western Australian law should be changed so that it likewise recognises that children aged 16 or 17 need protection from being exploited by the producers of child pornography or other child exploitation material. The question now is whether, for the sake of children, additional restrictions are needed. There certainly appears to be a growing momentum in this respect.

In April 2012 the Australian Medical Association called for a new inquiry into the premature sexualisation of children in marketing and advertising. AMA President Dr Steve Hambleton said '[t]here is strong evidence that premature sexualisation is likely to be detrimental to child health and development, particularly in the areas of body image and sexual health.'¹⁸ This call followed a private member's motion moved in the House of Representatives on 13 February 2012 by Labor MHR Trish Rishworth and supported by members of parliament across the political spectrum. The motion called (in part) that the House:

notes with concern that the sexualisation of children is a growing issue ... in Australia; [and]

recognises that the sexualisation of children, and in particular girls, has been associated with a range of negative consequences including body image issues, eating disorders, low self esteem and mental ill health.

In a motion which enjoyed similar cross-party support in the Legislative Council of the Parliament of Western Australia I moved (in part) that the Legislative Council:

¹⁸ Australian Medical Association, *AMA Calls for New Inquiry into the Sexualisation of Children in Advertising* (3 April 2012) <<https://ama.com.au/media/ama-calls-new-inquiry-sexualisation-children-advertising>>.

recognises that the sexualisation of children has been an important issue of ongoing concern in the community, which has now become urgent.

I expect that over the next few years this growing concern will translate into legislative action to protect children better from premature sexualisation and other forms of exploitation. Such legislation will of necessity restrict free speech in various ways.

In a paper given at the 5th World Congress on Family Law and Children's Rights held in 2009 in Halifax, Nova Scotia, Dr Tom Altobellia, Judge in the Federal Magistrate's Court of Australia, gave a moving account of a case he had heard in 2007 involving a 5 year old boy Sam, who had developed aggressive sexual behaviour towards his younger brother following exposure to pornographic images on the internet. Dr Altobelli observed:

... the dynamic nature of cyberspace is in itself the strongest reason for advocating an approach that the key to protecting children is regulating content in cyberspace, not access to cyberspace. Of course the notion of regulating content invokes in many people a concern about censorship and free speech ... There can be little doubt that, at least at a superficial level, protecting children from the dangers of cyberspace presents a clash of competing interests: the best interests of children, as opposed to free speech. But perhaps the clash of interests is not necessarily as great as it seems? There are limits to the concept of the best interests of children, just as there are limits to the concept of free speech. No one seriously advocates that each concept is unlimited and unfettered.¹⁹

¹⁹ Tom Altobelli, 'Cyber-Abuse – A New Worldwide Threat to Children's Rights' (Paper presented at 5th World Congress on Family Law and Children's Rights, Halifax, 23–26 August 2009) 32–3.

IV HATE SPEECH LAWS

In an oration delivered on 10 December 2012 for Human Rights Day, His Honour James Spigelman, Chairman of the ABC and former Chief Justice of the Supreme Court of NSW from 1998 until 2011, addressed the question of so-called ‘hate speech’ laws and the protection of freedom of speech. His remarks were in part directed to the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) which would extend the vilification provisions currently in *Racial Discrimination Act 1975* (Cth) s 18C to apply to seventeen other protected attributes in addition to ‘race’, including, at least in a context related to employment, ‘religion’ and ‘political opinion’. Furthermore, the definition of discrimination would be broadened significantly to include ‘*conduct that offends, insults or intimidates*’ another person.

His Honour observed that:

The freedom to offend is an integral component of freedom of speech. There is no right not to be offended. ...

When rights conflict, drawing the line too far in favour of one, degrades the other right. Words such as ‘offend’ and ‘insult’, impinge on freedom of speech in a way that words such as ‘humiliate’, ‘denigrate,’ ‘intimidate’, ‘incite hostility’ or ‘hatred’ or ‘contempt’, do not. To go beyond language of the latter character, in my opinion, goes too far.²⁰

Some people can be very easily offended by robust expressions of opinion by others on religious or political matters. Will an employer who

²⁰ James Spigelman, ‘2012 Human Rights Day Oration’ (Speech delivered at the Australian Human Rights Commission’s 25th Human Rights Award Ceremony, Sydney, 10 December 2012 <<http://about.abc.net.au/speeches/hate-speech-and-free-speech-drawing-the-line/>>).

makes remarks, or who does not prevent employees making remarks, that may be found offensive by an overly sensitive employee of a particular religion or with a particular political opinion be in danger of a complaint of discrimination on the grounds of religion or political opinion and, in the face of evidence that the employee was offended have the burden of proving that the conduct was not offensive or was unrelated to the protected attribute of the employee?

The proposed definition goes well beyond a person being denied a job or promotion because of a protected attribute and seeks to intrude into the day-to-day interactions between people in the workplace and other areas of public life. It introduces a form of ‘religious vilification’ law by stealth. Such laws had fallen into disfavour following the notorious finding at first instance in 2005 by the Victorian Civil and Administrative Tribunal in the case of *Catch the Fire Ministries* which was so scathingly overturned by the Supreme Court of Victoria in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*.²¹ In its application to political opinion the provisions may breach the implied right to freedom of political communication in the Constitution.

On 30 January 2013 Attorney-General Nicola Roxon announced that she had asked her department to develop alternative drafting of sections of the Human Rights and Anti-Discrimination Bill 2012 (Cth) that have raised freedom of speech concerns. In particular, she flagged the possibility of removing *Racial Discrimination Act 1975* (Cth) s 19(2)(b), which stipulates that conduct that ‘offends, insults, or intimidates’ would constitute discrimination. Parliaments should not enact legislation that would significantly erode free speech in the name of protecting people from being offended or insulted.

²¹ [2006] VSCA 284.

V PARLIAMENTARY PRIVILEGE

The *Bill of Rights 1688*, 1 Will and Mar Sess 2, c 2, art IX provides (in the English of the day):

That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.

Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament summarises the implications of this freedom of speech in debate in Parliament as follows:

Subject to the rules of order in debate, a Member may state whatever he thinks fit in debate, however offensive it may be to the feelings, or injurious to the character, of individuals; and he is protected by parliamentary privilege from any action for defamation, as well as from any other question or molestation.²²

In Western Australia the effect of *Bill of Rights 1688*, 1 Will and Mar Sess 2, c 2, art IX on the Parliament of Western Australia is preserved by the operation of *Parliamentary Privileges Act 1891* (WA) s 1(b). The parliamentary privilege of free speech is in effect an immunity for parliamentarians from being sued or prosecuted for anything said in the course of parliamentary proceedings. This privilege can only be overridden by an explicit provision in a statute.

Parliamentary privilege can be abused and particular instances where it has allegedly been abused have lead to calls for its limitation by statute. For example, in February 2010 the then leader of the opposition in the United Kingdom, David Cameron, foreshadowed Conservative plans to

²² Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011) 222.

amend the *Parliamentary Privilege Act 1770*, 10 Geo 3, c 50 in response to claims that three Labour MPs were seeking to avoid criminal prosecution for fraudulent expense claims. Subsequently the UK Supreme Court ruled that the submission of expense claims was not covered by parliamentary privilege. Lord Rodgers stated:

I am accordingly satisfied that the prosecution does not infringe article 9 of the Bill of Rights by impeaching or questioning the freedom of speech, the freedom of debates or the freedom of proceedings of the House or of its Members. I am equally satisfied that the prosecution is not precluded on any other basis relating to the Commons' privilege of exclusive cognisance.²³

Recent controversial uses of parliamentary privilege in the Commonwealth Parliament include the naming of an alleged child rapist by Senator Nick Xenophon in the Senate on 12 and 13 September 2011. Following the procedures established by a resolution of the Senate in 1988,²⁴ Senator David Johnston, chair of the Committee of Privileges, sought and was given leave to table a response to Senator Xenophon's allegations by the person he named.²⁵ While the right to seek the tabling of a reply gives some redress to a person against whom accusations are made under cloak of parliamentary privilege this still leaves parliamentarians in a privileged position of immunity.

Perhaps it is ironic that Parliamentarians enjoy the special immunities bestowed on them by parliamentary privilege whilst having the power to restrict the freedom of speech of the very people they represent. Accordingly, parliamentarians have an extraordinary responsibility to

²³ *R v Chaytor* [2010] UKSC 52, [125].

²⁴ Senate Resolution 5(7)(b), 25 February 1988.

²⁵ Commonwealth, *Parliamentary Debates*, Senate, 22 September 2011, 6870–1 (David Johnston).

ensure they understand this privilege, respect this privilege and utilise this privilege responsibly.

VI CONCLUSION

Freedom of speech is a significant component of a democratic polity. Democratically elected parliaments nonetheless have an obligation to pass laws, on occasion, which limit freedom of speech. Such laws should be few and should be enacted judiciously.

In relation to shield laws for journalists there will always be a balance to be struck between facilitating freedom of speech by giving journalists some protection from being compelled to reveal their sources and allowing courts to order disclosure where genuinely necessary for the sake of a competing public interest such as the administration of justice.

The sexualisation of children in modern society results in part from a lack of adequate restrictions on freedom of expression and communication. Laws prohibiting the production and distribution of child pornography of their nature restrict such freedoms. These restrictions are justified because of the serious nature of the harms to children involved in the production of child pornography. These harms apply also to children aged 16 or 17 and the law in Western Australia should be changed to reflect this.

So-called 'hate speech' laws have the potential to significantly restrict free speech by overreaching in their definitions and seeking to penalise speech that may offend or insult. A free society must allow the robust exchange of views on matters including religion and political opinion. Naturally in the course of such discourse some persons may be offended or insulted. Parliaments should not adopt the position of nannies trying to

bring peace to the nursery by avoiding hurt feelings between their charges.

Parliamentarians enjoy the special immunities bestowed on them by parliamentary privilege. They need to respect the purpose for which such immunity is given and use it responsibly. Otherwise they will be faced with understandable calls to limit the scope of their parliamentary privilege.

THE POSTMODERN UNDERPINNINGS OF RELIGIOUS VILIFICATION LAWS: IMPLICATIONS FOR DEMOCRACY AND FREEDOM OF SPEECH

AUGUSTO ZIMMERMANN*

Abstract

Religious vilification laws are supposedly designed to promote greater tolerance and harmony among religious groups. And yet, such vilification laws are conceptually unsound and their postmodern underpinnings produce results that are often antithetical to the level of tolerance their advocates hope or aspire for. Although these laws aim to develop a more tolerant 'multicultural' society, their postmodern underpinnings ultimately erode freedom of speech, a cardinal tenet of every truly democratic society. Indeed, such laws might become a permanent invitation for religious bigots and extremists to silence any criticism of their beliefs, by claiming that they, rather than their radical beliefs, have been attacked. Ironically, the more a religion warrants debate and discussion, the more protection such religion appears to receive from this sort of legislation.

I INTRODUCTION

Designed to promote religious tolerance by prohibiting the vilification of persons on the grounds of religious belief or activity, religious vilification laws of the sort of those enacted in Australia may not necessarily promote

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the level of tolerance its advocates hope or aspire for. On the contrary, laws such as the Victorian *Racial and Religious Tolerance Act* 2001 (Vic) ('Victorian RRTA') may become a permanent invitation to individuals to avoid debate of their religious beliefs by claiming that they, rather than their beliefs, have been attacked. First, this article explains how the meaning of tolerance has suffered a remarkable transformation in our 'multicultural' societies. Second, this paper reveals the postmodern underpinnings of religious vilification laws enacted in Australia, in particular the Victorian RRTA. Finally, the article explains how the enactment of such anti-discrimination laws may have an undesirable effect on democracy and freedom of speech.

II TOLERANCE: OLD AND NEW

In the Oxford English Dictionary the verb 'to tolerate' means 'to endure, sustain (pain or hardship)'. One is tolerant if he or she, while perhaps holding strong convictions, insists that others must have the right to dissent and to argue their cases freely. This meaning of tolerance implies that truth can be known, although the best way to achieve truth is by means of a spirit of mutual understanding and open-mindedness; for whilst truth can be discovered, the wisest and least malignant course of action is a 'benign tolerance' grounded in intellectual modesty that recognises our own human limitations.¹

Since our Western traditions consider that truths can be known, freedom of speech is therefore approached as an important mechanism by which truth can be obtained and falsehood can be eliminated. Because of our human fallibility, and the fact that without freedom of speech an

¹ Donald Carson, *The Intolerance of Tolerance* (William B Eedermans Publishing, 2012) 6.

individual cannot really be free, ‘the great debate over toleration emphasised that conscience and expression were one’. God did not give any person the power to police the thoughts of another person. So, reasoned the advocates of tolerance, He did not mean for monarchs to force religious tolerance on their subjects’.²

This is the essence of the classical liberal argument for religious toleration. For instance, John Locke, one the greatest philosophers in the liberal tradition, argued for religious tolerance not because he doubted the existence of absolute truth, or because he had any sympathy to the beliefs that he thought should be tolerated.³ Rather, in *Letter Concerning Toleration* he advocated tolerance on the basis that positive laws are incapable of producing genuine religiosity in the minds of citizens who are subjected to them, so that even the opinions which ‘are false and absurd’ must be tolerated.⁴ Locke thus argued that each person is *individually* responsible for finding ‘the narrow way and the strait gate that leads to heaven’.⁵ Whilst he believed that there is ‘only one way to heaven’, Locke insisted that ‘a man cannot be forced to be saved’,⁶ and that ‘religious truth must be left to individual conscience and individual discernment’.⁷

Given the cultural relativism of our present time, however, this classical meaning of tolerance is becoming obsolete and it is being replaced by a

² Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt* (Institute of Public Affairs and Mannkal Economic Education Foundation, 2012) 156.

³ John Locke, *A Letter Concerning Toleration* (John Horton and Susan Mendus, 1991) 42-3.

⁴ Ibid 41.

⁵ Ibid 19.

⁶ Ibid 32.

⁷ Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press, 1993) 98.

new approach that denies the attainment of the absolute truth. To be ‘tolerant’, therefore, no longer implies an attitude of intellectual modesty in which one learns through trial and error. On the contrary, the ‘new tolerance’ now operates under a postmodern assumption that ‘truth’ is always subjective and all beliefs must have equal validity. We have moved away from a culture of free expression of contrary opinions to the acceptance of all opinions. As such, it is morally wrong to claim that there might be only one possible truth.⁸ The new approach changes the meaning of tolerance from an attitude of permitting the articulation of beliefs that we may not necessarily agree with, to asserting that all beliefs and claims are equally valid. ‘Thus we slide from the old tolerance to the new’⁹ and, as result of such remarkable transformation, D A Carson states:

Intolerance is no longer a refusal to allow contrary opinions to say their piece in public, but must be understood to be any questioning or contradicting the view that all opinions are equal in value, that all worldviews have equal worth, that all stances are equally valid. To question such postmodern axioms is by definition intolerant. For such questioning there is no tolerance whatsoever, for it is classed as intolerance and must therefore be condemned. It has become the supreme vice.¹⁰

The ‘new tolerance’ appears to indicate that all values and beliefs are positions worthy of an equal respect. One may ask if this would apply for Nazism, Stalinism, cannibalism, etc. Whereas the ‘old tolerance’ declared objective standards of truth, the ‘new tolerance’ argues from a morally relativist perspective whereby no values and beliefs can be challenged. Thus the new meaning of ‘tolerance’ implies a psychological

⁸ Carson, above n 1, 11.

⁹ Ibid 3–4.

¹⁰ Ibid 12.

attitude that conveys not only a sense of identity or empathy, but also the tacit support or consent with almost every existing value and belief.¹¹ Indeed, desperate straits are no longer required for anyone to claim the emotional status of being a victim of ‘intolerance’, because all that is required is often ‘the vaguest notion of emotional distaste at what another has said, done, proposed, or presented’.¹²

In this sense, the old link between tolerance and judgment has been lost due to our cultural obsession with being non-judgemental.¹³ When the meaning of tolerance can be distorted to such an extent that it now signifies the impossibility of making judgement, such ‘tolerance’ has ceased to be a virtue to become, rather, ‘the superficial signifier of acceptance of affirmation of anyone and everyone’.¹⁴ Of course, real tolerance would demand an attitude of critical reflection and personal restraint. That being so, explains Frank Furedi quite correctly:

The most troubling consequence of the rhetorical transformation of this term has been its disassociation from discrimination and judgement. When tolerance acquires the status of a default response connoting approval, people are protected from troubling themselves with the challenge of engaging with moral dilemmas.¹⁵

III THE IRRELEVANCE OF TRUTH

Three Australian states have introduced legislation aiming to support ‘religious tolerance’: Queensland,¹⁶ Tasmania,¹⁷ and Victoria. These

¹¹ Frank Furedi, ‘On Tolerance’ (2012) 28 *Policy* 30, 32.

¹² Ibid 31.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid 32.

¹⁶ Queensland has passed legislation introducing religion vilification laws in 2001. This Act is called the *Anti-Discrimination Amendment Act 2001* (Qld). Similar to Victoria’s law, Queensland outlines that a person must not publically act in a way

laws are sufficiently similar so as to merit the discussion of one to encompass all. As such, the 2001 Victorian RRTA will be taken as representative.

The Victorian RRTA applies to religious beliefs the same formulations often applied to racial issues. Of course, religion, unlike race, is not an immutable genetic characteristic. One should expect the laws of democratic societies to be much less prepared to protect criticism based on voluntary life choices, compared to unchangeable attributes of an individual's birth.¹⁸ Of course, if people cannot choose the colour of their skin, religion is, to some degree at least, a matter of personal choice. In contrast to racial issues where one finds no ultimate questions of 'true' or 'false', religion involves ultimate claims to truth and error that are not mirrored in racial discourse.¹⁹

To determine who might have committed 'religious vilification', the Victorian RRTA states: 'It is irrelevant whether or not the person who has made an assumption about the race or religious belief or activity of another person or class of persons, was incorrect at the time that the

of which would 'incite hatred towards, serious contempt for, or severe ridicule of a person or persons on the basis of their religion' (*Anti-Discrimination Amendment Act 2001* (Qld) s 124A(1)). The provision also provides the circumstances in which such an act could be legal: the act must be public, done reasonably and in good faith, for academic, artistic, scientific or research purposes; a publication of material that would be subject to the defence of absolute privilege in defamation case; or the publication of a fair report of a public act. Queensland also criminalises serious religious vilification. The section dealing with serious religious vilification is comparable to the Victorian section.

¹⁷ *Anti-Discrimination Act 1998* (Tas) s 19 outlines that one must not publically act in a way that would incite 'hatred towards, serious contempt for, or severe ridicule of a person or persons on the basis of their religious beliefs or affiliations'.

¹⁸ Rex Tauati Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *University of Queensland Law Journal* 293, 301.

¹⁹ Ivan Hare, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' (2006) *Public Law* 521, 531.

contravention is alleged to have taken place’.²⁰ Once a complaint is filed, those charged under the legislation must prove that they have not committed any such crime, or why they may qualify for any exemptions under the legislation.²¹ Naturally, this may cause a chilling effect on people who certainly must think twice before making any comment, because of ‘fear of litigation and its risk of financial ruin, jail, collegial ostracism, or embarrassment’.²²

The motivation causing ‘religious vilification’ is irrelevant for the purposes of the legislation.²³ Indeed, the Victorian RRTA informs that it is irrelevant whether the statement leading to ‘vilification’ is true. In other words, a person may be found guilty of vilification ‘by conduct which has the effect of inciting religious hatred even where the inciter had no intention to do so’.²⁴ Such is the situation that unless the person falls within the exceptions of ‘good faith,’ art, academic, religion, science, or public interest, he or she is restricted in the manner in which they may express themselves. This creates an elitist distinction by which the more ‘eloquent’ forms of expression are protected, whilst all the others are restricted.²⁵ Such elitist exemption supports the conception of two-tiered speech by which only the so-called disinterested ‘experts’ or more ‘qualified’ individuals are able to pursue ideas freely, whereas the

²⁰ *Racial and Religious Tolerance Act 2001* (Vic) s 9(1) states: ‘In determining whether a person has contravened section 7 or 8, the person’s motive in engaging in any conduct is irrelevant.’

²¹ There is no contravention if the person is able to establish that the act was, in the circumstances, reasonable and in good faith for the purpose of genuine academic, artistic, religious or scientific interest: *Racial and Religious Tolerance Act 2001* (Vic) s 11. If the accused establishes that they reasonably believed that the conduct would be seen or heard only by them, they will not be held to have contravened s 8.

²² Joel Harrison, ‘Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression’ (2006) 12 *Auckland University Law Review* 71, 79.

²³ *Racial and Religious Tolerance Act 2001* (Vic) ss 9(1), 10.

²⁴ Ahdar, above n 18, 301.

²⁵ Harrison, above n 22, 88.

‘irrational masses’ are restrained. Cardinal Pell criticises this strange anomaly:

Citizens rightly resent any attempt to limit their free speech more than the free speech of their ‘betters’. It is quite unfair that the deliberate conduct of the artist or the politician is exempted but the clumsy contribution of the less educated is made criminal. If any serious movement for racial and religious persecution were to gain momentum, then no doubt it would have been led and nourished by certain misguided politicians, academics and artists.²⁶

The Victorian RRTA states that the truth may not be used as a legal defence against charges of religious vilification.²⁷ Why would this so be? After all, the truth has always amounted to a fundamental element of defence in defamation cases, and so it should. The answer seems to lie in the postmodern underpinnings of religious tolerance laws. According to postmodern theory, ‘truth’ is socially constructed and so it is possible to conclude that one is ‘morally wrong’ just for criticising someone else’s beliefs, whatever such beliefs might be. Rather, it is the criticism itself that deserves criticism, because if one agrees with the postmodern premise that truth is always relative, then it is not difficult to assume that it is indeed quite ‘intolerant’ to criticise someone’s values and beliefs. In sum, if truth is relative to each individual and social context then, according to postmodernist literary theorist Stanley Fish, there should be ‘no such thing as free speech’ which validates the criticism of another person’s values and beliefs.²⁸ Of course, this might explain why in anti-

²⁶ *The Age*, 16 March 2001, quoted in Robert Forsyth, ‘Dangerous Protections: How Some Ways of Protecting the Freedom of Religion May Actually Diminish Religious Freedom’, (Speech delivered at the Third Action Lecture on Religion and Freedom, Centre for Independent Studies, 24 September 2001) 9.

²⁷ Berg, above n 2, 155.

²⁸ Postmodernist Stanley Fish comments:

discrimination laws the truth of a statement cannot be relied as a defence against charges of vilification. These laws are clearly sceptical of objective truth, religious or otherwise. This may also mean that these laws are not really taking religious statements seriously.²⁹ As law professor Carl Esbeck explains,

one who has never disagreed with others about religion is not ... commendably tolerant, but is treating religious difference as trivial, as if religious beliefs do not matter. That is just a soft form of religious bigotry.³⁰

Naturally, atheists often would think that religion does not ultimately matter. Curiously, then, all the major postmodern philosophers have been Atheists: Foucault, Derrida,³¹ Lyotard, Bataille, Barthes, Baudrillard,

When one speaks to another person, it is usually for an instrumental purpose: you are trying to get someone to do something, you are trying to urge an idea and, down the road, a course of action. There are reasons for which speech exists and it is in that sense that I say that there is no such thing as 'free speech', that is, speech that has its rationale nothing more than its own production:

Stanley Fish, *There's No Such Thing as Free Speech* (Oxford University Press, 1994) 104.

²⁹ Charles Rice argues on the absurdity of postmodern scepticism:

One who says we can never be certain of anything contradicts himself because he is certain of that proposition. If he says instead that he is not sure he can be sure of anything, he admits at least that he is sure he is not sure. Or some will say that all propositions are meaningless unless they can be empirically verified. But that statement itself cannot be empirically verified:

Charles Rice, *50 Questions on the Natural Law: What it is and Why We Need It* (Ignatius Press, 1999) 132.

³⁰ Carl Esbeck, 'The Application of RFRA to Override Employment Nondiscrimination Clauses Embedded in Federal Social Services Programs' (2008) 9(2) *Engage* 1, 9.

³¹ Yet at times Derrida himself was more cryptic about his Atheism. Speaking before a convention of the American Academy of Religion in 2002, Derrida commented: 'I rightly pass for an atheist'. However, when asked why he would not say more plainly 'I am an atheist', he replied, 'Maybe I'm not an atheist'. How can Derrida claim to be and not be an atheist? Both the existence and nonexistence of God requires a universal statement about reality, but Derrida is unwilling to make such an absolute claim. In this regard Derrida's theology is consistent with his

Macherey, Deleuze, Guattari and Lacan³². Alister McGrath speaks of the intimate relationship between Postmodernism and atheism:

Many Postmodern writers are, after all, atheist (at least in the sense of not actively believing in God). The very idea of deconstruction seems to suggest that the idea of God ought to be eliminated from Western culture as a power play on the part of churches and others with vested interests in its survival.³³

Postmodern philosophy states that what one takes for religious truth is no more than a Christian perspective, a Jewish perspective, a Muslim perspective, a Hindu perspective, and so forth. Each of these religious ‘perspectives’ are equally valid so that any claim to ‘truth’ should be dismissed as naïve at best, and deceptive at worse, in such case as an attempt to ‘impose’ one’s religious perspective upon others. Such premise which reduces religion to a private preference has been filtered down from academy to our ‘un-enlightened’ legislators, many of whom having embraced the postmodern premise that we must tolerate all

Postmodern inclination for ambiguity. Likewise, Richard Rorty at one time admitted he was an atheist, but in a subsequent work, *The Future of Religion*, he says he now agrees with Gianni Vattimo that ‘atheism (objective evidence for the nonexistence of God) is just as untenable as theism (objective evidence for the existence of God)’. Thus, Rorty insists that atheism, too, must be abandoned in favour of something he labels ‘anti-clericalism’. Ecclesiastical institutions are dangerous, but not necessarily the local congregation of believers. ‘Religion’, he says, ‘is unobjectionable as long as it privatized’: David Noebel, *Understanding the Times: The Collision of Today’s Competing Worldviews* (Summit Press, 2nd ed, 2006) 80.

³² ‘Postmodernists agree with Nietzsche that “God” – which is to say, the supreme being of classical theism – has become unbelievable, as have the autonomous self and the meaning of history’: Kevin Vanhoozer, *Postmodern Theology* (Cambridge University Press, 2005) 12. David Noebel comments ‘a sympathetic critic defined Postmodernism as Marxism-lite dressed in a French tuxedo, sippin’ French wine in a French café on the campus of the College International de Philosophie. A less sympathetic critic referred to Postmodernism as linguistic sophistry seeking to save Marxism’s irrelevant posterior’: David Noebel, *Understanding the Times: The Collision of Today’s Competing Worldviews* (Summit Press, 2nd ed, 2006) 78.

³³ Alister McGrath, *The Twilight of Atheism* (Doubleday, 2004) 227.

religions because no one religion can be true. These legislators have therefore accepted the denial of religious truth, meaning that they perceive all religious claims as no more than personal *preferences*, rather than universal values or standards of truth.

IV MARXIST ROOTS OF POSTMODERN PHILOSOPHY

Although it is not easy to define the term postmodernism, one may loosely define it as a label for a broad range of theoretical challenges to the objectivity of truth and knowledge. In our Western philosophical tradition, the idea of truth is related to the relationship between the real world and statements corresponding to the real world. Postmodernists, however, argue that there is no such a thing as objective truth. For them, everything we know is subjective and so it is subject to particular contexts and surroundings. Moreover, Postmodernists also say that any claim to objective truth may actually legitimise instances of oppression and inequality, particularly against women and minority groups.

Although Marxism is a form of dialectical logic, and postmodern theory may be defined as reaction to all forms of dialectic, mainstream postmodernism emerged from a certain Marxist tradition of anti-Western philosophy. Marx himself was a moral relativist. He believed that human rights are not inalienable or universal, but conditional and socially determined. Postmodernists may not accept the Marxian dogma of dialectical logic, but postmodernism was birthed as a 'wayward stepchild of Marxism, and in a sense a generation's realisation that it is

orphaned'.³⁴ Thus, Glen Ward comments that the vast majority of mainstream postmodernists have emerged from the Marxist tradition.³⁵

The Marxist link with postmodernism is particularly evident with respect to French Postmodernists. They invariably emerged from the Marxist tradition. For instance, Pierre Macherey has been described as 'a Marxist critic ... concerned with how texts act to reproduce the values of capitalism'.³⁶ His postmodern theory rests on a 'loosely Marxist framework' that aspires to 'bring Marx up to date'.³⁷

Similarly, Michel Foucault was a member of both the Maoist *Gauche Proletarienne* and the French Communist Party, but left the latter once he discovered the Marxist instance towards homosexuality.³⁸ In spite of his well-known aversion to some aspects of Marxist theory, Foucault did not abandon Marxist thought altogether. On the contrary, Foucault remained under 'the profound influence of Marxist analyses of power relations and the role of economic inequality in determining social structures'.³⁹ Mark Lilla notes that Foucault felt a deep need to develop something 'more radical' than orthodox Marxism, so he turned to 'Nietzsche and Heidegger, but also avant-garde writers and Surrealists whose hostility to bourgeois life took a more aesthetic and psychological forms'.⁴⁰

Inspired by these particular philosophies, Foucault thought that Westerners were both a product *and* an agent of a diabolical capitalist

³⁴ Lawrence Cahoon (ed), *From Modernism to Postmodernism: An Anthology* (Blackwell Publishers, 2nd ed, 2003) 4–5.

³⁵ Glenn Ward, *Teaching Yourself Postmodernism* (McGraw-Hill, 2003) 78.

³⁶ Ibid 97.

³⁷ Ibid 78.

³⁸ Mark Lilla, *The Reckless Mind: Intellectuals in Politics* (New York Review of Books 2001) 150.

³⁹ Robert Eaglestone (ed), *Routledge Critical Things* (Routledge, 2003) 15.

⁴⁰ Lilla, above n 38, 142.

system that is inherently oppressive and exploitative. Indeed, Foucault embraced a view of civil society that condemned Western citizens as irretrievably evil and corrupt, exploitative and oppressive, and, accordingly, a legitimate target of terrorism. His deep-seated hatred of Western democracies led him to strongly support both Maoism in communist China and the 1978 Islamic Revolution in Iran. As the protests against the Shah of Iran reached their zenith, Foucault visited Iran to lend his full support to the theocratic leader of the Iranian revolution Ayatollah Khomeini. After meeting with Khomeini as a special correspondent for *Corriere della Sera* and *Le Nouvel Observateur*,⁴¹ Foucault wrote numerous articles praising religious extremism and interpreting the Iranian Islamic Revolution as a turning point in world history which, according to him, signalled the end of Western hegemony that would ‘set the entire region afire’ and forever change the ‘global strategic equilibrium’. As Bendle points out:

Foucault’s assessment became rapturous, describing the revolution as a mystical manifestation of ‘an absolute collective will’ that has ‘erupted into history’, ‘like God, like the soul’. He endorsed the Islamist claim that democratic political systems are inherently corrupt, and that Iranian theocracy, with all its brutality, expressed the ‘collective will’ of the Iranian people in a pure and uncorrupted fashion that Western democracy could never match. This is a view of democracy shared by many [postmodern] academics.

Throughout his life Foucault was also fascinated with suicide and sadomasochistic sexuality. In Iran he was attracted to the ideal of revolutionary martyrdom and embraced its ‘discourse of death’. He was mesmerised by the marching columns of black-clad men,

⁴¹ For a more comprehensive analysis, see Janet Afary and Kevin Anderson (eds), *Foucault and the Iranian Revolution: Gender and the Seductions of Islamism* (University of Chicago Press, 2005).

rhythmically flagellating themselves in prolonged rituals of mass penitence, celebrating a 'political spirituality' that embraced death and would, he proclaimed with delight, overwhelm a decadent and materialist West.⁴²

Although a totalitarian theocracy, Foucault interpreted radical Islam as an essential factor of upheaval and not of passivity at the heart of Western democracies. According to Pascal Bruckner, Foucault and like-minded thinkers have a visceral hatred of both liberal democracy and free-market capitalism. Hence, they would be willing to promote a tactical alliance with radical Islamists against the more universalistic values of Western societies, in the hope that radical Islamism might become 'the spearhead of a new insurrection in the name of the oppressed'.⁴³ In the postmodern mind of such left-wing radicals, says Bruckner,

the hatred of the market is worth a few compromises regarding fundamental rights, and especially of the equality between men and women. The [Islamists], disguised as friends of tolerance, are dissimulating and using the Left to advance their interests under the mask of a progressive rhetoric. There is a twofold deception here: one side supports the Islamic veil or polygamy in the name of the struggle against racism and neo-colonialism. The other side pretends to be attacking globalisation in order to impose its version of religious faith. Two currents of thought form temporary alliances against a common enemy: it is not hard to predict which one will crush the other once its objectives have been achieved. The Leftist intransigence that refuses any compromise with bourgeois society and cannot castigate too severely 'little white men' actively collaborates with the most reactionary elements in the Muslim religion. But if

⁴² Mervyn Bendle, '9/11 and the Intelligentsia, Ten Years On' (2011) 55 *Quadrant* 46, 47–8.

⁴³ Pascal Bruckner, *The Tyranny of Guilt: An Essay on Western Masochism* (Princeton University Press, 2012) 25.

the far Left courts this totalitarian theocracy so assiduously, it is perhaps less a matter of opportunism than of a real affinity. The far Left has never gotten over communism and once again demonstrates that its true passion is not freedom but slavery in the name of 'justice'.⁴⁴

V SHARIA LAW BY STEALTH?

One common argument against vilification laws is that legislation of this kind can be exploited by some people in order to secure immunity from public scrutiny of their beliefs. This concern may be proven correct when one considers what took place in *Islamic Council of Victoria v Catch the Fire Ministries*⁴⁵ in Victoria, an episode which illustrates the full potential abuse of these laws by people who are reluctant to endure any criticism of their religious beliefs.⁴⁶ Of course, this perceived desire to

⁴⁴ Ibid 25–6.

⁴⁵ [2004] VCAT 2510.

⁴⁶ *Islamic Council of Victoria v Catch the Fire Ministries* [2004] VCAT 2510. The outcome of this controversial case bears out concerns that tolerance laws might be used to silence any strong criticism based on religious beliefs. In June 2002 three Victorian Muslims attended a Christian seminar on the topic of Islam. These attendees did not disclose their identity and were encouraged to attend this meeting by a member of the Executive of the Islamic Council of Victoria (ICV) and employed by the Victorian Equal Opportunity Commission, the Act's primary administrative body. Pursuant to a deliberate plan, each one sat in at different times in order to ensure that the complete event was covered. The case had clear elements of a 'set-up', including a pre-arrangement by the Islamic Council of Victoria to send anonymous informants to a seminar held privately, followed by the coordinated lodgement of a formal complaint with the *Victorian Civil and Administrative Tribunal* (VCAT). In December 2004, pastors Daniel Scot and Danny Nalliah were found guilty of inciting religious hatred against Victorian Muslims. The evidence of vilification, however, was not based on whether the attendees felt hatred or contempt toward Muslims, but whether those Muslim attendees, who did not reveal their faith and were technically not invited, felt offended by the comments made during the course of the seminar. These pastors were condemned to post an apology on their website and in four leading newspapers to the Muslim community, at the cost of \$90,000. The advertisements would reach 2.5 million rather than the 250 individuals who attended the seminar. Of course, the respondents appealed the decision and two years later the Court of Appeal overruled the decision on the grounds of numerous errors of fact by the judge who decided on the matter. There was no re-hearing and the case was

shelter any religious group from public scrutiny should be of great concern to every citizen, including those of no religious persuasion. After all, it is not really clear why free speech should be restricted by the inflated sensitivities of any religious group. And yet, anti-vilification laws appear to ultimately serve as a sort of Islamic blasphemy law by stealth; a suspicion that is deeply reinforced when one considers that the Victorian RRTA was enacted at the insistence of the influential Islamic Council of Victoria.

Ayaan Hirsi Ali has opined that Islam is a totalitarian religion and that many Muslims believe that blasphemers deserve punishment.⁴⁷ Whether this is true or not, the fact is that across the Islamic world accusations of insulting ‘the prophet’ are systematically used to send people to jail and to justify death threats, beatings and assassination.⁴⁸ According to Dr Michael Nazir-Ali, ‘there is unanimity among the [Islamic] lawyers that anyone who blasphemes against Muhammad is to be put to death, although *how* the execution is to be carried out varies from one person to another’.⁴⁹ Hence, in *The Price of Freedom Denied*, Dr Brian J Grim and Dr Roger Finke comment that in Muslim-majority countries ‘religious

closed through mediation, meaning that a case that lasted five years and costed several hundreds of thousands of dollars to the defendants, reached its final conclusion without a clear winning side. See Augusto Zimmermann, ‘Why the Victorian Vilification Legislation Undermines Democratic Freedoms’ (2005) 1 *Original Law Review* 52, 53–5.

⁴⁷ Ayaan Hirsi Ali, ‘The Painful Last Gasp of Islamist Hate’, *The Weekend Australian* (Sydney), 22–23 September 2012, 16.

⁴⁸ Paul Marshall, ‘Blasphemy and Free Speech’ (2012) 41 *Imprimis* 1, 2. In these Islamic countries even Muslims themselves may be persecuted if they do not endorse the official interpretation of Islam: ‘Sunni, Shia and Sufi Muslims may be persecuted for differing from the version of Islam promulgated by locally hegemonic religious authorities. Saudi Arabia represses Sunnis and Suffis. In Egypt, Shia leaders have been imprisoned and tortured.’

⁴⁹ Michael Nazir-Ali, ‘Islamic Law, Fundamental Freedoms, and Social Cohesion: Retrospect and Prospect’ in Rex Ahdar and Nicholas Aroney (eds), *Shari’a in the West* (Oxford University Press, 2010) 79.

persecution is reported in 100 per cent of cases'.⁵⁰ As they point out, '[r]eligious persecution is not only more prevalent in Muslim-majority countries, but it also generally occurs at a more severe level'.⁵¹

Recent scholarship on the subject shows that the execution of apostates is sanctioned by all the five dominant streams of Islamic jurisprudence, namely the *Hanafi* (Sunni), *Shafi'i* (Sunni), *Maliki* (Sunni), *Hanbali* (Sunni) and *Ja'fari* (Shi'a) legal codes, under which the State may impose the death penalty as a mandatory punishment ('*hudud*') against adult male converts from Islam ('*irtidad*').⁵² For adult women, death is proscribed by three of the five Islamic schools. The exceptions are *Hanafi* (which allows for permanent imprisonment until the woman recants), and *Ja'fari* (which allows imprisonment and beating with rods until death or recantation).⁵³ With the exception of *Ja'fari*, the death penalty is applied to child apostates under Sharia law, with the penalty typically delayed until attainment of maturity. Even more unsettling is the reality that, under three of the five Islamic legal codes, apostasy need not be articulated verbally to incur mandatory punishment; even inward apostasy is punishable.⁵⁴

⁵⁰ Brian Grim and Roger Finke, *The Prince of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (Cambridge University Press, 2011) 21.

⁵¹ Ibid 169.

⁵² Patrick Sookhdeo, *Faith, Power and Territory: A Handbook of British Islam* (Isaac Publishing, 2008) 24.

⁵³ Ibid.

⁵⁴ Ibid. In countries subject to Islamic Sharia Law: Believers who reject or insult Islam have no rights. Apostasy is punishable by death. In Iran, Saudi Arabia and Sudan, death is the penalty for those who convert from Islam to Christianity. In Pakistan, the blasphemy law prescribes death for anyone who, even accidentally, defiles the name of Mohammed. In a religion which, unlike Christianity, has no idea of a god who himself suffers humiliation, all insult must be avenged if the honour of god is to be upheld. Under Islam, Christians and Jews, born into their religion, have slightly more

Naturally, radical Islamists living in a Western democracy will have to discover different mechanisms to punish those who might have ‘offended’ their religion. They will find in anti-vilification legislation such as the Victorian RRTA a suitable mechanism to strike fear and intimidation on the ‘enemies’ of their faith. Indeed, one of the greatest ironies of anti-vilification laws is that their chief beneficiaries are a small but vocal group of religious extremists, although it is not clear why such people should merit any statutory protection from ‘hate speech’.⁵⁵ Surely

rights than apostates. They are ‘dhimmis’, second-class citizens who must pay the ‘jizya’, a sort of poll tax, because of their beliefs. Their life is hard. In Saudi Arabia, they cannot worship in public at all, or be ministered to by clergy even in private. In Egypt, no Christian university is permitted. In Iran, Christians cannot say their liturgy in the national language. In almost all Muslim countries, they are there on sufferance and, increasingly, because of radical Islamism, not even on that:

Charles Moore, ‘Is It only Mr Bean who Resists this New Religious Intolerance?’, *Daily Telegraph* (online) 11 December 2004 <<http://www.telegraph.co.uk/comment/columnists/charlesmoore/3613495/Is-it-only-Mr-Bean-who-resists-this-new-religious-intolerance.html>>.

⁵⁵

Bruckner writes on the need to criticise Islam:

The process of questioning remains to be carried out by Islam, which is convinced that it is the last revealed religion and hence the only authentic one, with its book directly dictated by God to his Prophet. It considers itself not the heir of earlier faiths but rather a successor that invalidates them forever. The day when its highest authorities recognize the conquering, aggressive nature of their faith, when they ask to be pardoned for the holy wars waged in the name of the Qu’ran and for infamies committed against infidels, apostates, unbelievers, and women, when they apologise for the terrorist attacks that profane the name of God – that will be a day of progress and will help dissipate the suspicion that many people legitimately harbour regarding this sacrificial monotheism. Criticising Islam, far from being reactionary, constitutes on the contrary the only progressive attitude at a time when millions of Muslims, reformers or liberals, aspire to practice their religion in peace without being subjected to the dictates of bearded doctrinaires. Banning barbarous customs such as lapidation, repudiation, polygamy, and clitoridectomy, subjecting the Qu’ran to hermeneutic reason, doing away with objectionable versions about Jews, Christians, and gains and appeals for the murder of apostates and infidels, daring to resume the Enlightenment movement that arose among Muslim elites at the end of the nineteenth century in the Middle East – that is the immense political, philosophical, and theological

some of their religious beliefs are rather repulsive and so they deserve our criticism.⁵⁶ Yet, because of legislation of this nature even the slightest indignation about their radical beliefs and statements may incur in a person being dragged into the secular court and charged with ‘religious vilification’.

There is no good reason why the tenets of any religion should be accorded special protection from spoken hostility.⁵⁷ Laws such as the Victorian RRTA allow certain religious groups to become a protected class of citizens beyond any criticism, precisely at the moment when Western democracies need to examine the implications of having admitted into their societies people with greater allegiance to their religious law than to the laws of the societies in which they have settled.

construction project that is opening up ... But with a suicidal blindness, our continent [ie Europe] kneels down before Allah’s madmen and gags and ignores the free-thinkers:

Bruckner, above n 43, 46–7.

⁵⁶ For example, in January 2009, a Muslim cleric from Melbourne instructed his married male followers to hit, and force sex upon their disobedient wives: ‘It’s OK to Hit Your Wife, says Melbourne Cleric Samir Abu Hamza’, *The Australian* (Sydney), 22 January 2009. Statements such as this clearly deserve our repulsion and indignation.

⁵⁷ As Steve Edwards points out:

This legal hypocrisy is compounded by that of the moral kind when one considers that religions and religious ‘holy texts’ themselves partake in some of the vilest hate speech towards nonbelievers, without providing a single morally defensible reason for their incitement. For instance, Sura 22:19-22 of the Koran claims, without providing any evidence, that non-Muslims will have ‘boiling water’ poured over their heads, melting their skin and innards, while being ‘punished’ and terrorised with ‘hooked rods of iron’. This horrific fate is not intended to be temporary: ‘Whenever, in their anguish, they would go forth from thence they are driven back therein and (it is said to them): *Taste the doom of burning*’. Sura 4:56 warns that ‘those who disbelieve our revelations’ shall suffer being ‘roasted’ alive. The punishment does not end there, for ‘as often as their skins are consumed, we shall exchange them for fresh skins that they may taste the torment’. The passage concludes: ‘Allah is ever Mighty, Wise’.

Steve Edwards, ‘Do We Really Need Religious Vilification Laws?’ (2005) 21 *Policy* 30, 33.

Of course, while the vast majority of Muslims are totally peaceful and law-abiding citizens, following a more moderate, non-literalist version of their religion, the potential for a more radicalised version of Islamism to foster the growth of fundamentalist variants should be of great concern to the every citizen. To quote Dr Patrick Sookhdeo, an expert on the growth of such religion as a cultural force within the British Isles:

Islam is unique among major world religions in its emphasis on state structures and governance, which are considered to be of as much importance as private belief and morality (if not more). Much of Islamic teaching is concerned with how to rule and organise society within an Islamic state and how that state should relate to other states.⁵⁸

The future of Australia's democracy and religious harmony depends on the cultivation of a more moderate, more acculturated forms of religious expression. Of course, attacking a place of worship should not be confused with a free examination of religious doctrine. For example, to speak of Islamophobia is often to avoid reasonable debate and maintain the crudest confusion between a specific belief system and the faithful who adhere to it. As the citizens of a liberal democracy we should have every right to reject and criticise any religious belief, and even to consider it mendacious, retrograde and mindless. Or must we re-establish the crime of blasphemy as the Organization of the Islamic Conference demanded in 2006, when it introduced at the United Nations a notorious motion that would prohibit defaming religion and imposing strict limits on freedom of expression in the domain of religion?

We are seeing therefore the fabrication of a new crime of opinion analogous to the crime that used to be committed by 'enemies of the

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Sookhdeo, above n 52, 2.

people' in the Soviet Union. This is why anti-vilification laws are so dangerously problematic and counter-productive. These laws may allow some individuals to demarcate the things that others are allowed to say. True religious freedom, however, implies the subjection of religious beliefs to competing perspectives as well as critical analysis and scrutiny. This must be done in the hope that the adherents of every religious belief understand that the practice of their faith within Australia implies a willingness to withstand public scrutiny of the kind long endured by the different Christian denominations. Because of the political nature of Islam, of course, such comprehension might be all the more important, because the subjugation of the political process by an extreme form of Islamic fundamentalism would be profoundly detrimental to our basic rights and freedoms.

VI TOLERANCE IN 'MULTICULTURAL DEMOCRACY'

The Victorian RRTA takes no account of whether vilification is committed in that state; or, even, if anybody from that state has seen or heard the vilification.⁵⁹ Such law is not even concerned that violence has been incited by argument, but rather that people may be convinced or, alternatively, *feel* offended by the argument. In other words, for words to be considered religious vilification there is no actual need to demonstrate that anybody has been incited into action. Simply the expression of an opinion is sufficient to be religious vilification.

This fact appears to underline the importance of the debates prior to the draft of the United Nations' declarations and covenants whether there should be, when it comes to protection of freedom of expression, an

⁵⁹ Greg Taylor, 'Casting the Net Too Widely: Racial Hatred on the Internet' (2001) 25 *Criminal Law Journal* 260, 268.

exception only for ‘incitement for violent’ or, more broadly, an exception for ‘incitement to hatred’ as the Soviet Union and its totalitarian bloc of communist nations maintained. For while the idea of inciting to violence links the expression of thoughts to actions, the latter formulation links the expression of thoughts to no more than just thoughts. As Chris Berg points out, the drafting history of the protection of the freedom of expression in these declarations,

does not leave any doubt that the dominant force behind the attempt to adopt an obligation to resist freedom of speech under human rights law was the Soviet Union... When it came to draft the binding International Covenant on Civil and Political Rights, this was not the ascendant view. The Soviet Union proposed extending those restraints to ‘incitement to hatred’ ... Suddenly, states were responsible for the elimination of intolerance and discrimination.⁶⁰

The Australian drive to enact the principles of international discrimination law took place during the Labor government of Prime-Minister Gough Whitlam, who felt it could introduce ‘multiculturalism’ by adopting the 1966 United Nations’ *Covenant on Civil and Political Rights*.⁶¹ The covenant was then embraced by Immigration Minister Al Grassby in his first major statement on multiculturalism. Hence, when Whitlam introduced the *Racial Discrimination Act 1975* (Cth), which adopted the principles of the convention, ‘he made explicit reference to its harmony with the government’s multiculturalism policy’.⁶² This information is relevant because, before the RRTA was passed by the Victorian Parliament, then state Labor Premier Steve Bracks, in a message printed in a Discussion Paper, commented: ‘Victoria’s most

⁶⁰ Berg, above n 2, 176.

⁶¹ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁶² Berg, above n 2, 177.

multicultural state and the diversity of its people is a great asset. Respect for this cultural diversity is vitally important to our community'.⁶³ Hence the legislation's preamble communicates that the ultimate purpose of such legislation is to advance so-called 'multicultural democracy'.⁶⁴

An idea that started out in the late sixties and seventies, multiculturalism initially had the reasonable goal of including minorities in Western societies. Nowadays, however, it is hard to talk so candidly about such an idea, since multiculturalism has become not just the fair understanding of different cultures, but also a radical anti-Western ideological project that is opposed to 'Eurocentric concepts of democratic principles, culture, and identity'.⁶⁵ 'We cannot judge other cultures but we must condemn our own.'⁶⁶ Hence, instead of promoting the globalisation of liberal democracy and human rights, radical multiculturalists regard these values as ethnocentric products of Western history. In their place they propose a form of cultural pluralism that, although preserving a certain gloss of tolerance and respect for all cultures, it stands as a form of moral relativism which refuses to admit that culture, at the extremes, may produce either a democratic society or social oppression, for example, against women and minority groups.⁶⁷ According to Roger Scruton,

⁶³ Jenny Stokes, *Religious Vilification Laws in Victoria – Background to the Law and Cases* (May 2005) Salt Shakers, <http://www.saltshakers.org.au/images/stories/attachments/252_300343_ARTICLES_ON_VILIFICATION.pdf>.

⁶⁴ See also *Racial and Religious Tolerance Act 2001* (Vic) s 4(1)(a).

⁶⁵ Samuel Huntington, *Who Are We? America's Great Debate* (The Free Press, 2004) 173.

⁶⁶ Keith Windschuttle, 'September 11 and the End of Ideology' in Imre Salusinszky and Gregory Melleuish (eds), *Blaming Ourselves: September 11 and the Agony of the Left* (Duffy & Snellgrove, 2002) 198.

⁶⁷ For a broad analysis of how culture shapes values such as democracy, economic development and human rights, see Lawrence Harrison and Samuel Huntington (eds), *Culture Matters: How Values Shape Human Progress* (Basic Books, 2000).

The official view in most Western countries is that we are multicultural societies, and that cultures should be allowed complete freedom to develop in our territory, regardless of whether they conform to the root standards of behaviour that prevail here. As a result, the 'multicultural' idea has become a form of apartheid. All criticism of minority cultures is censured out of public debate, and newcomers quickly conclude that it is possible to reside in a European state as an antagonist and still enjoy all the rights and privileges that are the reward of citizenship.⁶⁸

Contrary to what the former Premier of Victoria appears to believe, an authentic democracy has never required the state-controlled promotion of cultural diversity. As a matter of fact, the leading scholar on the subject of democracy, Emeritus Professor of Political Science Robert Dahl from Yale University, explains that democracy is far more likely to be achieved and developed in societies that are 'culturally fairly homogeneous' than in those with 'sharply differentiated sub-cultures'.⁶⁹ According to Dahl, 'cultural diversity' may actually represent a serious threat to the realisation of democracy, because this might result in the cultivation of 'intractable social conflicts' whereby democratic institutions cannot be maintained. The practical implications of the empirical fact are cogently explained by Professor Dahl:

Cultural conflicts can erupt into the political arena, and typically they do: over religion, language, and dress codes in schools, for example; ... or discriminatory practices by one group against another; or whether the government should support religion or religious institutions, and if so, which ones and in what ways; or practices by one group that another finds deeply offensive and wishes to prohibit, such as ... cow slaughter, or 'indecent' dress, or

⁶⁸ Roger Scruton, *The West and the Rest: Globalization and the Terrorist Threat* (Continuum, 2002) 63.

⁶⁹ Robert Dahl, *On Democracy* (Yale University Press, 1998) 150–1.

how and whether territorial and political boundaries should be adapted to fit group desires and demands. And so on. And on... Issues like these pose a special problem for democracy. Adherents of a particular culture often view their political demands as matters of principle, deep religious or quasi-religious conviction, cultural preservation, or group survival. As a consequence, they consider their demands too crucial to allow for compromise. They are nonnegotiable. Yet under a peaceful democratic process, settling political conflicts generally requires negotiation, conciliation, compromise.⁷⁰

Because certain cultural allegiances may be regarded by the members of any particular cultural group as being ‘non-negotiable’, no democratic society should be radically multicultural. Rather, a truly democratic society ‘depends for its successful renewal across the generations on an undergirding culture that is held in common’.⁷¹ Democracy requires a ‘common culture’ that ideally encompasses common values and is based not only on ‘good’ legal-institutional framework but also on the widespread acceptance of substantive norms and conventions of behaviour that typically characterise a society based on unconditional respect to the basic rights of the individual and the fundamental rules of constitutional law.⁷²

⁷⁰ Ibid 150.

⁷¹ John Gray, *Enlightenment's Wake* (Routledge Classics, 2007) 36.

⁷² Bruckner offers this insightful, though rather polemical, criticism of multiculturalism:

[U]nder the cover of respecting cultural or religious differences (the basic credo of multiculturalism), individuals are locked into an ethnic or racial definition, cast back into the trap from which we were trying to free them. Their good progressive friends set blacks and Arabs, forever prisoners of their history, back into the context of their former domination and subject them to ethnic chauvinism. As during the colonial era, they are put under house arrest in their skins, in their origins. By a perverse dialectic, the prejudices that were to be eradicated are reinforced: we can no longer see others as equals but

In this sense, John Stuart Mill argued that democratic government is as much a socio-political achievement as it is a matter of legal-institutional design. Democracy, Mill asserted, rests not so much on institutional framework but on values that are transmitted to citizens from generation to generation. Unfortunately, Mill also observed, some societies are not culturally prepared to accept all the moral implications of living under a democratic rule of law. He believed that the realisation of democratic government is actually ‘determined by social circumstances’.⁷³ These circumstances Mill believed to be relatively malleable so they can be changed for better or for worse. Although Mill considered that people could be taught to behave democratically, he nonetheless kept on insisting that some patterns of cultural behaviour are absolutely essential in determining the proper realisation of democracy and the rule of law. As Mill pointed out:

The people for whom the form of government is intended must be willing to accept it; or at least not so unwilling as to oppose an insurmountable obstacle to its establishment ... A rude people ... may be unable to practice the forbearance which ... representative government demands: their passions may be too violent, or their personal pride too exacting, to forego private conflict, and leave to the laws the avenging of their real or supposed wrongs.⁷⁴

In the long run, values such as democracy and the rule of law depend on a firm element of public morality that incorporates a serious commitment to the protection of basic individual rights, as well as a commitment to principles and institutions of the rule of law. Samuel Huntington once

must see them as ... victims of perpetual oppression whose past ordeals interest us more than their present merits:

Bruckner, above n 43, 145.

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John Stuart Mill, *Considerations on Representative Government* (William Benton, 1952) 31.

⁷⁴

Ibid 29.

commented that if popular elections were held in most countries of the Middle East, chances are that such electoral process would bring radicals into power who, by appealing to their religious and/or ethnic loyalties, would be very inclined to deny a broad range of human rights to women and religious minorities.⁷⁵ Of course, Professor Huntington's prediction of the rise of radicalism in the Middle East if elections were held has actually been fulfilled. The recent fall of authoritarian regimes throughout the greater Middle East has fuelled growing persecution of minority communities.

The *Pew Research Center* has charted extensive government restrictions on non-Muslim religions in numerous 'democratic' countries of the Middle East, including Egypt, Afghanistan, Pakistan, Iraq, and the Palestinian territories.⁷⁶ In this context, because democracy may be

⁷⁵ Samuel Huntington, 'Democracy for the Long Haul' in Larry Diamond, Marc Plattner, Yun-han Chu and Hung-mao Tien (eds), *Consolidating the Third Wave Democracies* (John Hopkins University Press, 1997) 7.

⁷⁶ Richard Russell, 'The Crushing of Middle Eastern Christianity', *The National Interest* (online), 10 May 2013 <<http://nationalinterest.org/commentary/the-crushing-middle-eastern-christianity-8457>>. Before the uprisings in Egypt, for example, ten per cent of the population identified with Christianity. But with a Muslim majority, the democratic elections are building a new government that is Muslim-dominated and determined to install strict Islamic law that forbids all Christian activities. And yet, a survey by Pew Research Center has found that about 60 per cent of Egyptians actually want the country's laws to 'strictly' follow the teachings of the Koran: Bloomberg, 'Egyptians Back Sharia Law, End of Israel Treaty, Poll Shows', *Arabian Business.Com* (online), 26 April 2011, <<http://www.arabianbusiness.com/egyptians-back-sharia-law-end-of-israel-treaty-poll-shows-396178.html>>. As for a 'democratic' country such as Iraq, the local Christian community has been severely discriminated against by Iraq's Shia majority, largely in control of the elected government. Since the 2003 American and British military invasion ousted Saddam Hussein, the ongoing violence against the Christian community has led to a mass exodus of Christians. In the time of Hussein there were between 1.2 and 1.4 million Christians in the country. Today, after the American-led 'coalition of the willing' imposed 'democracy' on Iraq, it is estimated that fewer than 500 000 remain: Rupert Shortt, 'In the Middle East, the Arab Spring Has Given Way to a Christian Winter', *The Guardian* (online), 2 January 2013 <<http://www.guardian.co.uk/commentisfree/belief/2013/jan/02/middle-east-arab-spring-christian-winter>>.

‘impracticable’ and even ‘an undesirable ideal’, ‘society will quickly relapse into a state of arbitrary tyranny’.⁷⁷

Indeed, surveys carried out by *Freedom House* on the situation of democracy and human rights throughout the world indicate that the denial of the broadest range of human rights comes from either Muslim-majority or Marxist-communist countries: ‘These worse-rated countries represent a narrow range of systems of cultures.’⁷⁸ According to *Freedom House*, the worst violators of human rights are North Korea, Turkmenistan, Uzbekistan, Equatorial Guinea, Eritrea, Saudi Arabia, Syria, Somalia and Tibet (under Chinese jurisdiction). Because of this, it is possible that the majority ideologies in these countries are not completely democratic, and it is important to openly discuss the reasons for this.

In short, real democracy has very little or nothing to do with state-sponsored ‘multiculturalism’. Nor is democracy simply a matter of good constitutional design, because democracy can actually be achieved in a variety of legal-institutional ways. Indeed, democracy ultimately is the result of an ‘interconnected cluster of values’ that are shared by members of a particular society from generation to generation.⁷⁹ As it has been properly said, ‘[democratic] values come to us trailing their historical past; and when we attempt to cut all [cultural] links to that past we risk

⁷⁷ Friedrich Hayek, *Constitution of Liberty* (University of Chicago Press, 1960) 206.

⁷⁸ Arch Puddington, *Freedom in the World 2012: The Arab Uprisings and their Global Repercussions* (2012) Freedom House
<http://www.freedomhouse.org/sites/default/files/FIW%202012%20Booklet_0.pdf>

⁷⁹ Martin Krygier, ‘Rule of Law’ in Neil Smelser and Paul Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier, 2001) 134–4.

cutting the life lines on which those values essentially depend'.⁸⁰ Of course, this also implies that the realisation of democracy is as much a socio-cultural as it is a legal-institutional achievement, since democracy ultimately depends on the intrinsic values and traditions of a particular society.⁸¹

VII CONCLUSION

One of the alleged goals of religious tolerance laws is to advance 'multicultural democracy'. Although resting on 'scepticism of truth', so that universalistic claims about religion must be privatised as personal preferences, such laws may actually generate inter-religious strife by creating an environment of fear and intimidation on those who merely wish to express their opinions more openly. Not surprisingly, many citizens are now reluctant to join public conversation, seemingly to fear not only what other citizens might do to them but also what their own government might do. This leads to the self-censoring of ideas, ultimately making the secular government and its courts, according to Joel Harrison,

⁸⁰ Jeffrie Murphy, 'Constitutionalism, Moral Scepticism, and Religious Belief' in Alan Rosenbaum (ed) *Constitutionalism: The Philosophical Dimension* (Greenwood Press, 1988) 249.

⁸¹ Every year a non-governmental institution called *Freedom House* organises a survey on the situation of democracy and human rights throughout the world. The survey shows that the denial of the broadest range of human rights comes, mainly, from Marxist-communist and Muslim-majority nations. According to Freedom House, 'these worse-rated countries represent a narrow range of systems of cultures'. The worst violators of human rights are North Korea, Turkmenistan, Uzbekistan, Equatorial Guinea, Eritrea, Saudi Arabia, Syria, Somalia and Tibet (under Chinese jurisdiction). If so, it is quite fair to suggest that there must exist something about communism and Islam that is clearly not democratic and to openly discuss the reasons for this: Arch Puddington, *Freedom in the World 2012: The Arab Uprisings and their Global Repercussions* (2012) Freedom House <http://www.freedomhouse.org/sites/default/files/FIW%202012%20Booklet_0.pdf> 5.

complicit in a process of legal silencing undertaken by rival minority groups, engaging with them in debates of truth and falsehood, good and evil. The court decides essentially theological questions in the process of finding incitement to hatred against persons.⁸²

In a world where terrorism has become common, and where radicalised Muslims have expressed sympathy with terrorists, the ability of Western democracies to defend their own interests is weakened by laws that make citizens unprepared to criticise or give warnings about the nature of religious beliefs, however well-based these warnings might be. This is the singular tragedy of ‘multicultural societies’ that allow legislation underpinned by postmodern philosophy to reduce free speech on some of the most fundamental issues of public morality.

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Harrison, above n 18, 72.

ARTICLES

GOVERNMENT REGULATION: FROM INDEPENDENCE TO DEPENDENCY, PART ONE

STEVEN ALAN SAMSON^{*}

Abstract

What Robert Bellah calls 'expressive individualism' has led to unprecedented social legislation in America and expanded government employment since the 1960s, helping to produce a generous supply of public services, policy entrepreneurs, and clientele groups. The legal scholar Lawrence M Friedman notes that 'the right to be "oneself," to choose oneself, is placed in a special and privileged position.' As a consequence, 'achievement is defined in subjective, personal terms, rather than in objective, social terms.' When the claims of expressive individualism are considered in tandem with the increasing reach of the modern social service state, a case may be made for their mutual dependency.

Today, the regulatory operations of central governments impinge upon virtually all areas of life, leading to widespread efforts by interest groups to have their vision of the good life implemented through law and regulatory oversight. Much of the resulting fiscal, educational, and social intervention is largely invisible to the electorate but has led to greater dependency. It also led the economist George J Stigler to offer a theory of regulatory capture when he observed that clientele groups develop a mutually beneficial relationship with the agencies that regulate their activities. Indeed, when this becomes business as usual, few will call it corruption. Thus, when examining laws and public policies, it is always wise to ask: Cui bono? Who benefits? As the Watergate whistle-blower, Mark Felt, put it: 'Follow the money.'

This article is drawn from a series of eight introductory lectures and readings for a course on government regulation. Part I is a revision of the first four lectures.

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I THE STATE OF INDEPENDENCE: LIFE, LIBERTY, AND PROPERTY

The subject of this essay, government regulation, is contested terrain. It is a busy intersection in a bustling centre of commerce where law, economics, property rights, and ethics converge and often conflict. It is a place where interests and boundaries are often fluid and confused, where an honest surveyor or an impartial judge may be difficult to find, where any determination of what is at stake – costs and benefits, private as well as public – is part of what is in dispute. Our best efforts to orient ourselves, to get the lay of the land, are too easily derailed or side-tracked as a result. The loss of constitutional bearings is one of the consequences of failure.

Let us start where we should wish to end and then work our way to the beginning. Following the Great Depression and the Second World War Henry Hazlitt wrote a book entitled *Economics in One Lesson*. The lesson is simply this: ‘The art of economics consists in looking not merely at the immediate but at the longer effects of any act or policy; it consists in tracing the consequences of that policy not merely for one group but for all groups.’¹ While this may be the place we should wish to reach, the challenge is how to stay on the right path and recognise the landmarks along the way in order to reach what might be called equity: that is, justice for all. Yet we are also fallen creatures. We tend to show partiality – to ‘know in part,’ as the Apostle Paul puts it in 1 Cor 13:9 – and in the end may, out of envy or anger, not even wish what is good for all.

¹ Henry Hazlitt, *Economics in One Lesson* (Arlington House, 1979) 17.

We need to prepare ourselves to think critically – that is, evaluatively – through repeated exercises in what Edmund Burke called ‘the moral imagination.’ This is not simply a matter of history, a law, economics, or philosophy. The relevant material should engage our moral imagination in all of these areas and many others. The writings of Henry Hazlitt and Frédéric Bastiat are a good place to start.

As the principal editorial writer on economics and finance for the *New York Times* from 1934 to 1946, Henry Hazlitt took aim at many of the economic fallacies – what Bastiat called *Economic Sophisms* – that had been used to justify the Franklin Roosevelt’s New Deal economic policies and what he called ‘capricious government intervention in business.’² In his chapter on ‘The Broken Window’ in *Economics in One Lesson*, Hazlitt drew upon an earlier essay by Bastiat to which we will turn later.³ So let us begin with Bastiat’s political pamphlet, *The Law*, which was published in 1850.

The confluence of law, economics, property rights, and ethics makes the subject of political intervention through regulation as wide as the world itself. In the process of mapping it we shall draw a number of great thinkers. Indeed, an intellectual genealogy links several of the writers will be touched upon in this essay. Bastiat was a mid-nineteenth century economist and member of the French National Assembly who satirized the self-absorbed character of interest group activity in ‘The Candlemakers’ Petition,’ which proposed to block the sun’s rays in view of the harm it inflicted upon their trade.⁴

² Ibid 180–1.

³ Ibid 23–4.

⁴ Letter from Frederic Bastiat to the Chamber of Deputies of the French Parliament, 1845, <<http://bastiat.org/en/petition.html>>.

Besides Bastiat, Henry Hazlitt also helped introduce the American public to the work of Friedrich von Hayek, a future Nobel laureate, whose early book *The Road to Serfdom* (1944) may be read in an abridged version.⁵ In a later book, *The Constitution of Liberty* (1960),⁶ Hayek drew upon Francis Lieber's 1849 essay, 'Anglican and Gallican Liberty,'⁷ which we will touch upon in the next section. Lieber, who at the time taught history and political economy at the University of South Carolina, also wrote a foreword to an early American edition of Bastiat's writings.

For these leaders and scholars, 'life, liberty, and property,' to use John Locke's phrase, was of critical moral importance. Thomas Jefferson's wording, 'life, liberty, and the pursuit of happiness,' in the *Declaration of Independence of the United States of America* is an excellent way of clarifying what is meant by property. Property is, among other things, a place from which a Martin Luther, for example, could launch the Protestant Reformation by saying in good conscience: 'Here I stand, I can do no other.' In fact, James Madison referred to conscience as 'the most sacred of all property' and 'a natural and unalienable right.'⁸ To claim otherwise is to make all of us dependent upon the power and whim of those in authority, which is the very definition of despotism.

Let us carefully unpack Bastiat's argument in favour of a state of social and economic independence – a part of what early Americans referred to

⁵ See Readers Digest, *Readers Digest Condensed Version of the Road to Serfdom* (originally published 1945, 2011) <<http://www.iea.org.uk/sites/default/files/publications/files/upldbook43pdf.pdf>>.

⁶ Friedrich Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960).

⁷ Daniel Gilman (ed), *Contributions to Political Science, Including Lectures on the Constitution of the United States and Other Papers: Volume 2 of the Miscellaneous Writings of Francis Lieber* (J B Lippincott, 1881) 371–88.

⁸ The Heritage Foundation, *Madison on Property* (29 March 1792) <<http://www.heritage.org/initiatives/first-principles/primary-sources/madison-on-property>>.

as ‘self-government’ – so we may clarify what is at stake, politically and economically, when we examine the many and ever-changing facets of government regulation. For the early portion of *The Law*⁹ let us engage in a close reading of the text, what the French call *explication de texte*.

Bastiat begins with an expression of dismay: ‘The law perverted! And the police powers of the state perverted along with it!’¹⁰ One synonym for ‘police powers’ is government regulation. At the time the book was written, revolution was in the air. In 1848 the monarchy had fallen and Louis Napoleon was elected president that year.

Bastiat published *The Law* in June 1850 as a warning against continuing abuses of power. Napoleon seized power outright the following year and briefly jailed Alexis de Tocqueville, a recent cabinet official who had earlier written the classic, *Democracy in America*. By then, Bastiat himself had died of tuberculosis and Tocqueville, who suffered from the same disease, was forcibly retired. *The Law* expresses Bastiat’s dismay that the world had been turned upside down:

The law, I say, not only turned from its proper purpose but made to follow an entirely contrary purpose! The law become the weapon of every kind of greed!’ The law, so to speak, has been conscripted or drafted into the service of the greedy. ‘Instead of checking crime, the law itself [is] guilty of the evils is supposed to punish!’¹¹

It is the age-old problem: Who will guard the guardians?

As James Madison put it in *Federalist* 51:

⁹ Frederic Bastiat, *The Law* (Foundation for Economic Education, 1998).

¹⁰ Ibid 1.

¹¹ Ibid.

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹²

Let us return to Bastiat's argument.

We hold from God the gift, which includes all others – physical, intellectual, and moral life. But life cannot maintain itself alone. The Creator of life has entrusted us with the responsibility of preserving, developing, and perfecting it. In order that we may accomplish this, He has provided us with a collection of marvellous faculties. And he has put us in the midst of a variety of natural resources. By the application of our faculties to these natural resources we convert them into products, and use them. This process is necessary in order that life may run its appointed course. Life, faculties, production – in other words, individuality, liberty, property – this is man. And in spite of the cunning of artful political leaders, these three gifts from God precede all human legislation, and are superior to it.¹³

A legal positivist, such as John Austin, defines law in terms of the sovereign's power to control people. Bastiat, instead, makes a natural law argument: '[I]t was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place.'¹⁴ But Jeremy Bentham, the utilitarian philosopher and legal positivist, regarded

¹² Jacob Cooke (ed), *The Federalist* (Wesleyan University Press, 1961) 349; James Madison, *The Federalist No 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments* (13 September 2013) Constitution Society <<http://www.constitution.org/fed/federa51.htm>>.

¹³ Bastiat, above n 9, 1.

¹⁴ Ibid 2.

natural rights as ‘nonsense on stilts.’ Here the intellectual battle lines have been drawn.

Bastiat next defines law as ‘the collective organisation of the individual right of lawful defence.’¹⁵ More succinctly, it is organised justice. Its purpose is to substitute a common force for individual forces to protect God’s gifts, maintain rights, and cause justice to reign. Bastiat then adds the proposition upon which his subsequent argument rests: If no individual can lawfully use force to destroy the rights of others, then the same principle applies to the common force.

When the law exceeds its proper functions, it acts in direct opposition to its own objective, destroying it and annihilating justice. It places ‘the collective force at the disposal of the unscrupulous who wish, without risk, to exploit the person, liberty, and property of others,’¹⁶ converting plunder into a right and lawful defence into a crime. Two causes motivate people to do so: greed and false philanthropy.

Bastiat observes that humanity has a common aspiration toward self-preservation and self-development. He adds that ‘if everyone enjoyed the unrestricted use of his faculties and the free disposition of the fruits of his labour, social progress would be ceaseless, uninterrupted, and unfailing.’ But history also bears witness to a fatal tendency of mankind: ‘When they can, they wish to live and prosper at the expense of others.’¹⁷ This covetous sort of desire is the first root cause: greed.

Bastiat then contrasts the origin of property with the origin of plunder. Property originates in the fact that ‘[m]an can live and satisfy his wants

¹⁵ Ibid.

¹⁶ Ibid 5.

¹⁷ Ibid.

only by ceaseless labour... But it is also true,' he continues, 'that a man may live and satisfy his wants by seizing and consuming the products of the labour of others. This process is the origin of plunder.' Here is where the law and the sovereign state are supposed to enter the picture. 'When, then, does plunder stop?' he asks. 'It stops when it becomes more painful and more dangerous than labour.'¹⁸

'It is evident, then, that the proper purpose of law is to use the power of its collective force to stop this fatal tendency to plunder instead of to work. But since the law is made by men and since law cannot operate without the sanction and support of a dominating force, this force must be entrusted to those who make the laws.'

This necessity, combined with the fatal tendency in the heart of man, 'explains the almost universal perversion of the law. Thus it is easy to understand how law, instead of checking injustice, becomes the invincible weapon of injustice.'¹⁹ So once again the question arises: Who will guard the guardians? How will greed be restrained?

Let us now see where the logic of Bastiat's argument impels us: 'when plunder is organised by law for the profit of those who make the law, all the plundered classes seek to enter into the making of laws.' Why? Either to stop the plunder, or to share in it. As participation in lawmaking becomes more universal, 'men seek to balance their conflicting interests by universal plunder.'²⁰ This is a pervasive pattern in all areas of politics.

To better understand this pattern it is useful to introduce René Girard's concepts of mimetic desire and mimetic rivalry, which he developed in

¹⁸ Ibid 6.

¹⁹ Ibid 6–7.

²⁰ Ibid 7.

the first chapter of *I See Satan Fall Like Lightning*, among other places. Drawing on Scripture as well as the great novelists, Girard finds expressed in this literature a dynamic process that drives human motivation. We seek what we desire – the political philosopher Thomas Hobbes calls this ‘appetite’ – but we learn our desires from other people. Other people model for us what is desirable through their own desires and we derive our own desires through imitation. This is what Girard calls ‘mimetic desire.’ If, however, we begin to desire or covet the same thing possessed and modelled by another as desirable, we are apt to provoke mimetic rivalry.²¹ The accounts of Eve and Cain in Genesis 3-4 may be carefully read to see how desire is characterised.

Although Hobbes did not use the word ‘sin,’ he saw something like this – the potential for anyone to kill anyone else – as a consequence of human equality in a pre-political ‘state of nature,’ which he described a state of war ‘of every man, against every man.’²² René Girard used the term mimetic contagion to describe this unfortunate condition, noting that the violence is usually purged only through an act of sacrifice, as when a scapegoat is identified, accused, and cast out.²³

Joseph Ratzinger, who subsequently served as Pope Benedict XVI, raises many of these same issues in an essay on the market economy and ethics in which he criticises Marxism and its reduction of man to a plaything of economic forces. He writes: ‘let me merely underscore a sentence of Peter Koslowski’s that illustrates the point in question: “The economy is

²¹ René Girard, *I See Satan Fall Like Lightning* (James G Williams trans, Orbis Books, 2001) 16 [trans of: *Je vois Satan tomber comme l’éclair* (first published 1999)].

²² Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil* (Michael Oakeshott ed, Basil Blackwell, 1957) 82.

²³ Girard, above n 21, 1, 19–22, 56–8; René Girard, *The Scapegoat* (Yvonne Freccero trans, John Hopkins University Press, 1986) 1–23.

governed not only by economic laws, but is also determined by men”.’ Ratzinger continues: ‘Even if the market economy does rest on the ordering of the individual within a determinate network of rules, it cannot make man superfluous or exclude his moral freedom from the world of economics.’²⁴ Man is a moral agent with the power to choose. Life, liberty, property, and ethics are forever intertwined – whether through politics and the rule of law under God or through despotism and the strong arm of man.

Thomas Jefferson and the other Founders believed in the rule of law under God, as may be seen in a careful reading of the American Declaration of Independence: ‘We hold these truths to be self-evident, that all men created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.’²⁵ The word ‘unalienable’ means that these rights cannot be given away or sold.

The story of Naboth’s Vineyard should also be read with that word ‘unalienable’ in mind. As the Apostle Paul wrote in Romans 8:38-39, ‘nothing can separate [or alienate] us from the love of God.’ God bought His people with a price and established a comprehensive system for the administration of justice. To understand the relevance of this story to the subject of this course, we should first recognise that Leviticus 25 establishes the rule of law and a system of checks and balances regarding land tenure in order to protect against oppression and injustice. According to 1 Kings 21, Naboth was the steward of the property God

²⁴ Joseph Ratzinger, ‘Church and Economy: Responsibility for the Future of the World Economy’ (1986) 13 *Communio* 199–204 <http://www.catholic-church.org/ejtyler/catholic_life/RatzingerOnTheMarket%20Economy%20and%20Ethics%20.html>.

²⁵ *Declaration of Independence* (10 November 2011) Constitution Society <<http://www.constitution.org/usdeclar.htm>>.

had given his ancestors, as established in Leviticus 25. Just as the vineyard had been passed down to him, Naboth, in turn, held it in trust for his descendants.

The larger context of the story is the reign of an idolatrous king of Israel, Ahab, and his wife Jezebel. Beginning in 1 Kings 16, the narrative covers a remarkable series of events, beginning inauspiciously with spiritual adultery and human sacrifice. Once the stage has been set, the story of Naboth begins with a covetous Ahab who wishes to purchase the vineyard. This is forbidden under Leviticus 25 and Naboth sternly rejects the offer. Afterward Jezebel finds him in a sullen mood.

Here the words of the Apostle Paul are especially helpful to understand the dynamic that is at work: ‘I would not have known sin except through the law. For I would not have known covetousness unless the law had said, ‘You shall not covet.’ But sin, taking opportunity by the commandment, produced in me all manner of evil desire. For apart from the law sin was dead. I was alive once without the law, but when the commandment came, sin revived and I died’ (Rom. 7:7-9).

Thus when Ahab’s covetous efforts to persuade Naboth to break the law fail, sin revives – it rears up – in the heart of his covetous queen. Jezebel usurps the king’s seal by misusing it to send instructions to the city fathers to elevate Naboth to a place of high honor. For their part, the city fathers conspire with her to have him accused of blasphemy by a couple of scoundrels and taken out to be stoned to death (1 Kings 21:9-13). Thus sin reproduces and multiplies and fills the land: a good description of mimetic contagion.

Here is a thought question: How does Queen Jezebel’s action differ from that of Queen Esther’s regarding the treacherous Haman in chapter 8 of

Esther? Consider how many commandments Jezebel violated and abuses of power she committed. God's wrath against and judgment of Ahab and Jezebel for the murder of Naboth and their high-handed expropriation of his vineyard should be as plain as day to anyone who reads 'the rest of the story,' as Paul Harvey used to say in concluding his commentaries on the news. This story is a microcosm of all the oppression that stains the pages of history.

Returning to the property rules in Leviticus 25 it should be clear that, even in a case where someone should sell himself into servitude, the Bible provides no reason to suppose it is a heritable status that may be passed down through the generations. The year of Jubilee proclaimed in this same chapter might, to use Madison's language, be described as an auxiliary precaution since it was so clearly designed to restore what had in fact been previously alienated. Thus we may discern a constitutional system of checks and balances even under the Old Testament regime.

So we begin our study of the police powers, the regulatory principle of government, with stories about how power can be usurped, how usurpation may be resisted, and how political rulers may be subordinated to the sovereignty of God. The question is always: Whom do you serve? The State? Oneself? Or God? Joshua made his own decision plain: 'as for me and my house, we will serve the Lord' (Josh 15:24).

II TWO CONCEPTIONS OF LIBERTY

A study of the *Declaration of Independence of the United States of America* and the other American founding documents should lead us to reflect upon something remarkable: Whence came this idea of unalienable rights? It cannot be found in the statute books and yet it runs as a thread through the history of western law generally and English law

specifically – from St Patrick to King Alfred to *Magna Carta* and the *Petition of Right*. The Founders cited the ‘Laws of Nature and of Nature’s God’ as the justification for dissolving the political bands that had, until that moment, connected them to the English Crown.

Two years before the *Declaration of Independence*, George Washington chaired a meeting on 18 July 1774 that produced the Fairfax County Resolves, which articulated these principles and bore witness to the long chain of English liberty.

Resolved, that this Colony and Dominion of Virginia can not be considered as a conquered Country, and, if it was, that the present Inhabitants are the Descendants, not of the Conquered, but of the Conquerors ... that our Ancestors, when they left their native Land, and settled in America, brought with them (even if the same had not been confirmed by Charters) the Civil-Constitution and Form of Government of the Country they came from; and were by the Laws of Nature and Nations entitled to all its Privileges, Immunities, and Advantages ... and ought of Right to be as fully enjoyed, as if we had still continued within the Realm of England ...²⁶

One of the fundamental conflicts in politics is over the nature and relationship between liberty and authority. Jesus reconciled the two in His concept of servant-leadership: ‘You know that the rulers of the Gentiles lord it over them, and their great ones exercise authority over them. It shall not be so among you. But whoever would be great among you must be your servant’ (Matt 20:25-26). Thus the perennial question: ‘How should we then live?’

²⁶ Chapter 17: *Constitutional Government: Fairfax County Resolves* (2000) The Founders’ Constitution <<http://press-pubs.uchicago.edu/founders/documents/v1ch17s14.html>>.

Institutions and entire civilisations are shaped by the choices people collectively make: what they are willing to give up in exchange for such other things as peace, security, and prosperity. René Girard, who has written so eloquently on mimetic desire and scapegoating, believes, as a matter of Christian conviction, that we must confront the dark side of what we are collectively prepared to sacrifice. Let us begin this task gently with a fable entitled *The Dog and the Wolf* collected by a Greek slave, Aesop.

A gaunt Wolf was almost dead with hunger when he happened to meet a House-dog who was passing by. ‘Ah, Cousin,’ said the Dog. ‘I knew how it would be; your irregular life will soon be the ruin of you. Why do you not work steadily as I do, and get your food regularly given to you?’

‘I would have no objection,’ said the Wolf, ‘if I could only get a place.’

‘I will easily arrange that for you,’ said the Dog; ‘Come with me to my master and you shall share my work.’

So the Wolf and the Dog went towards the town together. On the way there the Wolf noticed that the hair on a certain part of the Dog’s neck was very much worn away, so he asked him how that had come about.

‘Oh, it is nothing,’ said the Dog. ‘That is only the place where the collar is put on at night to keep me chained up; it chafes a bit, but one soon gets used to it.’

‘Is that all?’ said the Wolf. ‘Then good-bye to you, Master Dog.’

The story's moral is: 'BETTER STARVE FREE THAN BE A FAT SLAVE'.²⁷

This attitude is deeply embedded within the American experience. A motto attributed to Benjamin Franklin reads: 'Those who would give up essential Liberty to purchase a little temporary Safety, deserve neither Liberty nor Safety.'²⁸ The state motto of New Hampshire makes a similar point more rudely: 'Live Free or Die.'²⁹

Liberty is one of the great themes of the *Bible*. The fear of the Lord may be the beginning of wisdom, but where does the fear of death lead? The author of Hebrews prays that God 'deliver them who through fear of death were all their lifetime subject to bondage' (Heb 2:15). Liberty – freedom from such bondage – is ultimately a spiritual matter, but, like faith, hope, and love, has its material ramifications. As the Apostle Paul wrote to the Galatians about an unavailing system of sacrifices: 'Stand fast therefore in the liberty wherewith Christ hath made us free, and be not entangled again with the yoke of bondage' (Gal 5:1 KJV).

In the third chapter of *The Constitution of Liberty* Friedrich Hayek draws on Francis Lieber's 1849 newspaper essay, *Anglican and Gallican Liberty*, to make a crucial distinction that could help dispel much of the confusion that has been infecting our political discourse. Francis Lieber, who was a transatlantic cultural missionary, held the first chair of political science at what is now Columbia University following a couple

²⁷ Charles Eliot (ed), *The Harvard Classics Volume 17: Folklore and Fable* (P F Collier & Son, 1909) 21–2.

²⁸ Letter from the Pennsylvania Assembly to the Governor, 11 November 1755; Leonard Labaree (ed), *The Papers of Benjamin Franklin* (Yale University Press, 1963) vol 6, 242. The Statue of Liberty is inscribed with a modified version of Franklin's original quotation; another inscription alludes to Aesop's fable with a quotation from Woodrow Wilson.

²⁹ New Hampshire State Government, *New Hampshire Almanac: State Emblem* (2011) <<http://www.nh.gov/nhinfo/emblem.html>>.

of decades of teaching in South Carolina.³⁰ Writing from a consciously Christian perspective, Lieber drew upon a life of self-sacrificing experience – as a soldier left for dead in the Napoleonic wars, as a young scholar who operated the first school of gymnastics in Boston, founded the first swimming school, edited the first American encyclopaedia, and served as a Public Professor in the German tradition of addressing matters of grave public concern. Lieber, whose own family was torn by the Civil War, drafted the first code of military conduct. His writings were known and used by presidents from Abraham Lincoln to Theodore Roosevelt and cited by the Supreme Court.

In his 1849 newspaper essay on *Anglican and Gallican Liberty* Lieber developed a contrast between two very different traditions of liberty: ‘one empirical and unsystematic,’ as Hayek put it in his commentary, ‘the other speculative and rationalistic – the first based on an interpretation of traditions and institutions which had spontaneously grown up and were but imperfectly understood, the second aiming at the construction of a utopia, which has often been tried but never successfully.’³¹

Lieber and Hayek here summarise the great dilemma of modern politics. These are the two poles toward which we are drawn. The first relies on the marketplace of individual initiative, giving rise to what Hayek – following Michael Polanyi – calls ‘spontaneous order.’³² In the absence of a political safety net, people usually know that sufficient resources must be held back in reserve. Such self-reliance and self-government resembles what Aaron Wildavsky called ‘resilience.’ The other side of

³⁰ See Steven Alan Samson, ‘Francis Lieber: Transatlantic Cultural Missionary’ in Charles Mack and Henry Lesesne (eds), *Francis Lieber and the Culture of the Mind* (University of South Carolina Press, 2005) 129–42.

³¹ Hayek, above n 6, 54.

³² Ibid 160.

risk management – ‘anticipation’ – represents the urge to systematically cover every need and prepare for every eventuality.³³ Taken to an extreme, the managerial state itself becomes a total package and an exclusive provider: what Hilaire Belloc called ‘the servile state.’ If we start with the definition of politics given by the political scientist Harold Lasswell – ‘who gets what, when, how’ (the subtitle of a 1936 book)³⁴ – it is reasonable to conclude that politics can never be other than contested terrain.

Lasswell gives us a definition that evades the justice described in Deuteronomy 18: ‘You shall appoint judges and officers in all your gates, which the Lord your God gives you, according to your tribes: and they shall judge the people with just judgement. You shall not pervert justice; you shall not show partiality, nor take a bribe: for a bribe blinds the eyes of the wise and twists the words of the righteous’ (Deut 16:18-19 NKJ). By contrast, Lasswell’s definition leaves open only the questions of who will win, who will lose, and whose interests will be served.

Lieber recognised that civil liberty is relative. It can follow the decentralised, case-by-case, trial-and-error of the English common law tradition. Or it can be rationally and deliberately crafted from the speculations of philosophers and the sort of false philanthropists mentioned by Bastiat into a system that may kill with kindness. Civil liberty also waxes and wanes at various stages of civilisation. For the ancient Greek, ‘man in his highest phase’ is truly human only as a citizen. ‘Man is a political animal,’ as Aristotle put it. He is a creature of the

³³ See Aaron Wildavsky, ‘If Regulation Is Right, Is It Also Safe?’ in Tibor Machan and M Bruce Johnson (eds), *Rights and Regulation: Ethical, Political, and Economic Issues* (Pacific Institute for Public Policy Research, 1983) xv–xxv.

³⁴ Harold D Lasswell, *Politics: Who Gets What, When, How* (Meridian Books, 1958).

city-state, which is the source of his identity. But this is a totalitarian conception. From the standpoint of Christian and modern liberty, the individual is the highest object and the state is a means to obtain ‘higher objects of humanity.’ The Apostle Paul answered the philosophers at the Areopagus in terms they applied to the *polis*: ‘for in Him we live and move and have our being’ (Acts 17:28). As Lieber recognised, Christianity had demoted the state from master to servant. Its purpose is to protect ‘chiefly against public power, because it is necessarily from this power that the greatest danger threatens the citizens.’³⁵ Lieber’s admonition extended to that species of privatised public power Bastiat called ‘legal plunder.’

Lieber’s ideas about civil liberty and self-government, the title of one of his major treatises, come much closer to the vision of the Founders. But such ideas are meaningful to people only as long as we are prepared to recognise and state what is usually unseen and unsaid. Their moral vision of a self-governing community must be understood in the context of the Judeo-Christian civilisation that shaped them. The *United States Constitution* of 1787 binds citizens together into a moral community. It is also a political covenant among ‘We the People.’ The opposite of the self-governing moral community it assumes at the outset is one that is ruled despotically.

In 1828 Noah Webster introduced the word ‘demoralisation’ into his *American Dictionary of the English Language* to express the great public danger that puts any such covenant as the *United States Constitution* at

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Gilman, above n 7, 372–3.

risk. Webster defined *demoralisation* as ‘The act of subverting or corrupting morals; destruction of moral principles.’³⁶

Speaker of the House Robert C Winthrop made the case for paying close attention to public morale in a speech to the Massachusetts Bible Society in 1849: ‘All societies of men must be governed in some way or other. The less they may have of stringent State Government, the more they must have of individual self-government. The less they rely on public law or physical force, the more they must rely on private moral restraint. Men, in a word, must necessarily be controlled, either by a power within them, or by a power without them; either by the word of God, or by the strong arm of man; either by the Bible, or by the bayonet. It may do for other countries and other governments to talk about the State supporting religion. Here, under our own free institutions, it is Religion which must support the State.’³⁷

Let us turn again to James Madison – this time to *Federalist 10* – to show how the principles of civil liberty and self-government were designed into the very fabric of the *United States Constitution*.³⁸ He begins his argument in favour of the new *United States Constitution* by observing what he calls its tendency to break and control the mischiefs of faction. By faction, he meant political parties, interest groups, and the very spirit of partisanship or what Erik von Kuehnelt-Leddihn called

³⁶ Noah Webster, *An American Dictionary of the English Language* (Foundation for American Christian Education, 1980).

³⁷ Robert Winthrop, *Addresses and Speeches on Various Occasions* (Little, Brown & Co, 1852) 172.

³⁸ See Cooke, above n 12, 56–65; James Madison, *The Federalist Number 10: The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection (continued)* (13 September 2013) <<http://www.constitution.org/fed/federa10.htm>>.

‘*identitarianism*,’ a mimetic ‘herd instinct’ driven by hatred and envy.³⁹ This is the sort of partiality or favouritism condemned in James 2:1-13. Likewise Micah wrote: ‘what does the Lord require of you but to do justly, to love mercy, and to walk humbly with your God?’ (Mic 6:8). Factionalism and favouritism threaten the enjoyment of life, liberty, and property.

Madison’s argument is simple but elegant. First, he notes that there are two methods of curing the mischiefs of faction: remove its causes or control its effects. Next, he notes two methods by which to remove the causes of faction. The first remedy, to destroy liberty, he says is worse than the disease. Liberty is to faction what air is to fire. It nourishes faction but it is also necessary to political life.⁴⁰ Practically speaking, the art of state has usually meant the substitution of despotism for politics.

The alternative, to give everyone the same opinions, passions, and interests, Madison considers impracticable.⁴¹ The unreliability of reason as well as the liberty we have in using our minds lead to different opinions. The connection between our reason and self-love means that our opinions and passions have a reciprocal influence. Still, attempts to standardise opinion, whether through control of media or education, are a favoured tactic of those who seek to impose uniformity or consensus in our more democratic age, especially if done in the name of the people, the general will, or the greater good.

³⁹ Steven A Samson, *Erik von Kuehnelt-Leddihn: Leftism: From de Sade and Marx to Hitler and Marcuse Study Guide* (Liberty University, 1974) 15.

⁴⁰ Cooke, above n 12, 58.

⁴¹ Ibid.

Madison contended that the protection of the diverse faculties of men, which is the source of property rights, is the first object of government. This diversity ensures a division of society into different interests and parties. Indeed, the latent causes of faction are sown into human nature, but it is possible to control at least some of the effects. In the case of a minority faction, relief is supplied by the republican principle of indirect representation.⁴²

The case of a majority faction, however, is more challenging. The form of popular government permits it to sacrifice the public interest to its own – in the very name of the people. Once again, there are two options: either to prevent the existence of the same opinions, passions, and interests in a majority, just the opposite to the impracticable method for removing the causes of faction, or to render such a majority-by-consensus unable to oppress others.⁴³

But Madison is not finished with his analysis here. Evidently in reference to the states under the old *Articles of Confederation*, he claims that there is no cure for the mischiefs of faction in a small democracy that consists of citizens who assemble and administer the government in person. The reason is because the majority will usually feel a common passion and, as a consequence, provoke turbulence and contention.⁴⁴

Turning to the differences between a republic and a democracy, Madison notes, first, the delegation of the government to elected officials and, second, the greater number of citizens and area over which it may be extended. The advantage of a republic over a democracy is that it allows public opinion to be refined and enlarged by filtering it through a select

⁴² Ibid 60.

⁴³ Ibid 60–1.

⁴⁴ Ibid 61–2.

body of citizens.⁴⁵ Yet the notion of the presumptive virtue of a political elite soon began to favour out of favour. The disadvantage of a republic is that intemperate, parochial, or sinister men may win the votes and then betray the interests of the people. This being the case, Madison believes a balance is needed between the extremes of detachment from the people and over-attachment to local interests.⁴⁶

As David Hume recommended in his essay, *Idea of a Perfect Commonwealth*, Madison's solution is to enlarge the size of the republic. This allows greater variety and makes it less probable that a majority-by-consensus will invade the rights of the rest. Enlarging the republic also permits the influence of factious leaders to be diluted. Madison hoped thereby to create firebreaks that would confine the dangers posed by factious leaders to their original locations. Among these dangers are religious sects that degenerate into political factions and a rage for (fiat) paper money, an abolition of debts, or an equal division of property.⁴⁷

The dangers that Madison detected in 1787 have remained with us to the present day. The names of the parties and the particulars of their programs have changed over the years, but Francis Lieber regarded the underlying problem as what he called Gallican liberty. 'The fact that Gallican liberty expects everything from *organisation* while Anglican liberty inclines to *development*, explains why we see in France so little improvement and expansion of institutions; but when improvement is attempted, a total abolition of the preceding state of things – a beginning

⁴⁵ Ibid 62.

⁴⁶ Ibid 63–4.

⁴⁷ Ibid 64–5.

ab ovo [from the egg] – a re-discussion of the first elementary principles.’⁴⁸

Gallican liberty is a recipe for ratcheting the growth of one overriding institution, the state, at the expense of all others. Parkinson’s Law states: ‘Work expands to fill the time available for its completion.’⁴⁹ A variation on that insight might read: The state expands to fill the space that impinges upon its operations. Robert Higgs discerned that the state expands in response to particular crises, such as war and depression, but fails to fully recede before the next crisis causes it to surge even further forward.⁵⁰ The danger is that other institutions will languish while the state and its agencies expand and become a total package. Anticipation and resilience are the two poles of risk management. The question to ask is this: When the state comes to the rescue and politics becomes an endless shuffling and reshuffling of the deck of life’s ‘chances,’ will there be enough left in reserve to meet an unexpected emergency? Path dependency has left the economies of the major powers highly vulnerable to the unanticipated while the scramble for legal plunder bloats their budgets and undermines their responsiveness. The possibilities for legal plunder are virtually limitless: a wide and open field.

Here we should ask ourselves: How does such liberty – a ‘freedom’ Francis Lieber called ‘Rousseauism’ and ‘democratic absolutism’ – differ from what Hilaire Belloc called a ‘servile state’ in which man is reduced to something a lot lower than the angels? Alexis de Tocqueville used the expression ‘tyranny of the majority’ to describe the danger we face in a

⁴⁸ Gilman, above n 7, 385.

⁴⁹ C Northcote Parkinson, *Parkinson’s Law, and Other Studies in Administration* (Ballantine, 1957) 15.

⁵⁰ Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (Oxford University Press, 1989).

democratic age. But it is merely a tyranny in the name of the majority. How can any faction, whether a majority or a minority, tyrannise the rest unless led to do so by ambitious ideologues, self-serving demagogues, and countercultural entrepreneurs? What we have here, collectively, is a problem of the soul such as the Apostle described in Eph 6:12 (NKJ): ‘For we do not wrestle against flesh and blood, but against principalities, against powers, against the rulers of the darkness of this age, against spiritual hosts of wickedness in the heavenly places.’ The tyranny that can take root in our souls is a problem that poets and philosophers from Homer and Plato to the present have meditated upon. As René Girard recognised, only the *Bible* tells us the truth about our sinful nature.

III THE CONSTITUTION OF LIMITATIONS

Matt Sieger tells a story about how Harold J Berman, a pioneer in the study of the interaction of law and religion,⁵¹ began studying law at a very early age. ‘Belief in law comes from early childhood,’ he said. ‘A child says, ‘It’s my toy.’ That’s property law. A child says, ‘You promised me.’ That’s contract law. A child says, ‘He hit me first.’ That’s criminal law. A child says, ‘Daddy said I could.’ That’s constitutional law.’⁵²

Once again let us do a bit of detective work and explore an intellectual genealogy. Berman, a specialist in Soviet law who taught at Harvard and Emory, did his undergraduate studies at Dartmouth under Eugen Rosenstock-Huessy, a legal historian who originally specialised in the

⁵¹ Harold Berman, *The Interaction of Law and Religion* (Abingdon Press, 1974); Harold Berman, *Faith and Order: The Reconciliation of Law and Religion* (Scholars Press, 1993).

⁵² Matt Sieger, Answering to a Higher Authority: The Life and Legacy of Harold J Berman (2009) *Jews for Jesus* <<http://www.jewsforjesus.org/files/pdf/issues/issues-17-09.pdf>>.

Middle Ages. Rosenstock, who devoted his life to studying the inner dynamism of Christian civilisation, anticipated the future development of a planetary society in which local customs and differences would retain their vitality.⁵³ Our efforts to reconcile the interests of the group with those of the individual, unity with diversity, the universal with the particular, and reason with experience represent a major theme that runs through many of the key ideas upon which this essay draws.

The medieval Battle of the Universals – the struggle between unity and diversity, the One and the Many, realism and nominalism – has considerable bearing upon the developmental stages through which the United States have been passing from the outset. This historical dynamic is a theme to which we will return. Let us begin by studying the historical context of the founding of the federal constitutional system of the United States.

Virtually from the beginning of the colonial period early in the 17th century, the early American provinces or states were founded and governed according to compacts, charters, covenants, and even full-fledged constitutions, as Donald Lutz has shown in a series of books. Many of these colonies drew heavily upon specific ecclesiastical traditions. All drew creatively upon English common law, of which Oliver Wendell Holmes, Jr, famously said: ‘The life of the law has not been logic; it has been experience.’⁵⁴

The New England colonies were especially innovative in fusing Puritan theological and political ideas about covenants into a coherent and very

⁵³ See Eugen Rosenstock-Huessy, *The Christian Future: Or the Modern Mind Outrun* (Harper & Row, 1966); Eugen Rosenstock-Huessy, *Out of Revolution: Autobiography of Western Man* (William Morrow, 1938).

⁵⁴ Mark DeWolfe (ed), *Oliver Wendell Holmes: The Common Law* (Little, Brown, 1963).

practical constitutional tradition, continuing and further developing an equally practical, as opposed to theoretical, Biblical republicanism modelled after the ‘Hebrew Republic.’⁵⁵

Here we can detect one root that marks the difference between Anglican liberty and Gallican liberty, between the American Revolution and the French Revolution. Among the noteworthy accomplishments of the New England clergy, as noted by Alice Baldwin and Ellis Sandoz,⁵⁶ was the creation of a vast literature of sermons for distinctly political occasions, such as days of fasting, days of thanksgiving, elections held by town, states, and artillery companies, and public ceremonies that attended inaugurations and oath-taking.

By the time of the *Declaration of Independence of the United States of America*, the *Articles of Confederation*, and the subsequent *United States Constitution* of 1787, America’s early political class had woven from many threads a distinctly American political language that has been passed down to us through the generations.

The sum of all this experience was a constitutional system of limited government and powers, in which power is both divided and shared between three branches, multiple levels of jurisdiction, and the citizenry and their representatives. Furthermore, sovereignty was not vested in either the state or the national government. Indeed, the word sovereignty is not even used in the *Constitution*. Instead, sovereignty, if we wish to use that term, appears to take form of a covenant that brings the various

⁵⁵ See Eric Nelson, *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought* (Harvard University Press, 2010); Enoch Cobb Wines, *The Hebrew Republic* (American Presbyterian Press).

⁵⁶ Alice Baldwin, *The New England Clergy and the American Revolution* (Frederick Ungar, 1965); Ellis Sandoz (ed), *Political Sermons of the American Founding Era: 1730–1805* (Liberty, 1991).

parts into active relationship with the whole. It is a covenant that brings each succeeding generation into dialogue within a perpetual corporation known as ‘We the People of the United States of America.’ This ‘more perfect Union’ is defined and delineated by a Constitution that Jeremy Rabkin believes to be irrevocable.⁵⁷

The purposes of government and the duties of rulers are set forth in Romans 13. But verses 8–10 provide a critical context for understanding the first seven verses. We are not to be indebted to others except to love one another. Unfortunately, we rarely ponder the radical implications of this injunction. What is just as rarely acknowledged is that these verses provide us with a working definition of love, drawn straight from the Ten Commandments and repeating a portion of the Great Commandment. In fact, the Decalogue bears a very distinctive relationship with the English common law, which has been referred to as a ‘cradle Christian.’⁵⁸ Alfred the Great opened his late ninth century law code with the Ten Commandments. Nearly eight centuries later, some of the laws of New England, including the Massachusetts Body of Liberties, cited Biblical law by chapter and verse.⁵⁹

Today we take so much for granted that we miss the significance of the controversies over this precious legacy. In an article entitled *The Revolutionary Revelation*, Sara Yoheved Rigler puts matters into fresh perspective by asking: ‘What would a world without Torah look like?’ Her description of an alternative New York that had never been under the *Bible*’s influence is certainly interesting for what is absent, although it is

⁵⁷ Jeremy Rabkin, ‘The Constitution and American Sovereignty’ (2009) 38 *Imprimis* 1.

⁵⁸ See John Wu, *Fountain of Justice: A Study in the Natural Law* (Sheed and Ward, 1955).

⁵⁹ See Hanover College, *Massachusetts Body of Liberties (1641)* (2012) <<http://history.hanover.edu/texts/masslib.html>> 272.

hard to imagine a New York or even a New World in the absence of God's promises to Abraham and his seed. Modern advances in general literacy, the institution of hospitals and public schools, the drafting of declarations of human rights, and a widespread sense of the sacredness of life – all were once unthinkable and would be so today except for the seminal influence of the *Bible*.⁶⁰

The seedtime of the American Republic was marked by the emigration across the Atlantic of many parties to a lively debate that had been generated by the Protestant Reformation, which was further deepened in the British Isles as the Church of England subdivided into High Church and Puritan factions. Separatist groups, such as the Pilgrims who settled Plymouth, spun off into their own independent congregations. The three types of church polity – Episcopalian, Presbyterian, and congregational – resembled three types of secular polity – monarchy, the republic, and democracy – and could be viewed as distant cousins of the presidency, the Senate, and the House of Representatives.

David Hackett Fischer's *Albion's Seed* identifies four different British folkways that were transplanted to America: 1) the Puritan refugees from the Anglican political-religious establishment; 2) the defeated cavaliers who had supported the King against Parliament during the English Civil War, along with their indentured servants; 3) the persecuted Quakers and German Anabaptists; and 4) impoverished masses of immigrants from the northern borderlands of Britain and Ireland.⁶¹ Separately and together they gave distinctive character to the mosaic of American settlement patterns and political bents. *E pluribus unum*: It is out of such diversity

⁶⁰ Sarah Yoheved Rigler, *The Revolutionary Revelation* (16 May 2004) aish.com <<http://www.aish.com/h/sh/t/48962111.html>>.

⁶¹ David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (Oxford University Press, 1989).

that the American founders sought to forge a unity-in-plurality. Consequently, a system of check and balances has grown along each political axis where power overlaps and is shared. This originative diversity brings us back to James Madison and the *Federalist Papers*.

Early in the 18th century the French *philosophe*, Baron Montesquieu, had discerned in the English constitution a separation of powers between three branches of government – king, House of Lords, House of Commons – and had recommend that reformers in France follow this principle. Madison took up this theme in the *Federalist Papers*, although his argument was built up through a series of specific essays.

In *Federalist 39*, Madison focused on the specific division of power between the national and state governments. Developing the principle of federalism, Madison showed how the division and overlapping of powers was built into the arrangement of national institutions, noting that Congress was divided by a national legislature, the House of Representatives, and a federal legislature, the Senate, in which the states and their specific interests were represented.⁶²

Turning now to *Federalist 51*, let us again engage in a close reading of the text. By now Madison is expressing concern that an outward division of power is not up to the task of protecting against the abuse of power. What sort of abuse? How about Bastiat's concept of legal plunder? How about the mimetic contagion that can result from envying one's neighbours and coveting what they have? At the end of *Federalist 10*, Madison gives a good theoretical account of the advantage of an extended federal system: 'The influence of factious leaders may kindle a flame

⁶² Cooke, above n 12, 250–7.

within their particular States, but will be unable to spread a general conflagration through the other States...'⁶³

From these words it should be clear that Madison has deep concerns – ones that are not allayed by the simple architecture of a separation of powers. To paraphrase, Madison opens *Federalist 51* with a question: Given the inadequacy of a merely external separation of powers, how is the defect to be remedied? His answer is that ‘the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.’⁶⁴ Thus the separation of powers must be supplemented by checks and balances.

As he develops his argument, Madison elaborates upon this point. Each branch or department of the government should have a will of its own. From this it follows that members of each major branch should have little say in the appointment of members of the others. How can this be accomplished? In a republic the power of appointment should be drawn from the same fountain of authority, the people, but it should be drawn through separate channels.

Let us consider for a moment how the framers designed these channels or lines of authority. Members of the House of Representatives hold seats that are apportioned among the states according to population. They are directly elected by the local citizens of their home districts for a two year term of office. Corporately they make up a national legislature representing all the people and have the responsibility to introducing all bills related to taxing and spending.

⁶³ Ibid 64.

⁶⁴ Ibid 347–8; Madison, above n 12.

Until the ratification of the *United States Constitution* amend XVII in 1913 during the Progressive era, senators were elected to six-year terms by members of their home state's legislature, who, in turn, were themselves elected by the people. Thus popular representation was indirect and states were given a voice in what James Madison called the 'federal legislature.'

Even more elaborate safeguards were built into presidential elections to ensure that the presidents were representative of all the people and that they had been thoroughly vetted. The Electoral College is somewhat akin to a grand jury that is temporarily summoned for an important public service. It is also akin to the federal system of electors that once chose the Holy Roman Emperor and resembles the College of Cardinals that assembles in Rome to choose the Pope. Each state was obliged elect or appoint electors, usually prominent citizens who had some leadership experience, who could act as a political filter to sift and evaluate the qualities of the candidates. Following the general election, the electors would meet in the state capitals and cast their votes. A list of all the people voted for would be certified, sealed, and sent to the national capital. There the certificates are opened about a month later by the President of the Senate in the presence of the Speaker of the House and the votes are counted at the opening of a newly elected Congress.

Finally, the justices of the Supreme Court and judges of the lower federal courts are appointed by the president with the advice and consent of the Senate: that is, the federal legislature. The idea in each case is both to represent 'We the People' through several different channels of expression and to filter the people's sentiments, which can be both self-contradictory and highly volatile at times.

The great security against a gradual concentration of power, Madison believed, was to give the heads of agencies the constitutional means and personal motives to resist encroachments on their authority. Madison expected them to engage in turf battles: ‘Ambition must be made to counteract ambition.’ Thus their personal interest had to be connected with the rights of their office.

But another question comes to mind: How does this self-interestedness differ from Bastiat’s legal plunder or the so-called ‘honest graft’ of a machine politician? Here the political scientist J Budziszewski makes explicit what Madison only implies: ‘How can we make government promote the common good when there is so little virtue to be found?’⁶⁵ Madison suggested that self-interest could be used in the absence of better motives. His idea is to arrange a checks and balances system based on opposite and rival interests so that the private interest of every individual may be a sentinel over public rights. In the end, such filtering and channelling of self-interest are no substitutes for virtue. Unfortunately, all such contrivances can be gamed and, in the end, prove inadequate. Ambition is not easily tamed.

The political scientist Kenneth Minogue notes that, down through history, politics has been the business of the powerful. ‘It was essential to the idea of the state, in all its forms, that it should be an association of *independent* disposers of their own resources.’⁶⁶ This was equally true of the early American republic in which such independence was widespread and expandable. But this is not a natural state of affairs. It must be upheld and protected by common consent.

⁶⁵ Jay Budziszewski, *The Revenge of Conscience: Politics and the Fall of Man* (Spence, 1999) 56.

⁶⁶ Kenneth Minogue, *Politics: A Very Short Introduction* (Oxford University Press, 2000) 105–6.

The danger against which we must always protect ourselves is the confusion of the coercive tools of despotism with the persuasive arts of politics through what Minogue calls ‘political moralism.’ It reverses the norms it seeks to replace: ‘Independent individuals disposing of their own property as they please are identified with selfishness and taken to be the cause of poverty.’⁶⁷ This sort of moralism resembles what Michael Polanyi called ‘moral inversion’ and Roger Scruton calls the ‘culture of repudiation.’⁶⁸ What Bastiat called false philanthropy today takes the form today of a state that can redistribute life’s opportunities and benefits. To conclude, our contemporary dilemma is neatly summarised as follows by Minogue:

Political moralism ... takes the independence of citizens not as a guarantee of freedom but as a barrier to the project of moralising the world ... Moralising the human condition is only possible if we can make the world correspond to some conception of social justice. But it turns out that we can only transcend the inequalities of the past if we institute precisely the form of social order – a despotism – which Western civilisation has immemorially found incompatible with its free and independent customs. The promise is justice, the price is freedom.⁶⁹

Political moralism is the latest avatar of Jean-Jacques Rousseau’s concept of the ‘general will,’ the exhortation to do whatever the state determines to be in your best interest. The ‘general will’ is the command to which all subjects of the state must either submit or, as Rousseau put it, ‘be forced to be free.’ Bastiat’s false philanthropy wears many masks – Lieber’s democratic absolutism, Tocqueville’s tyranny of the majority,

⁶⁷ Ibid 106.

⁶⁸ Michael Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (Harper & Row, 1962) 231–5; Roger Scruton, *The West and the Rest: Globalization and the Terrorist Threat* (ISI Books, 2002).

⁶⁹ Minogue, above n 66, 106.

Minogue's political moralism – but, whatever form it takes, it tends to deny individual citizens standing and subvert their conscience.

Returning again to the text of *Federalist 51*, we can see that Madison offers still another safeguard. Members of each branch should be as little dependent as possible on those of the others for their salaries.⁷⁰ Here we come to the great source of political corruption down through history: dependency and, its counterpart, clientelism. In the opening chapter of the *Godfather*, Don Vito Corleone invites Amerigo Bonasera to be his friend. What did the Godfather mean by that? He meant that by accepting a favour, his protection, Bonasera would become his retainer, thus a minor member of his retinue.⁷¹

What Mario Puzo, the author, here describes is a feudal-style, paternalistic form of government that had been transplanted to and superimposed on a political system that, at least at one time, valued an independent citizenry: a people that could collectively stand on its feet like Martin Luther, who had made his famous statement, 'Here I stand, I can do no other,' when summoned before the emperor's council, the Diet of Worms. Corleone's politics of friendship, as Paul Rahe has called it, lacks the cool detachment, the individual self-government, of those who wish to remain a free people.⁷²

The political history of western civilisation is a perpetual dialogue or debate between the advocates of a politics of friendship – the cronyism that typifies corrupt political machines and ruling classes – and what

⁷⁰ Cooke, above n 12, 348. But another and somewhat related security listed in *Federalist Number 57* – that members of the House of Representatives 'can make no law which will not have its full operation on them and their friends' – has been repeatedly breached: Cooke, above n 12, 386.

⁷¹ Mario Puzo, *The Godfather* (G P Putnam's Sons, 1969) 29–31.

⁷² Paul A Rahe, 'Don Corleone: Multiculturalist' (1997) 16 *Business & Professional Ethics Journal* 133, 133–53.

Rahe calls a politics of distrust. To sum up the argument in favour of a politics of distrust, we might say that the virtue of independence requires a wariness toward those who seek out office, especially those who seek to worm their way into our confidence. As Thomas Jefferson warned a friend, once the people ‘become inattentive to the public affairs, you and I, [and] Congress [and] Assemblies, judges [and] governors shall all become wolves. It seems to be the law of our general nature, in spite of individual exceptions; and experience declares that man is the only animal which devours his own kind...’⁷³ *Homo homini lupus*: man is a wolf to man.⁷⁴ As Jefferson noted elsewhere, free government is founded in jealousy, not in confidence.⁷⁵

IV FAITH, FREEDOM, AND THE ABUNDANT LIFE

Western civilisation – once known as Christendom – arose out of a combination of Greek learning (*paideia*), Roman law, and Biblical faith and justice. The first of these elements helped shape our systems of education. The second is preserved in the European civil law codes and international law. The third element, the Biblical tradition, has been unfortunately neglected within an increasingly secularised order. Although its contribution is not well understood and has been deliberately ignored in Europe by the *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*,⁷⁶ which govern the European Union, the Bible’s vitality is everywhere felt, as Sara Rigler has shown in a previous section.

⁷³ Letter to Edward Carrington from Thomas Jefferson, 16 January 1787, <http://en.wikisource.org/wiki/Letter_to_Edward_Carrington_-_January_16,_1787>.

⁷⁴ J Huizinga, *In the Shadow of Tomorrow* (W W Norton, 1964) 151.

⁷⁵ *The Kentucky Resolutions of 1798* (4 November 2011) The Constitution Society <<http://www.constitution.org/cons/kent1798.htm>>.

⁷⁶ Opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009).

Four decades ago Goh Keng Swee, the Singaporean defence minister, recommended that developing countries should convert to a demanding form of the Protestant religion in order to encourage habits of personal thrift and public honesty.⁷⁷ He believed that it would result in great material progress. More recently Zhao Xiao, a Chinese economist, has endorsed the idea that the spread of Christianity would be good for China's economy.⁷⁸ Although such recommendations make the adoption of Christianity sound pragmatically like a formula for material success, the far-reaching consequences of the *Bible's* influence should not be lightly dismissed.

On the other hand, we should not make the mistake of trying to equate godliness with worldly success. Whatever link there may be between them is often too complicated for us to see a direct link at the individual level. It is difficult enough to see even at the societal or cultural level. Yet there are still meaningful and often indirect things that can be said this connection. For example, it seems reasonable to assume that, as opposed to a civil society that enjoys liberty, a society that is full of envy and strife of the sort the Apostle Paul describes in Rom 1:18-32 is unlikely to move forward from success to success. A society in the midst of what René Girard calls a 'mimetic contagion' is most likely to seek scapegoats upon which it can purge its violence and then marginalise or otherwise dispose of its victims. Remember the opening lines of James Madison's *Federalist 10*: 'Among the numerous advantages promised by

⁷⁷ Goh Keng Swee, (Speech delivered at the General Conference of the Methodist Church in Malaysia and Singapore, 13 November 1972).

⁷⁸ Evan Osnos, Interview with Zhao Xiao (Television Interview, 2011) <http://www.pbs.org/frontlineworld/stories/china_705/interview/xiao.html>.

a well constructed union, none deserves to be more accurately developed, than its tendency to break and control the violence of faction.⁷⁹

The *Bible* provides us with many illustrations of the mimetic character of violence generally, persecution in particular, and the need that the godly have for a place where they may take a stand. And we should always remember that, as James Madison put it: ‘Conscience is the most sacred property.’ So here is some more food for thought: What should the faithful do when their rulers fail to make a place for liberty of conscience?

Resistance to tyrannical actions takes many forms in the *Bible*. We see it in the first chapter of Exodus 1 with the captivity of Israel and the threat of genocide. But we can also see that the Egyptian midwives boldly resisted Pharaoh. The *Bible* shows that God blessed both the midwives and the children of Israel. Likewise, the first chapter of the *Book of Daniel* opens with four young men who respectfully chose to resist adopting the king’s prescribed diet in order to faithfully observe God’s dietary laws. With the help of some men of good will, they were able to demonstrate the superiority of their own diet and were permitted to continue it in good conscience.

Acts 5:17-32 illustrates yet another godly way of responding to injustice. Peter and the Apostles returned to teaching the Gospel despite having been ordered to the contrary and even imprisoned. From this account it should be clear that firmness in defence of principles has a central place in the life of faithful service.

⁷⁹

Cooke, above n 12, 56.

Now let us move the calendar to 19th century Europe. Early in 1859, Francis Lieber gave an introductory public lecture in 1859 that examined some of the threats to liberty in his day and ours.

The advance of knowledge and intelligence gives to despotism a brilliancy, and the necessity of peace for exchange and industry give it a facility to establish itself which it never possessed before ... Absolutism in our age is daringly draping itself in the mantle of liberty, both in Europe and here. What we suffer in this respect is in many cases the after-pain of Rousseauism, which itself was nothing but democratic absolutism. There *is*, in our times, a hankering after absolutism; and a widespread, almost fanatical idolatry of success, a worship of will, whose prostrate devotees forget that will is an intensifier and multiplier of our dispositions, whatever they are applied to, most glorious or most abhorrent, as the case may be, and that will, without the shackles of conscience or the reins of a pure purpose, is almost sure of what contemporaries call success. It is so easy to succeed without principle!⁸⁰

With these Biblical examples and Lieber's admonition in mind, let us now examine some of the practical consequences of a civilisation shaped by a Biblical heritage and some of the costs we incur in repudiating this bequest, just as Esau and the prodigal son spurned theirs by squandering it. At the risk of oversimplifying the many contributing causes, let us carefully consider one scholar's analysis of the economic consequences of Western Christianity, the kind of analysis that is typically narrowed to a simple formula, such as is found in Max Weber's long essay entitled *The Protestant Ethic and the Spirit of Capitalism*. In his article on the

⁸⁰ Daniel Coit Gilman (ed), *The Miscellaneous Writings of Francis Lieber Volume I: Reminiscences, Addresses, and Essays* (J B Lippincott, 1880) 383–4. Lieber's friend and correspondent, Alexis de Tocqueville, similarly wrote against democratic despotism.

‘European Miracle’ the historian Ralph Raico also addresses the question, ‘Why Europe?’

One characteristic Raico notes is its relative lack of external political control. He quotes Jean Baechler, who drew upon Montesquieu, to argue that ‘every political power tends to reduce everything that is external to it, and powerful objective obstacles are needed to prevent it from succeeding.’⁸¹ It should be evident that Baechler is recommending a system of checks and balances.

But such a shorthand answer leaves only implicit what must be made explicit to a largely uncomprehending public. It misses the leaven in the loaf. Does the internal self-government associated with the Christian ethic perhaps have something to do with this relative absence of external guidance: this *laissez faire*? Does political, economic, and moral self-discipline reduce the need for an elaborate regulatory command structure? Is politics, the art of persuasion, something that might flourish best in the absence of despotism, the technology of coercion?

Drawing upon the work of Lord Peter Bauer, David Landes, Harold J Berman, and other scholars, Raico contends that the key to understanding the success of western economic development ‘is to be found in the fact that, while Europe constituted a single civilisation – Latin Christendom – it was at the same time radically decentralised. In contrast to other cultures – especially China, India, and the Islamic world – Europe comprised a system of divided and, hence, competing powers and jurisdictions.’⁸² This is a point that is brought out especially in David

⁸¹ Ralph Raico, ‘The Theory of Economic Development and the European Miracle’ in Peter Boettke (ed), *The Collapse of Development Planning* (New York University Press, 1994).

⁸² Ibid.

Landes's *The Wealth and Poverty of Nations*.⁸³ Here again what we see at work is a harmonising of unity and diversity, an institution of checks and balances, and reliance upon talents and treasure vested in ordinary people. Raico's discussion of Latin Christianity at least demonstrates an acknowledgment of the religious dimension of this story.

Similarly, Francis Lieber attributed the successes of modern societies to the spread and development of Christianity. Among many other scholars, Eugen Rosenstock-Hessy, David Gress,⁸⁴ and Harold J Berman have looked at the Christian Middle Ages as a great wellspring of Europe's political and economic development. Kenneth Minogue notes that the kings of early Christendom were bound by oath to uphold an inherited body of laws that held their kingdoms together.⁸⁵ Thus the rule of law. Medieval Europe was decentralised and yet a common legal order spread through Germanic and English realms.⁸⁶ Thus Hayek's idea of spontaneous order.

Yet the literature on political and economic development, like so much within the social science fields, has long endured what Thomas Sowell calls *A Conflict of Visions*⁸⁷ that pits off the constrained vision, the practical-mindedness of those who promote free markets and investment, against the unconstrained vision of social utopians who emphasise domestic political intervention and international aid agencies. But what's

⁸³ David Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor* (W W Norton, 1998). Landes illustrates the decentralisation by noting the rise of Holland following its war for independence against Habsburg Spain.

⁸⁴ David Gress, *From Plato to NATO: The Idea of the West and Its Opponents* (Free Press, 1998).

⁸⁵ Minogue, above n 66, 26.

⁸⁶ Ruben Alvarado, *A Common Law: The Law of Nations and Western Civilization* (Pietas, 1999).

⁸⁷ Thomas Sowell, *A Conflict of Visions: Ideological Origins of Political Struggle* (William Morrow, 1987) 19–25.

in a name? Such terminology can be maddeningly imprecise. Sowell's two visions are merely more recent handles for what Lieber called Anglican and Gallican liberty. The 'European Miracle,' as Raico calls it, sprang from an experience that was first and foremost concrete and empirical rather than abstract and rationalistic. To paraphrase what Oliver Wendell Holmes, Jr said about the life of the law, we may say that the life of Europe's development is also experience.

Lord Peter Bauer, an adopted Englishman of Hungarian extraction, certainly epitomised the constrained, Anglican vision. In *Dissent on Development* and other works, Bauer criticised the professional tunnel vision of social scientists who were so obsessed with numbers that they have neglected such factors as '[a]bilities and attitudes, mores and institutions, [which] cannot generally be quantified in an illuminating fashion.'⁸⁸ The result is an 'amputation of the time dimension.'

Today it is the occupational disease of bureaucracies and universities to elevate specialisation over general knowledge and reward a fixation on data that can be statistically massaged. As Bauer observed of the state of academic economics: 'The historical background is essential for a worthwhile discussion of economic development, which is an integral part of the historical progress of society. But many of the most widely publicised writings on development effectively disregard both the historical background and the nature of development as a process.'⁸⁹ Here is a nice illustration of the unconstrained vision at work. Tunnel vision, anyone?

⁸⁸ Peter Thomas Bauer, *Dissent on Development* (Harvard University Press, 1972) 326; see also Peter Thomas Bauer, *From Subsistence to Exchange and Other Essays* (Princeton University Press, 2000) 18–24.

⁸⁹ Bauer, *Dissent on Development*, above n 87, 324–5.

As early as the cusp of the twentieth century, the journalist E L Godkin complained that, in Progressive reform circles, *laissez faire* economics had gone out of fashion. Furthermore, the *Declaration of Independence of the United States of America* was regarded as an embarrassment and the *United States Constitution* something to be outgrown. In *Soft Despotism, Democracy's Drift*, Paul Rahe cited Godkin's lament while echoing Lieber's and Tocqueville's earlier warnings. Rahe underscored that Godkin understood

that those who repudiate the notion of natural rights abandon thereby the principles dictating that government be limited in the ends it may pursue and in the means it may employ, and he recognised that in the name of a largely imaginary public interest – divorced from a concern with individual interests and rights, inspired by Rousseau's notion of the general will, and grounded in Hegel's vision of an ethically satisfactory public life – such men would be apt to commit what would hitherto be recognised as monstrous crimes.⁹⁰

An earlier visual rendering of this point may be found in Francisco Goya's etching, 'The Dream of Reason Produces Monsters.'

Others have lauded the ability to vote with one's feet – to escape major inconveniences if not monstrous crimes – as an additional safeguard: 'The possibility of "exit," facilitated by geographical compactness and, especially, by cultural affinity, acted to transform the state into a "constrained predator."' ⁹¹ Residents of states that are not friendly to

⁹⁰ Paul Rahe, *Soft Despotism, Democracy's Drift: Montesquieu, Rousseau, Tocqueville, and the Modern Prospect* (Yale University Press, 2009) 246.

⁹¹ J Anderson, *Explaining Long-Term Economic Change* (Macmillan, 1992) 28 quoted in Ralph Raico, *The European Miracle* (10 May 2013) <<http://mises.org/daily/2404>>; Albert Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970).

business – high on taxes but low on returns for investment – often have more productive uses to which they can put their time, talent, and treasure. The consequence, of course, is a shrinking tax base where emigration is high. Of course, many countries – Lenin called Russia ‘the prison-house of nations’ – seek to hold onto such ‘human resources’ by denying them an exit visa, but this merely locks everyone into preordained failure, as the dissolution of the Soviet Union illustrates. It is far better for a government to acknowledge that legal plunder is by nature predatory and then take steps to restrain and minimise it through the rule of law. Such an alternative requires a public philosophy that maintains a healthy scepticism toward grand political schemes that seduce people with pie-in-the-sky promises.

The constant element at work in all of these cases is the old demon of envy, a warped form of mimetic desire that seeks to destroy what others enjoy. Envy is certainly one possible expression of mimetic rivalry. Raico turns to the work of the sociologist Helmut Schoeck who wrote a very influential study of envy. ‘Perceived as a grave threat by those at whom it is directed, [envy] typically results in elaborate envy-avoidance behaviour: the attempt to ward off the dangers of malicious envy by denying, disguising, or suppressing whatever traits provoked it.’⁹² All of this unproductive behaviour, including superstitious attempts to ward off the ‘evil eye,’ tends to diminish everyone’s stature by breaking down the bonds of trust and community.

In his book *Envy*, Schoeck, like Max Weber, offers a pragmatic analysis of Christianity’s influence to the contrary:

⁹²

Ibid.

It must have been one of Christianity's most important, if unintentional, achievements in preparing men for, and rendering them capable of, innovative actions when it provided man for the first time with supernatural beings who, he knew, could neither envy nor ridicule him. By definition the God and saints of Christianity can never be suspected by a believer of countering his good luck or success with envy, or of heaping mockery and derision upon the failure of his sincere efforts.⁹³

This may seem like tepid praise but it acknowledges the vitality and hope inspired by a truly revolutionary revelation.

Raico cites a few of the points made by Harold Berman in the first volume of *Law and Revolution* (1983). In fact, Berman's summary of the principal characteristics of the Western legal tradition – its relative autonomy, professionalism, specialised training, and scientific mindset – provides us with a good place to wind down our survey of the building blocks of our tradition of liberty.⁹⁴

In the second part of this essay, let us retrace many of our steps and even reverse course, chiastically, as we examine how that tradition has been put at risk by relinquishing and even deprecating many of the distinctive assets of western civilisation. Berman himself witnessed and warned against these dangers decades ago. His bill of indictment is severe:

Almost all the nations of the West are threatened today by a cynicism about law, leading to a contempt for law, on the part of all classes of the population. The cities have become increasingly unsafe. The welfare system has almost broken down under unenforceable regulations. There is almost wholesale violation of

⁹³ Helmut Schoeck, *Envy: A Theory of Social Behaviour* (Liberty Fund, 1987)

76.

⁹⁴ Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 7–10.

the tax laws by the rich and the poor and those in between. There is hardly a profession that is not caught up in evasion of one or another form of governmental regulation. And the government itself, from bottom to top, is caught up in illegalities. But that is not the main point. The main point is that the only ones who seem to be conscience-stricken over this matter are those few whose crimes have been exposed.⁹⁵

What a picture he paints! Five centuries after Luther took his stand on grounds of conscience and two centuries after Madison saw conscience as the most sacred property, where do we stand today? Is the West facing foreclosure? Might the corporation we call our 'perpetual union' be placed into receivership? The attacks by critical legal theorists and other postmodernists on legal formalism now threaten to sweep aside rule, precedent, policy, and equity:

In the name of antiformalism, 'public policy' has come dangerously close to meaning the will of those who are currently in control: 'social justice' and 'substantive rationality' have become identified with pragmatism; 'fairness' has lost its historical and philosophical roots and is blown about by every wind of fashionable doctrine. The language of law is viewed not only as necessarily complex, ambiguous, and rhetorical (which it is) but also wholly contingent, contemporary, and arbitrary (which it is not). These are harbingers not only of a 'post-liberal' age but also of a 'post-Western' age.⁹⁶

This contempt for law – antinomianism is the word for it – is the spectre that haunts the West today. The question is whether the well-tempered engine of the American Constitution with its separation of powers and its checks and balances is any match for a post-Christian social order.

⁹⁵ Ibid 40.

⁹⁶ Ibid 41.

JUSTICE MCHUGH: A MODERATELY CONSERVATIVE APPROACH TO PRECEDENT IN CONSTITUTIONAL LAW

JOHN CARROLL^{*}

Abstract

This paper analyses McHugh J's approach to precedent in constitutional law in order to provide an insight into his Honour's view of the role of the judge in upholding the Constitution. In his time on the High Court McHugh J produced judgments that fiercely advocated both for and against accepting a prior precedent of the Court. However, such judgments should not be seen as at odds with each other, but rather, once contextual factors surrounding the cases are taken into account, it can be seen that his Honour sought to promote similar values in both approaches. In particular, McHugh J's approach to precedent sought to promote certainty in the law, particularly where governmental reliance was involved, his Honour believed such certainty promoted the values of legitimacy and confidence in the Court.

I INTRODUCTION

It has been contended by Guilfoyle that the jurisprudence of Justice McHugh is permeated by the balance of two distinct themes – the respect for individual rights, and an adherence to principle, which is motivated by a desire for ‘certainty ... in the law’.¹ This paper seeks to examine McHugh J's view as to the role of the judge in upholding the *Constitution*

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¹ Kate Guilfoyle, ‘McHugh, Michael Hudson’ in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 464, 465.

by examining his Honour's approach to precedent in constitutional cases. Of particular interest is to test how McHugh J balanced the two themes of his Honour's jurisprudence in the constitutional arena.

Precedent has been described as the 'hallmark of the common law'.² However, the High Court, as a final court of appeal, and also as a constitutional court, has never been strictly bound by its decisions.³ There are a number of competing values involved when considering precedent, including stability, consistency and predictability from following precedent, versus the need for justice, flexibility and rationality that departing from precedent may bring.⁴ Precedent also has a special significance in constitutional law, where a tension can be set up between adhering to the law as articulated by precedent, and adhering to the law of the *Constitution* itself.⁵ Accordingly, in considering precedent in constitutional law, a judge must weigh up the importance of a significant range of values in light of their own view of the role of the judge in upholding the *Constitution*.⁶ It is this balancing process that will be used to identify the values that were most significant for McHugh J when interpreting the *Constitution*.

The particular interest in McHugh J is that first, his Honour was a member of the High Court from 1989 until 2005 – a significant period for constitutional jurisprudence. This was a time of flux in the Court, when

² Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 93.

³ Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243, 246.

⁴ Mason, 'The Use and Abuse of Precedent', above n 2, 93–5.

⁵ Tony Blackshield, 'Precedent' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 550, 553.

⁶ See Michael Gerhardt, 'The Role of Precedent in Constitutional Decisionmaking and Theory' (1991–1992) 60 *George Washington Law Review* 68, 74.

the High Court moved from taking an ‘expansive approach to express and implied constitutional rights’ to applying a more confined approach to such rights.⁷ Second, Justice McHugh has written extensively about the judicial process, which can be utilised to enrich the understanding of the values that influenced his Honour.

This paper is divided into three parts. Chapter One analyses approaches to precedent, particularly in constitutional law, and discusses the competing values underlying such approaches. Chapter Two discusses constitutional cases where McHugh J deferred to precedent, and analyses the values that influenced his Honour to take this approach. Three cases are of particular interest here. First, *Re Tyler; Ex parte Foley* (‘Tyler’)⁸ and *Commonwealth v Mewett* (‘Mewett’)⁹ demonstrate instances where McHugh J followed the precedent of an earlier decision, despite his Honour holding a different opinion on the constitutional issue. The third case, *Austin v Commonwealth* (‘Austin’),¹⁰ is of interest for McHugh J’s criticism of the majority for refusing to follow precedent. One further case is discussed in Chapter Two, *Street v Queensland Bar Association* (‘Street’).¹¹ In *Street*, McHugh J rejected precedent; this approach will be rationalised with his Honour’s deferral to precedent in *Tyler*.

Chapter Three turns to McHugh J’s rejection of precedent in *Theophanous v Herald & Weekly Times Ltd* (‘Theophanous’)¹² and *McGinty v Western Australia* (‘McGinty’).¹³ This chapter discusses the values that influenced McHugh J’s approach to reject precedent, and

⁷ Fiona Wheeler, ‘Due Process, Judicial Power and Chapter III in the New High Court’ (2004) 32 *Federal Law Review* 205, 206.

⁸ (1994) 181 CLR 18.

⁹ (1997) 191 CLR 471.

¹⁰ (2003) 215 CLR 185.

¹¹ (1989) 168 CLR 461.

¹² (1994) 182 CLR 104.

¹³ (1996) 186 CLR 140.

analyses whether this was inconsistent to his Honour's approach when deferring to precedent.

As will be seen, both the themes of respecting individual rights, and adhering to principle,¹⁴ are evident in McHugh J's approach to constitutional precedent. However, when the two values conflicted, McHugh J preferred the certainty provided by adherence to principle. Also, rather than McHugh J's approach to constitutional precedent being viewed as inconsistent, his Honour's rejection, and deferral, to precedent can *both* be understood as instances of adhering to principle.

II CHAPTER ONE: THE DOCTRINE OF PRECEDENT

Former Chief Justice Mason has provided an influential account of the doctrine of precedent, noting that the term 'precedent' can be used in a number of different senses.¹⁵ Precedent may refer to the obligation of lower courts to apply decisions of courts higher in the hierarchy; or, more broadly, precedent may also encompass the doctrine of *stare decisis*.¹⁶ *Stare decisis* refers to the idea that 'a superior court is bound by its own decision or *ought not* to depart from it.'¹⁷ In the sense of *stare decisis*, precedent has been referred to as a process involving a 'value judgment'.¹⁸ *Stare decisis* may be labelled a 'product of human experience',¹⁹ where the effects that flow from past decisions are simply considerations to take into account in the judging process, rather than mechanically applying previous decisions. It is this 'value judgment' that

¹⁴ Guilfoyle, above n 1, 465.

¹⁵ Mason, 'The Use and Abuse of Precedent', above n 2, 95–6.

¹⁶ Ibid 95, 98.

¹⁷ Ibid 98 (emphasis added).

¹⁸ John Lockhart, 'The Doctrine of Precedent – Today and Tomorrow' (1987) 3 *Australian Bar Review* 1, 6.

¹⁹ Ibid.

is of particular interest in examining McHugh J's approach, and accordingly, precedent will be referred to in the sense of *stare decisis* in this paper.

The doctrine of precedent does not require that the whole of a previous decision be applied; rather, only the ratio decidendi (ratio) of the decision must be followed.²⁰ The ratio comprises that part of the judicial reasoning that is essential for deciding the case,²¹ and not any additional remarks that were not essential to the decision.²²

This chapter first considers the approach that the High Court has taken to constitutional precedent, followed by an examination of the values at stake when considering approaches to precedent. Finally, there is a brief discussion as to how approaches to precedent in constitutional law have a complex relationship with the approach to constitutional interpretation that a judge prefers.

A *The Approach of the High Court*

It has long been established that the High Court can overrule its own decisions,²³ and, particularly in constitutional law, the Court has adopted a flexible approach to precedent.²⁴ However, no settled principles as to when it may be appropriate to overrule have been developed, particularly

²⁰ Kirby, 'Precedent Law, Practice and Trends in Australia', above n 3, 245.

²¹ Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 3rd ed, 2004) 363.

²² Kirby, 'Precedent Law, Practice and Trends in Australia', above n 3, 245.

²³ See, eg, *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 278–9 (Isaacs J); David Bennett, 'Overruling' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 516, 516.

²⁴ Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997) 433. The fourth edition is being utilised here as Zines omitted the section on precedent in constitutional law in the fifth edition.

in constitutional cases.²⁵ The case law does, however, provide a framework to the approach taken by the Court when overruling previous constitutional decisions.

1 *Framework for Overruling*

First, a cautionary approach is taken when considering overruling. Gibbs J summed up this position; that '[i]t is only after the most careful and respectful consideration of the earlier decision ... that a Justice may give effect to his own opinions in preference to an earlier decision'.²⁶ Next, a judge considers whether the previous decision is 'wrong'.²⁷ Phrases such as 'manifestly wrong'²⁸ or 'fundamentally wrong'²⁹ have been used to demonstrate that it is appropriate to overrule.³⁰ Horrigan suggests, however, that such terms merely give 'emphatic force' to a judge's opinion, and are simply a conclusion that the judge has already made in regards to overruling.³¹

If the previous decision is thought to be 'wrong' then the judge considers whether it is appropriate to overrule. In determining this, consideration is given to a range of factors, identified in the case law, to provide an *indication* as to whether the circumstances are appropriate to overrule.

²⁵ Bryan Horrigan, 'Towards a Jurisprudence of High Court Overruling' (1992) 66 *Australian Law Journal* 199, 199.

²⁶ *Queensland v Commonwealth* (1977) 139 CLR 585, 599 ('*Second Territories Senators Case*').

²⁷ See, eg, Horrigan, above n 25, 205.

²⁸ See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554 ('*Lange*').

²⁹ See, eg, *McGinty* (1996) 186 CLR 140, 235 (McHugh J).

³⁰ Kirby, 'Precedent Law, Practice and Trends in Australia', above n 3, 245.

³¹ Horrigan, above n 25, 205.

2 *Factors Involved in Considering Precedent*³²

Four matters that may justify a *departure* from an earlier decision were affirmed in *John v Federal Commissioner of Taxation* (*John v FCT*),³³ and were applied in the constitutional context in *Street*.³⁴ These matters include, if the ‘earlier decision [does] not rest on a principle carefully worked out in a significant succession of cases’; if there are differences in the reasoning of the majority in the previous case; if the prior decision has ‘achieved no useful result’ or ‘led to considerable inconvenience’; and if the previous decision has ‘not been independently acted upon in a manner which [militates] against reconsideration’.³⁵ These factors demonstrate that more is involved than simply the ‘correctness’ of a past decision – with reference being made to the practical consequences of a decision, the level of reliance that has been placed on it, and also the degree to which a decision has been accepted by members of the Court.

Another argument favouring overruling is, if the constitutional issue is of ‘fundamental’ importance,³⁶ or relates to individual rights,³⁷ then a judge should uphold the ‘correct’ interpretation, even if it is contrary to precedent. Judges are likely to differ considerably in their interpretation as to what is of ‘fundamental’ importance in relation to the *Constitution*. Identifying those issues that are so ‘fundamental’ that a judge prefers to

³² For a comprehensive discussion see Zines, *The High Court and the Constitution*, above n 24, 433–44.

³³ (1989) 166 CLR 409.

³⁴ Ibid 489 (Mason CJ), 549 (Dawson J), 560 (Toohey J), 569 (Gaudron J), 586 (McHugh J).

³⁵ Ibid 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

³⁶ See, eg, *Second Territories Senators Case* (1977) 139 CLR 585, 630 (Aickin J).

³⁷ *Street* (1989) 168 CLR 461, 489 (Mason CJ), 518–9 (Brennan J), 588 (McHugh J). *Street* considered the *Constitution* s 117, an ‘individual right’ preventing a state from discriminating against residents of other states by reason of their inter-state residence.

reject precedent can provide an insight into the values that are significant for that judge, and also as to the judge's perceived limits of their authority in interpreting the *Constitution*.

A final factor favouring overruling precedent is if the previous decision has become inconsistent with contemporary developments in other areas of the *Constitution*. For example, Deane J in *Street* argued that the word 'discrimination' in *Constitution* s 117 must extend past formal discrimination to also include substantive discrimination, since the Court 'rejected the preference of form for substance in the construction of ... s 92'³⁸ in *Cole v Whitfield*.³⁹ This factor draws together the need for consistency of interpretation, predictability, and flexibility in order to account for changing circumstances.

In relation to *adhering* to precedent in constitutional cases, it necessarily follows that the converse of the factors enunciated in *John v FCT* weigh in favour of following precedent. Zines notes that precedent may also be followed if the decision in question brought about agreement following previous uncertainty.⁴⁰

It is also clear that a mere change in composition of the bench is *not* a reason, of itself, to overturn precedent.⁴¹ Also, whilst the relative age of a decision has been used to support both overruling and affirming a precedent, Horrigan notes that in no case has the age of a decision been a decisive factor in overruling.⁴²

³⁸ Ibid 524.

³⁹ (1988) 165 CLR 360.

⁴⁰ Zines, *The High Court and the Constitution*, above n 24, 442.

⁴¹ See *Second Territories Senators Case* (1977) 139 CLR 585, 594 (Barwick CJ).

⁴² See Horrigan, above n 25, 211.

3 *Alternatives to Overruling*

If a judge comes to the conclusion that a previous case is ‘incorrect’, it may be possible to apply his or her own interpretation without overruling the previous decision, since only the ratio of the previous decision is binding. The ratio of a previous decision may be narrowly defined in order to allow what may appear to be a differing interpretation to be able to sit alongside the previous decision without overruling it.⁴³ This approach may be a useful tool as a compromise, to both promote consistency, by not overruling, and allow the judge to apply his or her own ‘correct’ interpretation of the *Constitution*.

B *Values Underlying Approaches to Precedent*

The factors involved in considering precedent have been developed from deeper values that inform the judicial process. Considering the range of factors that are involved there is much scope for a judge’s judicial method to come to the fore in their approach to precedent. Zines suggests that consideration of precedent eventually comes down to a judge weighing up the ‘conflicting interests and policies’ involved in overruling.⁴⁴ By assessing which factors a judge considers most important, an insight can be gained as to the values informing that judge’s approach. Specifically in constitutional law, the identification of such values provides information as to the role that the judge believes they

⁴³ See, eg, Hayne J’s dissent in *Smith v ANL Ltd* (2000) 204 CLR 493 (‘*Smith*’). The earlier case of *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 (‘*Georgiadis*’) decided that the statutory extinguishment of a right to sue for common law damages was an ‘acquisition of property’ requiring ‘just terms’. In *Smith*, however, Hayne J held that since the Act in that case extinguished the accrued cause of action six months after the commencement of the Act, the appellant still had a valuable right, and thus, *Georgiadis* could be distinguished, and there was no ‘acquisition of property’ requiring ‘just terms’.

⁴⁴ See Zines, *The High Court and the Constitution*, above n 24, 443.

have to play in interpreting the *Constitution*. This section provides a discussion of the basic arguments for and against accepting precedent, followed by a discussion of the specific values underlying approaches to precedent. Chapters Two and Three will then seek to identify which values were most important for McHugh J in his approach to precedent in constitutional law.

1 *Arguments for and against Precedent*

Overwhelmingly, precedent is used to promote consistency and predictability in the law.⁴⁵ However, if precedent is applied too strictly it can ‘[destroy] or at least ... [delay] the development ... of principles’,⁴⁶ meaning that the law may lose its ability to account for changing social conditions.⁴⁷

In constitutional law, precedent carries a special significance, due to considerations respecting the *Constitution*. First, due to the entrenched nature of the *Constitution*, the High Court is more willing to reconsider past constitutional cases rather than non-constitutional cases, since the Parliament is unable to ‘correct’ a decision that is thought to be erroneous.⁴⁸ Second, in constitutional law, judges have two loyalties – loyalty to existing precedent, and loyalty to the *Constitution* itself. Some argue that the reasoning of the Court in past decisions is *only* persuasive, and ‘may not be used as a substitute for the *Constitution*’.⁴⁹ However, if each judge only followed their own opinion there would be an

⁴⁵ Kirby, ‘Precedent law, Practice and Trends in Australia’, above n 3, 243.

⁴⁶ Lockhart, above n 18, 5.

⁴⁷ Mason, ‘The Use and Abuse of Precedent’, above n 2, 94.

⁴⁸ See *Second Territories Senators Case* (1977) 139 CLR 585, 599 (Gibbs J).

⁴⁹ *Damjanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390, 396 (Barwick CJ).

unacceptable amount of instability within the law.⁵⁰ Third, since the *Constitution* is designed to endure over time, previous decisions may need to be reconsidered to take account of changing circumstances,⁵¹ thus, decreasing the strength of a precedent. Consequently, in constitutional law an even more complex array of factors confront a High Court judge when deciding whether to apply precedent.

2 Underlying Values

(a) Certainty and Reliance

Promoting consistency and predictability through adhering to precedent can relate to the need to be able to *rely* on decisions of the court, which requires *certainty* in the law.⁵² This has been heralded as a ‘principal’ purpose of *stare decisis*.⁵³ In constitutional law, a particular emphasis may be placed on *governmental* reliance,⁵⁴ since constitutional decisions ‘directly affect the institutional shape and powers of ... government’.⁵⁵ Reliance of *citizens* can also be important when considering precedent; however, in relation to citizens, reliance is more often referred to in the context of promoting security of *commercial* transactions.⁵⁶ Accordingly, reliance of citizens does not carry the same importance in constitutional law.

⁵⁰ Zines, *The High Court and the Constitution*, above n 24, 433.

⁵¹ Ibid. This may be linked to whether the judge prefers ‘originalist’ or ‘progressive’ modes of interpretation – discussed further below.

⁵² Saul Brenner and Harold Spaeth, *Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946–1992* (Cambridge University Press, 1995) 2.

⁵³ *Itel Containers International Co v Huddleston*, 507 US 60, [43] (1993) (Scalia J).

⁵⁴ Edmund Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) 145.

⁵⁵ Brian Galligan, ‘The Australian High Court’s Role in Institutional Maintenance and Development’ in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 184, 185.

⁵⁶ See Thomas, above n 54, 148; Brenner and Spaeth, above n 52, 3–4.

(b) *Fairness and Equality before the Law*

Following precedent may also be used to promote equality before the law. This may be due to the ‘rule of law’ ideal that like cases should be treated alike,⁵⁷ promoting fairness and justice. Counter to this view is that if the earlier decision was itself unjust, then by following precedent the court is simply promulgating unjust outcomes.⁵⁸

(c) *Legitimising Judicial Review*

A common theme in the American literature is that adherence to precedent is one method of legitimising judicial review.⁵⁹ Judicial review needs legitimising because it is argued that it is undemocratic for a court, comprised of non-elected judges, to strike down legislation and actions of elected officials.⁶⁰ Consequently, by following precedent the court demonstrates that it is bound by the rule of law, rather than by political motivations, when reviewing governmental action, providing legitimacy to the ‘anti-democratic’ task.⁶¹

(d) *Legitimacy and Confidence in the Court*

Arguments may be made both for and against adhering to precedent in order to promote legitimacy and confidence in the court.⁶² These values may be fostered through the court providing predictability in the law by adhering to precedent. Also, they may be promoted on ‘rule of law’

⁵⁷ Brenner and Spaeth, above n 52, 5.

⁵⁸ Ibid.

⁵⁹ See, eg, Henry Monaghan, ‘Stare Decisis and Constitutional Adjudication’ (1988) 88 *Columbia Law Review* 723, 752; James Rehnquist, ‘The Power that shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court’ (1986) 66 *Boston University Law Review* 345, 354.

⁶⁰ Rehnquist, above n 59, 353–4.

⁶¹ Monaghan, above n 59, 753.

⁶² See Thomas, above n 54, 150–1.

grounds, where the court demonstrates it is engaged in a legal process, and not a political one.⁶³ Justice Heydon has argued that this value of upholding the ‘rule of law’ goes to the core of the judicial function – where a judge’s function is to ‘administer the law’, and not ‘change ... or undermine’ the law.⁶⁴ As such, Justice Heydon contends that ‘the conscious making of new law’ by judges is due to a confusion of the judicial function.⁶⁵

Alternatively, adherence to precedent can prevent development in the law when there are changing social conditions,⁶⁶ which could then decrease confidence in the court’s ability to perform its role as final arbiter of the *Constitution*. Thus, confidence may be promoted through departing from precedent in certain circumstances. On this approach, the judicial function, as described by Justice Kirby, is to allow for development of the law to account for ‘[b]asic considerations of ... common justice’ in the face of changing social circumstances.⁶⁷

Whilst legitimacy and confidence in the court may be promoted by opposing approaches to precedent, it is the *manner* in which a judge promotes these values that is significant in understanding their view as to the limits of judicial authority in interpreting the *Constitution*. Using the above examples of Justices Heydon and Kirby, it may be possible to gauge where a particular judge sits along this spectrum of judicial philosophy by assessing the *manner* in which that judge attempts to uphold these institutional values.

⁶³ Brenner and Spaeth, above n 52, 5.

⁶⁴ Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2003) 47 *Quadrant* 9, 17.

⁶⁵ Ibid.

⁶⁶ Thomas, above n 54, 145.

⁶⁷ Michael Kirby, ‘Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty’ (2006) 30 *Melbourne University Law Review* 576, 590.

C *Approaches to Interpreting the Constitution*

A complex interrelationship exists between a judge's approach to precedent and their preferred method of constitutional interpretation. For example, if a judge is concerned, on democratic grounds, that the *Constitution* be interpreted according to the original intent of its framers, then such concerns are also likely to impact the judge's view on their authority to overturn prior decisions of the Court. Whilst this paper does not undertake an in-depth analysis of methods of interpretation, it will become evident in Chapter Three that a basic understanding of 'originalist' versus 'progressive' approaches to interpretation is useful.⁶⁸

A basic description of an 'originalist'⁶⁹ approach is that the *Constitution* has a fixed meaning⁷⁰ that is found by discerning the 'original understanding of constitutional terms'.⁷¹ One criticism of originalism is that it prevents the *Constitution* developing with changing conditions that were not envisaged when the *Constitution* was adopted. However, one method to respond to this criticism is construing constitutional powers broadly, so that the *Constitution* can apply to circumstances that were not foreseen when it was framed.⁷²

⁶⁸ For a more comprehensive analysis see Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories Principles and Institutions* (Cambridge University Press, 1996) 13.

⁶⁹ 'Originalism' is an overly broad categorisation under which a number of interpretive methods may be classified. See *ibid* 14–16.

⁷⁰ Antonin Scalia, 'The Role of a Constitutional Court in a Democratic Society' (1995) 2 *The Judicial Review* 141, 142.

⁷¹ Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy', *above* n 68, 14.

⁷² *Ibid* 15.

Alternatively, a basic description of a ‘progressive’⁷³ approach is that by recognising that the *Constitution* is designed to be capable of adjusting to ‘changing conditions’,⁷⁴ the *Constitution* must be interpreted by determining its *contemporary* meaning.⁷⁵ The main originalist criticism to this approach is that it allows the meaning of the *Constitution* to change over time.⁷⁶ A modern example of a progressive approach can be seen in Kirby J’s judgment in *Al-Kateb v Godwin* (‘*Al-Kateb*’).⁷⁷ Kirby J argued that the *Constitution* must be interpreted ‘in a way that is generally harmonious with the basic principles of international law’⁷⁸ so that the *Constitution* can be adapted to ‘changing times’.⁷⁹ McHugh J rejected Kirby J’s approach in *Al-Kateb*, claiming it allows the meaning of the *Constitution* to change whenever rules of international law change, amounting to unauthorised amendments of the *Constitution*.⁸⁰

McHugh J was one of the few judges to explicitly explain his interpretive approach whilst on the Court.⁸¹ McHugh J’s approach has been described as a ‘version of moderate originalism’,⁸² where his Honour’s starting point was to discern the *objective* intentions of the makers of the

⁷³ See Ibid 16. ‘Progressivism’ is also a broad label under which a number of interpretive methods may be classified.

⁷⁴ Ibid 17.

⁷⁵ Graeme Hill, “‘Originalist’ vs “Progressive” Interpretations of the Constitution – Does it Matter?” (2000) 11 *Public Law Review* 159, 159.

⁷⁶ Mason, ‘The Interpretation of a Constitution in a Modern Liberal Democracy’, above n 68, 18.

⁷⁷ (2004) 219 CLR 562.

⁷⁸ Ibid 624.

⁷⁹ Ibid 625.

⁸⁰ Ibid 592. Note, however, that different methods of interpretation do not, as a matter of course, lead to different results on constitutional issues – see generally Hill, above n 75.

⁸¹ See Bradley Selway, ‘Methodologies of Constitutional Interpretation in the High Court of Australia’ (2003) 14 *Public Law Review* 234, 244.

⁸² Jeffrey Goldsworthy, ‘Interpreting the *Constitution* in its Second Century’ (2000) 24 *Melbourne University Law Review* 677, 706.

Constitution.⁸³ This basic understanding of McHugh J's interpretative approach as a form of 'originalism' is useful for understanding his Honour's reasons for rejecting precedent in the cases discussed in Chapter Three. Prior to this, however, Chapter Two will consider the values underlying McHugh J's approach in constitutional cases where his Honour deferred to precedent.

III CHAPTER TWO: DEFERRING TO PRECEDENT

This chapter analyses constitutional cases where McHugh J deferred to precedent and identifies the values informing this approach, providing an insight as to McHugh J's view of the proper role of the judge in interpreting the *Constitution*. These cases demonstrate that, in comparison to other judges on the bench in the same period, McHugh J particularly valued the certainty that precedent provides. Additionally, his Honour's approach necessarily recognises that there are occasions when an individual judge's opinion must give way to that of the court in order to promote the institutional values of legitimacy and confidence in the court.

The 'centre piece' for analysis of McHugh J deference to precedent is his Honour's remarkable judgment in *Tyler* in relation to the jurisdiction of service tribunals. In *Tyler*, his Honour held that the previous cases were 'binding' on him in a limited way, despite there being no test previously accepted by a majority. The later decisions of *Mewett* and *Austin* are useful as further examples of McHugh J promoting the values that his Honour upheld in *Tyler*.

⁸³ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 551 (McHugh J) ('*Re Wakim*'); for an analysis of McHugh J's approach see Selway, above n 81, 244–6.

A Service Tribunal Cases – Setting the Scene

1 Background

To fully appreciate McHugh J's approach in *Tyler*, an understanding of the significance of the issues is required. The service tribunal cases involved constitutional challenges to the jurisdiction of a military tribunal to hear service offences. If a wide jurisdiction was granted to the tribunals then a wider exception would be created to the protections offered by *Constitution* ch III. A narrow jurisdiction, however, could potentially undermine the ability of the military to enforce service discipline.⁸⁴ The first case, *Re Tracey; Ex parte Ryan* ('Tracey'),⁸⁵ decided in 1989, before McHugh J's appointment to the Court, set the scene for sharp divisions in the Court. In *Tracey* the Court split, providing three lines of reasoning as to the scope of service tribunal jurisdiction, with no line of reasoning attracting majority support.⁸⁶

The divisions in the Court continued two years later in *Nolan*, where all members of the Court that decided *Tracey* retained their views from that case.⁸⁷ In *Nolan*, McHugh J, the only new member of the Court, concurred with Deane J's reasons from both *Tracey* and *Nolan*.⁸⁸ Deane J's view in *Tracey* provided the narrowest scope for service tribunal jurisdiction,⁸⁹ thus providing the greatest protection for individual 'rights'. Deane J made two important arguments in *Nolan* that McHugh J

⁸⁴ See Richard Tracey, 'The Constitution and Military Justice' (2005) 28 *University of New South Wales Law Journal* 426, 426–7.

⁸⁵ (1989) 166 CLR 518.

⁸⁶ See *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 471 (Mason CJ and Dawson J) ('*Nolan*').

⁸⁷ Ibid 474 (Mason CJ and Dawson J), 484 (Brennan and Toohey JJ), 490 (Deane J), 494 (Gaudron J).

⁸⁸ Ibid 499 (McHugh J).

⁸⁹ *Tracey* (1989) 166 CLR 518, 591.

necessarily adopted. First, Deane J recognised that no test had been accepted by a majority in *Tracey*.⁹⁰ Second, Deane J held that it is out of ‘imperative judicial necessity’ that he adhere to his own view of the *Constitution* in circumstances where the opposing views detract from the ‘fundamental guarantee of the manner of exercise of judicial power’.⁹¹ Thus, McHugh J accepted that a ‘fundamental guarantee’ was involved and also that no approach had gained majority approval.

Following *Nolan*, McHugh, Deane and Gaudron JJ constituted the minority, providing the narrowest scope for service tribunal jurisdiction. In the majority, Mason CJ and Dawson J provided the widest scope for jurisdiction, with Brennan and Toohey JJ accepting a middle ground, with jurisdiction nevertheless valid on the facts of *Nolan* for their Honours. Thus, there was still no majority acceptance of a single test regulating the limits of service tribunal jurisdiction.

2 *McHugh’s J Values* – Tyler

Three years after *Nolan* the issue arose again in *Tyler* and McHugh J sided with the majority on the grounds of precedent. This was a remarkable approach to precedent for a number of reasons. With the bench unchanged since *Nolan*, all other judges retained their views from the earlier cases, arguing that the previous cases had not produced a binding ratio,⁹² whereas McHugh J did find the previous cases to constitute binding precedent. However, in holding that the *outcomes* of *Nolan* and *Tracey* were binding on him, McHugh J remarkably did not accept any line of reasoning as authoritative, with his Honour only

⁹⁰ *Nolan* (1991) 172 CLR 460, 492.

⁹¹ *Ibid* 493.

⁹² *Tyler* (1994) 181 CLR 18, 26 (Mason CJ and Dawson J), 29 (Brennan and Toohey JJ), 34 (Deane J), 35 (Gaudron J).

following the result of the previous cases. This fascinating deferral to precedent by McHugh J is instructive as to the values that are significant for his Honour in the decision making process.

McHugh J held that due to divergent reasoning, *Nolan* and *Tracey* had no ratio. However, that fact did not mean that the doctrine of *stare decisis* had no relevance.⁹³ His Honour held that a court ‘is bound to apply [a] decision when the circumstances of the instant case are “not reasonably distinguishable from those which gave rise to the decision.”’⁹⁴ Accordingly, whilst McHugh J was convinced that the reasoning of the majority in *Tracey* and *Nolan* was erroneous, he saw no ‘legally relevant distinction between the three cases’ and consequently his Honour decided *Tyler* in conformity with them.⁹⁵ In relation to precedent, his Honour summed up his concerns concisely:

Uniformity of judicial decision is a matter of great importance. Without it, confidence in the administration of justice would soon dissolve. ... Furthermore, for the Court now to hold that a service tribunal had no jurisdiction to try this case ... would defeat the expectations of the Parliament and those concerned with the administration of discipline in the defence forces.⁹⁶

Thus, for McHugh J, precedent went beyond the ratio of a case, extending to requiring similar outcomes for indistinguishable cases.

B *Valuing Certainty*

McHugh J’s reasons for being bound by precedent in *Tyler* indicate that in the circumstances of the case, his Honour was compelled towards the

⁹³ Ibid 37.

⁹⁴ Ibid citing *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, 479 (Lord Reid).

⁹⁵ *Tyler* (1994) 181 CLR 18, 39.

⁹⁶ Ibid.

theme of adhering to principle.⁹⁷ It is contended, from *Tyler*, that the ‘principle’ which McHugh J was adhering to was the promotion of certainty in the law, so that government could *rely* on decisions of the Court. Importantly, for McHugh J, promoting certainty in *Tyler* outweighed the desire to maintain an interpretation of the *Constitution* that had a greater protection for individual rights.

1 *Governmental Reliance*

Critical for McHugh J in *Tyler* was that Parliament had formed expectations from past decisions. Similar concerns were displayed by his Honour in *Re Aird; Ex parte Alpert* (‘*Aird*’),⁹⁸ where the issue of service tribunal jurisdiction was again raised ten years later. This case demonstrates the consistency of McHugh J’s desire to promote certainty, at least in the circumstances of the service tribunal cases. In *Aird*, McHugh J argued that Brennan and Toohey JJ’s ‘service connection’ test had gained general acceptance since the previous cases.⁹⁹ This was a reference to general acceptance by the government and, in particular, the Judge Advocate in trying the case, rather than referring to acceptance by a majority of the Court. Thus, McHugh J perceived the reliance of the government, and the Judge Advocate, as significant factors when considering precedent.

It is uncontroversial that constitutional decisions have a key role to play in developing and maintaining governmental institutions.¹⁰⁰ Justice McHugh has argued that this role of shaping the ‘social, economic and political fabric of the country’ forms part of the *constitutional strength* of

⁹⁷ See Guilfoyle, above n 1, 465.

⁹⁸ (2004) 220 CLR 308. Note that *Aird* was not a good vehicle to analyse precedent since neither party sought to re-open the earlier decisions.

⁹⁹ Ibid 322.

¹⁰⁰ See Galligan, above n 55, 201; Rehnquist, above n 59, 368.

the Court.¹⁰¹ Arguably, McHugh J's recognition, in *Tyler and Aird*, of the level of reliance taken by the government, demonstrates that his Honour believes that the Court's strength must be exercised with care. McHugh J considered that if the earlier decisions were to be reversed, then the detrimental effect to the government would be significant, and it was a lesser evil to adopt an interpretation that his Honour considered erroneous. Accordingly, at least in the circumstances of enforcing military discipline *effectively*, McHugh J considered that Parliament must be able to rely on past decisions of the Court. Thus, given the power that Justice McHugh recognises the Court to have, it must be exercised with an appreciation of the *practical* effects that will flow from the decision. In the circumstances of the severe uncertainty pervading the service tribunal cases, McHugh J felt bound to adhere to the 'principle' to provide certainty to the issue.

Support for McHugh J consistently valuing reliance in relation to governmental interests is found in *Austin*. *Austin* was decided late in McHugh J's time on the Court, and concerned the doctrine of state immunity from Commonwealth laws. Significantly, McHugh J criticised the joint judgment for not following precedent. The joint judgment, with Kirby J concurring on this point,¹⁰² held that the previous decisions on state immunity were consistent with a one limb test, and, rather than overruling precedent, argued that judgments promoting a two limb test were an erroneous interpretation of earlier decisions on state immunity.¹⁰³ McHugh J, however, held that a 'long line' of decisions that accepted the

¹⁰¹ Michael McHugh, 'The Strengths of the Weakest Arm' (2004) 25 *Australian Bar Review* 181, 181–2.

¹⁰² *Austin* (2003) 215 CLR 185, 301.

¹⁰³ *Ibid* 258 (Gaudron, Gummow and Hayne JJ).

two limb test, prevented him from agreeing with the joint judgment that the test comprised only one limb.¹⁰⁴

In responding to the joint judgment, McHugh J argued that while there may not be a difference between the two tests, if there was a substantive difference, the single limb test ‘may lead to unforeseen problems in an area that is vague and difficult to apply’.¹⁰⁵ Significantly, the doctrine of state immunity provides an area of protection for the states from Commonwealth interference. Thus, McHugh J’s desire for certainty again related to governmental interests. This reiterates that in certain circumstances McHugh J values adhering to principle to promote certainty in constitutional law, particularly to account for governmental reliance.

C *Value of the Court*

It has been noted by Thomas that a strict approach to precedent necessarily hampers judicial autonomy.¹⁰⁶ Accordingly, in the cases where McHugh J has deferred to precedent, his Honour has favoured *restricting* individual judicial autonomy as a way of promoting institutional values in the Court.

1 *Promoting Institutional Values*

In *Tyler*, McHugh J linked uniformity of decision with ‘confidence in the administration of justice’.¹⁰⁷ Justice McHugh has suggested that one source of the strength of the judiciary is the ‘public confidence in the

¹⁰⁴ Ibid 281; the ‘long line’ includes acceptance of the two limb test by Mason J in *Commonwealth v Tasmania* (1983) 158 CLR 1, subsequently accepted by a majority in both *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 and *Victoria v Commonwealth* (1996) 187 CLR 416.

¹⁰⁵ *Austin* (2003) 215 CLR 185, 282.

¹⁰⁶ Thomas, above n 54, 141.

¹⁰⁷ (1994) 181 CLR 18, 39.

integrity, impartiality and capacity of the judiciary’;¹⁰⁸ and maintaining such confidence is critical for the Court to effectively perform its constitutional function.¹⁰⁹ This puts into perspective why confidence was such a critical factor for McHugh J in *Tyler*.

(a) *Capacity*

In relation to *capacity*, McHugh J may consider that the deep divisions in the Court prior to *Tyler* could harm the public perceptions of the capacity of the Court. Due to the Court’s role to provide authoritative determinations on the *Constitution*,¹¹⁰ if the Court was unable to reconcile the uncertainty, then confidence in the Court’s capacity to maintain the *Constitution* may wither. Accordingly, for McHugh J, there are circumstances where the individual must dismiss their own opinion so that the Court can effectively exercise its role as final arbiter of the *Constitution*. This may also be linked to legitimacy of the court, as discussed in Chapter One. If judges are willing to accept that they are bound by decisions of the Court that are contrary to their own view, then they are demonstrating that decisions are made according to law, rather than personal preference.¹¹¹

This *manner* of promoting legitimacy in the functioning of the Court is more closely linked to Justice Heydon’s, rather than Justice Kirby’s, judicial philosophy, as discussed in Chapter One. Underlying McHugh

¹⁰⁸ McHugh, ‘The Strengths of the Weakest Arm’, above n 101, 191 (emphasis added).

¹⁰⁹ Ibid.

¹¹⁰ See Galligan, above n 55, 186.

¹¹¹ See Rehnquist, above n 59, 353–4.

J's approach is a belief that it is the role of the judiciary to 'administer the law',¹¹² which includes the law articulated by the Court.

(b) *Impartiality*

Impartiality of the court evokes the value of 'equality before the law'. The need for impartiality was demonstrated by McHugh J judicially when his Honour argued in *Tyler* that consistent outcomes should apply when cases are 'not reasonably distinguishable'.¹¹³ Accordingly, for McHugh J, for the Court to maintain its constitutional strength, it must be perceived by the public as providing 'fair' or 'just' outcomes by treating like cases alike.

(c) *Integrity*

A judicial example of McHugh J promoting integrity in the Court can be seen in *Austin*. McHugh J, in criticising the joint judgment, noted that while there may be no practical difference between the one and two limb tests, if there is no difference, there is no advantage gained by 'jettisoning' the two limb test.¹¹⁴ This demonstrates that, for McHugh J, there is *value* in retaining past analyses of the Court, even if an 'updated' test that has no practical difference to the previous test can be articulated. Arguably, for McHugh J, the value of overtly accepting past decisions is in paying due respect to the Court as an institution – and such respect fosters public perceptions of the Court's integrity.

¹¹² Heydon, above n 64, 17.

¹¹³ (1994) 181 CLR 18, 37.

¹¹⁴ *Austin* (2003) 215 CLR 185, 282.

2 *Critique of McHugh J in Tyler*

McHugh J's unique judgment in *Tyler* may be open to criticism. First, McHugh J's judgment in *Tyler* was not pleasing for a 'student of the law', since no test was accepted by his Honour as determinative of the issue. It must be remembered, however, that if his Honour had maintained his position from *Nolan* there also would have been no authoritative test accepted by a majority. Second, Gaudron and Deane JJ may criticise his Honour for abandoning the 'rights protectionist' view before a clear majority had accepted another position. Contrary to this criticism, given the stalemate that had occurred within the Court, McHugh J should be heralded *at least* for attempting to provide certainty to the issue. Given the clear refusal of the other justices to alter their view, McHugh J should be recognised for being the only Justice to overtly consider the potential ramifications for the Court as an institution if it was unable to resolve its internal divisions. For McHugh J, rather than simply focussing on the doctrine involved in the service tribunal cases, his Honour appealed to what, for him, was a higher 'principle' of creating certainty in the law, and protecting the legitimacy of the Court.

3 *Supporting Evidence – Mewett*

The above discussion in relation to the institutional values that McHugh J was promoting in *Tyler* is supported by the more 'classical' application of precedent by McHugh J in *Mewett*. This demonstrates a consistent approach by McHugh J in promoting such values, rather than *Tyler* being a deviation from his Honour's usual approach.

In *Mewett*, McHugh J departed from his own view to follow the precedent set by a majority of the Court in *Georgiadis*. In *Georgiadis*, the majority found that a provision purporting to extinguish an accrued

right to sue for common law damages was invalid as being an ‘acquisition of property’ other than on ‘just terms’.¹¹⁵ McHugh J dissented in *Georgiadis*, holding that the plaintiff’s cause of action only had an existence due to federal law, and that it was ‘liable to be revoked by federal law’, thus, there was no ‘acquisition of property’.¹¹⁶ There were also two other dissenting judgments, on different grounds to McHugh J, in *Georgiadis*.¹¹⁷ By accepting *Georgiadis* as precedent in *Mewett*, McHugh J accepted the majority reasoning despite there being three dissenting judges in *Georgiadis*. Consequently, by holding that he was bound by the slim majority of the Court in *Mewett*, McHugh J was promoting the values of certainty, legitimacy and public confidence in the Court.

A final point on *Mewett* is that McHugh J did not articulate the values that led his Honour to follow precedent to the same extent as his Honour did in *Tyler*. It appears that, for McHugh J, accepting precedent in *Mewett* was a simple and uncontroversial step – which supports the proposition that such an approach is consistent for his Honour.¹¹⁸

¹¹⁵ (1994) 179 CLR 297, 308 (Mason CJ, Deane and Gaudron JJ), 312 (Brennan J).

¹¹⁶ Ibid 325.

¹¹⁷ Ibid 315 (Dawson J), 320–1 (Toohey J).

¹¹⁸ Note that in *Smith* (2000) 204 CLR 493, McHugh J dissented, concurring with Hayne J, that the provision in question was not an ‘acquisition of property’ as it could be distinguished from the provisions considered in *Georgiadis* and *Mewett*. The author agrees with Lynch that the provisions could be legitimately distinguished so as to not constitute an attempt to ‘attack *Georgiadis* through the back door’: Andrew Lynch, *The Impact of Dissenting Opinions Upon the Development of Australian Constitutional Law* (PhD Thesis, University of New South Wales, 2005) 249. As such, *Smith* is not an attempt by McHugh J to get around precedent by ‘stealth’.

D *The Significance of Individual Rights for McHugh J*

The analysis of *Tyler* has demonstrated that the theme of adherence to principle is evident in McHugh J's approach to precedent; the question is, what role does the second theme of his Honour's jurisprudence, the respect for individual rights, have to play for his Honour?¹¹⁹ In *Tyler*, even though McHugh J described the protection that *Constitution* ch III provides as a 'fundamental guarantee', this possibility of protecting individual rights was *outweighed* by the need to promote certainty. Thus, while McHugh J recognised that a guarantee of rights was involved, that was only one interest to be balanced as part of the decision-making process. In particular, McHugh J's approach can be contrasted to that of Deane and Gaudron JJ, who each retained their own view from the earlier cases in *Tyler*, due to the fundamental nature of the issue. This contrast highlights the different weightings given to competing values by the judges: while Deane and Gaudron JJ preferred protecting individual rights, McHugh J, clearly valued certainty over protecting individual rights *in the circumstances* of *Tyler*. Consequently, *Tyler* does not demonstrate that individual rights had no role to play in considering constitutional precedent for McHugh J, but rather, in certain circumstances other values must prevail.

1 *Inconsistent Approach?*

One example where the value of individual rights prevailed for McHugh J, when considering precedent in constitutional law, is found in *Street*. In *Street* each member of the Court, in separate judgments, overruled *Henry v Boehm* ('*Henry*'),¹²⁰ to widen the protection that *Constitution* s 117

¹¹⁹ These themes were referred to in the introduction: see Guilfoyle, above n 1, 465.

¹²⁰ (1973) 128 CLR 482.

offered to individuals. *Constitution* s 117 involves an express guarantee of individual rights, preventing a State from imposing discrimination on residents of other states by reason of their inter-state residence.¹²¹ Consequently, McHugh J, along with the rest of the Court, disregarded precedent to increase the protection of individual rights. It is argued, however, that due to the different circumstances in *Street* in regards to precedent, McHugh J's approach should not be viewed as being inconsistent with *Tyler*.

(a) *Reasons for Overruling in Street*

In holding that the interpretation of *Constitution* s 117 in *Henry* was incorrect, McHugh J appealed to the text of the *Constitution*,¹²² contemporary understandings of 'discrimination',¹²³ consistency of interpretation within the *Constitution*,¹²⁴ and the nature of the section as a 'great constitutional protection'.¹²⁵ His Honour then outlined the relevant factors that made it proper to overrule *Henry*:

The decision and essential parts of its reasoning are erroneous; it does not rest upon a principle carefully worked out in a significant succession of cases; there was a dissenting judgment; and the decision has not been independently acted upon in a manner which militates against reconsideration.¹²⁶

¹²¹ See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 1175.

¹²² *Street* (1989) 168 CLR 461, 581.

¹²³ *Ibid.*

¹²⁴ *Ibid* 586.

¹²⁵ *Ibid* 582.

¹²⁶ *Ibid* 588.

Also ‘most importantly’, for McHugh J, was that a ‘great constitutional protection’ would be reduced if *Henry* were followed.¹²⁷

For the rest of the Court, a similarly large array of factors was relied on in overruling *Henry*. These included that the principle from *Henry* was not worked out over a significant series of cases;¹²⁸ the decision had not been independently acted upon to an extent which militated against overruling;¹²⁹ the previous decision had not stood for a long time;¹³⁰ and it was not a unanimous decision.¹³¹ Additionally, the nature of *Constitution* s 117 as a guarantee protecting individual rights¹³² and the fact that constitutional developments since *Henry* were inconsistent with the approach taken in that case¹³³ were recognised as important factors.

(b) *Reconciling Street with Tyler*

In *Street*, most of the factors referred to in *John v FCT*, as well as the fact that *Constitution* s 117 protects individual rights, were recognised as good reasons to overrule *Henry*. Significantly, McHugh J referred to the protection of rights as the ‘most important’ factor – appearing at odds with his Honour’s approach in *Tyler*.

Despite the *apparent* inconsistency, it is contended that *Street* can be differentiated from the circumstances of *Tyler*. First, *Constitution* s 117 does confer individual rights, and since the *Constitution* does not generally confer rights on individuals, McHugh J was more concerned to provide an *effective* protection of such rights. Second, due to the sheer

¹²⁷ Ibid.

¹²⁸ Ibid 489 (Mason CJ), 549 (Dawson J).

¹²⁹ Ibid 489 (Mason CJ).

¹³⁰ Ibid 549 (Dawson J).

¹³¹ Ibid.

¹³² Ibid 489 (Mason CJ), 518–9 (Brennan J), 527 (Deane J), 569 (Gaudron J).

¹³³ Ibid 518 (Brennan J), 524 (Deane J), 569 (Gaudron J).

number of factors favouring overruling *Henry, Street* did not require the judges to ‘balance’ competing interests in a manner which would demonstrate which factors were most important. In particular, McHugh J noted that the past decision had not been independently acted upon, thus, the issue of reliance did not arise, which was the critical factor for his Honour in *Tyler*.

Finally, the context of *Tyler* was extremely different to *Street*. Whereas *Street* was the first decision on *Constitution* s 117 in 16 years, *Tyler* was the third time the Court had considered the question of service tribunal jurisdiction in recent years, and there was clearly a stalemate amongst the justices. This was certainly a factor influencing McHugh J to prefer certainty over individual rights in *Tyler*. This point is critical for demonstrating the existence of both themes of adhering to principle, and valuing individual rights, in McHugh J’s approach.¹³⁴ Since reliance was not in issue for McHugh J, in *Street*, no tension arose between protecting individual rights and promoting certainty. However, in *Tyler*, such a tension did arise, and due to the circumstances, his Honour was compelled to promote certainty over individual rights. Consequently, McHugh J’s judgment in *Street* should not be seen as inconsistent with *Tyler*, but rather, demonstrates that different circumstances will call for a different balancing of values.

(c) *McHugh’s J Respect for Civil Liberties*

Extra-judicially, Justice McHugh has made it clear that he holds the protection of human rights in high regard.¹³⁵ The question is whether this position can sit comfortably with his Honour’s approach to the

¹³⁴ See Guilfoyle, above n 1, 465.

¹³⁵ See generally Michael McHugh, ‘The Need for Agitators – The Risk of Stagnation’ (2007) 9 *Constitutional Law and Policy Review* 46.

Constitution. Arguably, the tension between the themes that Guilfoyle¹³⁶ contends permeate McHugh J's jurisprudence came to the fore in McHugh J's judgments in the service tribunal cases. McHugh J's adoption of the interpretation providing greatest protection for individual rights in *Nolan* demonstrated that his Honour values protecting civil liberties. However, in *Tyler*, the balance of the competing interests weighed in favour of adhering to principle to promote certainty.

Extra-judicially Justice McHugh has noted that constitutional decisions of the High Court have highlighted that gaps exist in the protection of human rights, and that there is an 'inability [for] Australian judges to prevent unjust human rights outcomes'.¹³⁷ This was not an accusation of a failing of the judiciary, but rather an acknowledgment that 'the High Court ... is *not empowered* to be as active as the Supreme Court of the United States ... in the defence of ... human rights.'¹³⁸ This understanding was clearly highlighted for McHugh J in the unfortunate case of *Al-Kateb*. While McHugh J recognised the 'tragic ... position of the appellant', his Honour held that there was nothing in the *Constitution* to prevent the Commonwealth Parliament authorising 'indefinite detention of an unlawful non-citizen in circumstances where there is no real prospect' of their removal.¹³⁹ In particular, McHugh J noted that '[i]t is not for the courts ... to determine whether the course taken by Parliament is ... contrary to basic human rights'.¹⁴⁰ Instead, his Honour held that if such rights are to be protected through the *Constitution* it must be done

¹³⁶ Guilfoyle, above n 1, 465.

¹³⁷ McHugh, 'The Need for Agitators – The Risk of Stagnation', above n 135, 53.

¹³⁸ Ibid 48 (emphasis added).

¹³⁹ *Al-Kateb* (2004) 219 CLR 562, 580–1.

¹⁴⁰ Ibid 595.

by inserting a Bill of Rights into the *Constitution* using the s 128 amendment process.¹⁴¹

Consequently, while McHugh J values protecting human rights, his Honour believes the Court has limited power to undertake an activist role in protecting such rights under the *Constitution*. In light of this understanding, it is not surprising that, in *Tyler*, the value of adhering to principle to promote certainty outweighed protecting individual rights.

E *Choices in Interpretation*

The cases where McHugh J has deferred to precedent also demonstrate that his Honour accepts that there is no single correct answer to constitutional issues, but rather, that choices must be made. Justice McHugh has recognised this, noting that ‘justices in constitutional cases often reach diametrically opposed views on the meaning of constitutional provisions even though they all use the same method of ... interpretation.’¹⁴² A more complex understanding of McHugh J’s view as to the scope for such choice emerges in the next chapter. As will be seen, for McHugh J, the ability for judges to make choices is not unbounded – and in certain circumstances his Honour has vigorously attacked *methods* of interpretation of the *Constitution* that he considers to fall outside such boundaries.

This analysis of McHugh J’s deferral to precedent in constitutional cases is consistent with Guilfoyle’s claim that a balance between the themes of adhering to principle and protecting individual rights permeate his Honour’s jurisprudence. Due to his Honour’s view that the Court has a

¹⁴¹ Ibid.

¹⁴² Michael McHugh, ‘The Constitutional Jurisprudence of the High Court: 1989–2004’ (2008) 30 *Sydney Law Review* 5, 10.

limited role in protecting individual rights under the *Constitution*, in *Tyler*, the value of adhering to principle outweighed protecting individual rights. By adhering to principle, it was seen that McHugh J was concerned to promote certainty and the institutional values of legitimacy and confidence in the Court. It will be seen in the next chapter, however, that his Honour also perceives that there are circumstances where such values will need to be protected by *rejecting* precedent.

IV CHAPTER THREE: OVERRULING PRECEDENT

This chapter analyses McHugh J's refusal to follow precedent in *Theophanous* and *McGinty*, and seeks to reconcile this approach with the cases in the previous chapter. First, these cases demonstrate that McHugh J used the rejection of precedent as a method of rejecting approaches to constitutional interpretation that were, according to his Honour, impermissible. This also accords with his Honour's value of adhering to principle, with the 'principle' being McHugh J's vision of the limits of legitimate methods of constitutional interpretation. Second, McHugh J also used the rejection of precedent to challenge the majority to synthesise their arguments on a novel and underdeveloped area of the law, so as to 'stimulate more thorough reasoning across the Court'.¹⁴³

A *Political Communication Cases – Context and Background*

In these cases, McHugh J refuses to follow recent decisions of the Court due to his Honour's belief that the majority reasoning was 'fundamentally wrong'.¹⁴⁴ The first case where McHugh J rejected precedent, *Theophanous*, was handed down in 1994, just four months after *Tyler*. Given McHugh J's judgment in *Tyler*, it may seem inconsistent that his

¹⁴³ See, eg, Lynch, above n 118, 2.

¹⁴⁴ *McGinty* (1996) 186 CLR 140, 235.

Honour vigorously rejected precedent in *Theophanous*. However, since the cases were handed down so close to each other, it is most likely to be the case that McHugh J believed that his approach in the two cases could be reconciled. McHugh J's approach in rejecting precedent in *Theophanous* was promoting similar values as his Honour was promoting by adhering to precedent in the cases discussed in Chapter Two.

To fully appreciate McHugh J's approach in *Theophanous*, and understand how the rejection of precedent can be reconciled with *Tyler*, it is necessary to have an understanding of the context surrounding *Theophanous*. Accordingly, it is instructive to briefly outline the precursor case to *Theophanous* – *Australian Capital Television Pty Ltd v Commonwealth* ('ACTV')¹⁴⁵ – as well as other constitutional developments at the time.

1 *The 'New Constitutional Law'*

In *ACTV*, the Court recognised a constitutional implication which limited Parliament's ability to legislate in a manner that infringed communication on political matters.¹⁴⁶ This case provided one example of the 'expansive approach to express and implied constitutional rights and freedoms' in which the High Court was involved during this period.¹⁴⁷ Detmold argued that in this period the High Court was developing a 'new constitutional law' that was creating more 'profound and far-reaching' individual rights.¹⁴⁸

¹⁴⁵ (1992) 177 CLR 106.

¹⁴⁶ Ibid 137–40 (Mason CJ), 149 (Brennan J), 168 (Deane and Toohey JJ), 186–7 (Dawson J), 212 (Gaudron J), 231–2 (McHugh J); note that some members of the Court refer to their reasons in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

¹⁴⁷ See Wheeler, above n 7, 206.

¹⁴⁸ M Detmold, 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228, 230.

In this ‘new constitutional law’, *Leeth v Commonwealth* (‘*Leeth*’),¹⁴⁹ decided in the same year as *ACTV*, is significant. In *Leeth*, Deane and Toohey JJ, in dissent, held that there is implied in the *Constitution* a general guarantee of legal equality.¹⁵⁰ In devising this implication their Honours relied on the common law doctrine of ‘legal equality’ being incorporated in ‘the very structure of the *Constitution*’.¹⁵¹ This method of deriving the implication opened an ‘interpretive door’ that was ‘very wide’,¹⁵² and it was this process which Detmold was heralding as the ‘new constitutional law’. Critics, however, argued that such developments may result in governmental power being limited through principles that have only a ‘tenuous link with anything in the *Constitution*’.¹⁵³ This then had the potential to ‘open up a Pandora’s box of implied rights and freedoms.’¹⁵⁴ It is in this context that McHugh J’s judgments are best understood.

2 ACTV

In *ACTV* there were differences amongst the judges as to the source of the implied freedom of political communication. For McHugh J, the words ‘directly chosen by the people’ in *Constitution* ss 7 and 24, interpreted against a background of representative and responsible government, refer to a process surrounding elections.¹⁵⁵ In this process, according to

¹⁴⁹ (1992) 174 CLR 455.

¹⁵⁰ Ibid 486.

¹⁵¹ Ibid 485.

¹⁵² Jeremy Kirk, ‘Constitutional Implications (II): Doctrines of Equality and Democracy’ (2001) 25 *Melbourne Law Review* 24, 32.

¹⁵³ Zines, ‘A Judicially Created Bill of Rights?’ (1994) 16 *Sydney Law Review* 166, 183.

¹⁵⁴ Ibid 177.

¹⁵⁵ *ACTV* (1992) 177 CLR 106, 232.

McHugh J, the people have a right to ‘participation, association and communication identifiable [from] ss 7 and 24’.¹⁵⁶

B *Rejecting the ‘New Constitutional Law’*

Following *ACTV*, over a series of cases, including *Theophanous* and *McGinty*, McHugh J criticised the majority approach to deriving the implication. Through these criticisms an understanding as to the factors that persuaded McHugh J to reject precedent can develop.

1 *Rejecting Precedent*

(a) *Theophanous*¹⁵⁷

In *Theophanous*, the question was whether the *ACTV* implication could provide either a constitutional defence for defamation on ‘political matters’, or whether the common law defences to defamation could be altered to be consistent with the implication.

In their joint judgment, Mason CJ, Toohey and Gaudron JJ held that the source of the implication was the need to ‘ensure the efficacious working of representative democracy’,¹⁵⁸ which their Honours held to be a concept ‘enshrined in the *Constitution*’.¹⁵⁹ On the question at issue, their Honours formulated a constitutional defence to actions in defamation.¹⁶⁰ Deane J, in the majority, agreed that the source of the implication was ‘the doctrine of representative government which forms part of the fabric of the

¹⁵⁶ Ibid 231–2.

¹⁵⁷ Note that *Theophanous* was heard successively with *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 (*‘Stephens’*), where the Court was similarly divided as to the source of the implication.

¹⁵⁸ *Theophanous* (1994) 183 CLR 104, 123.

¹⁵⁹ Ibid 121–1.

¹⁶⁰ Ibid 140.

Constitution', and his Honour held that this was established in *ACTV*.¹⁶¹ Deane J, however, held that the *Constitution* provided a *complete* defence in relation to publications 'about the official conduct or suitability of a member of the Parliament or other holder of high Commonwealth office.'¹⁶² This was a wider view than that expressed in the joint judgment, however, Deane J added that while he was 'unable to accept' the position of the joint judgment, he would agree with them in order to gain majority support.¹⁶³

In *Theophanous*, McHugh J rejected the majority approach to the source of the implication, authoring a forceful dissent. McHugh J could not agree with 'the proposition that the institution of representative government [was] a part of the *Constitution*, *independently of its text and structure*'.¹⁶⁴ His Honour held that any implication from the concept of 'representative government' can only be to the extent that the concept is apparent in the 'text and structure of the *Constitution*'.¹⁶⁵ Interestingly, it could have been legitimately argued that due to the novel nature of the implication, and the differences between the judgments in *ACTV*, that no approach to deriving the implication had been accepted by a majority there. However, McHugh J held that a majority in *ACTV* had accepted a wider view of the implication,¹⁶⁶ and, consequently, his Honour considered whether he should follow precedent.¹⁶⁷

In taking the significant step to depart from precedent, his Honour criticised the majority for not following the 'theory of constitutional

¹⁶¹ Ibid 163.

¹⁶² Ibid 185.

¹⁶³ Ibid 188.

¹⁶⁴ Ibid 195 (emphasis added).

¹⁶⁵ Ibid 196.

¹⁶⁶ Ibid.

¹⁶⁷ See *ibid* 205–6.

interpretation' that had prevailed since the *Engineers' Case*,¹⁶⁸ which held that it is illegitimate to 'construe the *Constitution* by reference to political principles or theories that find no support in the text'.¹⁶⁹ McHugh J noted that for the Court 'to retain the confidence of the nation as the final arbiter of ... the *Constitution* ... no interpretation ... can depart from the text and structure of the *Constitution*.'¹⁷⁰ Thus, not only was the majority's reasoning incorrect, but McHugh J argued it could lead to drastic consequences for the Court as an institution. Chapter Two demonstrated, however, that McHugh J deferred to precedent, despite believing the majority reasoning was erroneous, on the grounds of promoting confidence in the Court. McHugh J was, however, aware of this different approach to protecting confidence, pointing out that more was involved in *Theophanous* than the conclusion that the reasoning in *ACTV* was erroneous.¹⁷¹

To reconcile the prima facie inconsistency as to the manner in which McHugh J sought to protect confidence in the Court, it is critical to understand what his Honour saw as the special circumstances in *Theophanous*. McHugh J was particularly concerned that if the majority approach was accepted there would be 'far reaching ramifications for the federal system'.¹⁷² This appears to relate to Zines' concern that a 'Pandora's box' of rights would be opened, having the potential to invalidate legislation on a large scale. Arguably McHugh J was concerned that a whole raft of unwarranted implications, using the method of the majority, may be derived from the *Constitution*.

¹⁶⁸ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

¹⁶⁹ *Theophanous* (1994) 183 CLR 104, 198.

¹⁷⁰ *Ibid* 197.

¹⁷¹ *Ibid* 205.

¹⁷² *Ibid*.

Accordingly, McHugh J's approach in *Theophanous* was not simply related to the doctrine of political communication, but was a rejection of the so-called 'new constitutional law'. For McHugh J, this new constitutional law was going past the legitimate authority that the Court has in interpreting the *Constitution*. Consequently, due to McHugh J's view as to the limit of the Court's authority, his Honour was unable to protect confidence in the Court by deferring to precedent, as was done in *Tyler*.

(b) McGinty

The question as to the source of the implication was raised again two years later in *McGinty*. Following *Theophanous*, a clear majority had accepted one line of reasoning, thus, McHugh J's rejection of that view in *McGinty* was a clear rejection of precedent.

In *McGinty*, McHugh J reiterated his contention that the idea of a 'free-standing principle of representative democracy' was contrary to the principles of interpretation outlined in the *Engineers' Case*.¹⁷³ His Honour held that the reasoning of the majority was 'fundamentally wrong', amounting to 'an alteration of the *Constitution* without the authority of the people under s 128 of the *Constitution*.'¹⁷⁴ By understanding what was 'fundamentally wrong', according to McHugh J, an understanding as to why his Honour believed the majority had departed from their legitimate authority in interpreting the *Constitution* can be developed.

¹⁷³ *McGinty* (1996) 186 CLR 140, 229–30.

¹⁷⁴ *Ibid* 236.

2 *Protection from Fundamental Errors of Interpretation*

It was noted in Chapter One that Horrigan suggests that terms such as ‘fundamentally’ wrong merely give force to the judge’s conclusion.¹⁷⁵ However, it is contended that, for McHugh J in *McGinty*, the ‘fundamental’ nature of the error did carry substantive meaning. The error was ‘fundamental’ for McHugh J because the majority failed to follow the *fundamental* method of constitutional interpretation outlined in the *Engineers’ Case*. It has been argued that the majority approach in *ACTV* impliedly overruled the *Engineers’ Case*.¹⁷⁶ Thus, in *McGinty*, McHugh J was confronted with two conflicting precedents – the precedent of a settled interpretation method from the *Engineers’ Case* versus the precedent set by *ACTV* and *Theophanous*. By rejecting the precedent of *ACTV* and *Theophanous*, his Honour accepted that the *Engineers’ Case* was of a more ‘fundamental’ nature.

Judges are often confronted with a ‘choice’ between precedents carrying different levels of importance.¹⁷⁷ The choice that is made provides an insight as to which values are of greater importance for that judge. McHugh J considered that a departure from the *Engineers’ Case* fundamentally changed the limits of authority that judges have in interpreting the *Constitution*.¹⁷⁸ This fits with arguments that the constitutional developments by the Court in the early 1990s had the potential to ‘[open] up a vast and uncertain area of constitutional

¹⁷⁵ See Horrigan, above n 25, 205.

¹⁷⁶ See George Williams, ‘*Engineers* is Dead, Long Live the *Engineers*!’ (1995) 17 *Sydney Law Review* 62.

¹⁷⁷ See Henry Abraham, *The Judicial Process* (Oxford University Press, 6th ed, 1993) 325.

¹⁷⁸ Such an approach is not surprising given the *Engineers’ Case* has been referred to as the ‘cornerstone of Australian constitutional jurisprudence’: See Williams, above n 176, 63.

limitations ... [increasing] the discretionary power of the judiciary.’¹⁷⁹ Arguably, McHugh J’s desire to firmly link the implication of freedom of political discussion back to the text of the *Constitution* was to reign in this increasing area of discretionary power. This goal is linked to philosophical underpinnings of the judicial process concerning the level of ‘restraint’ or ‘activism’ that a judge is empowered to employ in interpreting the *Constitution*.¹⁸⁰ By attempting to narrow the scope of the implication, perhaps McHugh J was trying to narrow the scope for judicial activism in the future. This is not an argument that McHugh J was *extremely* conservative. Rather, on a spectrum, his Honour had a greater concern than most other members on the bench, during the same period, of the limits of the authority of the Court being breached. To link this back to the themes that pervade McHugh J’s jurisprudence,¹⁸¹ the interpretive method enunciated in the *Engineers’ Case* can be seen as the ‘principle’ that his Honour was attempting to adhere to.

The approach of McHugh J in preferring the precedent of the *Engineers’ Case* is perhaps one manifestation of a consistent approach taken by his Honour in rejecting certain forms of ‘progressive’ methods of constitutional interpretation. McHugh J’s accusation in *McGinty*, that the majority approach amounted to an unauthorised alteration of the *Constitution*, is echoed in other judicial statements of his Honour. In *Al-Kateb*, McHugh J charges Kirby J with ‘amending the *Constitution* ... in disregard of s 128’ when interpreting the *Constitution* by reference to contemporary rules of international law.¹⁸² Also, in *Re Wakim*, McHugh

¹⁷⁹ Zines, ‘A Judicially Created Bill of Rights?’, above n 153, 181.

¹⁸⁰ See Williams, above n 176, 1–2. Williams notes that underlying the issues involved in the political communication cases was the ‘issue of judicial activism versus judicial restraint’.

¹⁸¹ Guilfoyle, above n 1, 465.

¹⁸² (2004) 219 CLR 562, 592.

J remarked that ‘the judiciary has no power to amend or modernise the *Constitution*’ in response to an argument that the cross-vesting legislation should be validated because it would be a convenient result.¹⁸³ Both methods of interpretation that McHugh J is condemning here can be seen to have ‘progressive’ elements.

In light of McHugh J’s similar criticisms in these cases, arguably, in *McGinty*, his Honour was similarly concerned with a ‘progressive’ method of interpretation, which was forming part of the ‘new constitutional law’. Whether or not the majority’s method could be classed as progressive,¹⁸⁴ McHugh J certainly thought it was. In *McGinty*, his Honour held that the majority approach required cases to be decided ‘by reference to what the principles of representative democracy *currently require*’,¹⁸⁵ which fits within the scope of ‘progressive’ interpretive methods.¹⁸⁶ Thus, recalling from Chapter One, that McHugh J’s approach to interpretation can be classed as a version of ‘originalism’, his Honour sought to protect the *Constitution* from unauthorised amendment through certain ‘progressive’ methods of interpretation.¹⁸⁷

It would be too sweeping to argue that McHugh J wished to reject *any* progressive method of interpretation.¹⁸⁸ Rather, it is the context of the

¹⁸³ (1999) 198 CLR 511, 549.

¹⁸⁴ Although, see Adrienne Stone, ‘Australia’s Constitutional Rights and the Problem of Interpretive Disagreement’ (2005) 27 *Sydney Law Review* 29, 42. Stone notes the implication was controversial because it was ‘contrary to originalist arguments ... and because of doubts as to its textual foundation.’

¹⁸⁵ (1996) 186 CLR 140, 236 (emphasis added).

¹⁸⁶ See Hill, above n 75, 159.

¹⁸⁷ Goldsworthy notes that the concern of originalism is to ensure that the authority of the people is not ‘usurped by a small group of unelected judges’ – this accords with McHugh J’s criticisms regarding illegitimately amending the Constitution: Goldsworthy, above n 82, 683.

¹⁸⁸ Note that McHugh J’s own interpretation method is a complex and nuanced method that recognises that the *Constitution* was intended to endure over time, and as such, his Honour recognises the ability for ‘*current* understanding[s] of ... concepts

‘new constitutional law’ that provides an illustration of what McHugh J’s concerns were in relation to ‘progressive’ approaches. Through interpreting the *Constitution* in light of contemporary principles and theories, constitutional doctrines may be formed which have the potential to develop ‘the full panoply of a bill of rights’,¹⁸⁹ resulting in a greater degree of power in the Court to invalidate governmental action. Ironically then, it can be seen that by rejecting precedent in the political communication cases, his Honour was demonstrating his ‘rigid adherence’¹⁹⁰ to principle that was demonstrated by deferring to precedent in other areas – with the ‘principle’ here being authorised limits of constitutional interpretation.

3 *McHugh J’s Legacy – Lange*

The uncertainty that was generated in *McGinty* was resolved with a unanimous judgment in *Lange*, where the Court held that the *Constitution* gives rise to an implication of representative government ‘only to the extent that the text and structure ... establish it.’¹⁹¹ Thus, it would appear that McHugh J’s approach to ground the implication in the text of the *Constitution* was influential in *Lange*.¹⁹²

In joining the unanimous judgment in *Lange*, McHugh J also necessarily accepted that the common law defence for defamation must be compatible with the *Constitution*.¹⁹³ However, his Honour had held in *Theophanous* that it was not possible that the freedom would override the

and purposes’ to ‘infuse’ the interpretation of the *Constitution*: *Eastman v The Queen* (2000) 203 CLR 1, 50 (McHugh J). This approach can itself be seen to have some ‘elements’ of a ‘progressive’ methodology.

¹⁸⁹ Zines, ‘A Judicially Created Bill of Rights?’, above n 153, 177.

¹⁹⁰ Guilfoyle, above n 1, 465.

¹⁹¹ (1997) 189 CLR 520, 567.

¹⁹² See, eg, Kirk, above n 152, 49.

¹⁹³ *Lange* (1997) 189 CLR 520, 571.

common law.¹⁹⁴ Thus, McHugh J was willing to compromise his own view in order to gain unanimous acceptance of the interpretative method for deriving the implication. Justice Heydon has noted that *Lange* involved a ‘tactical compromise’, where there was ‘an agreement by seven people to do what at different stages all seven had thought was wrong.’¹⁹⁵ Accordingly, for McHugh J, the real sticking point was the *method* of interpretation, and not the final form of the doctrine, thus, strengthening the argument that his Honour’s rejection of precedent was based on rejecting the developing method of interpretation.

The bottom line from *Lange* is that McHugh J’s influence on the source of the implication is part of his Honour’s legacy to constitutional law. Arguably, however, this legacy runs deeper, with McHugh J’s rejection of precedent, to adhere to the ‘principle’ of an established method of deriving implications, can be seen to have played a role in preventing the ‘realisation of ... “The New Constitutional Law”’.¹⁹⁶

Due to what looks like a contradictory approach to constitutional precedent of McHugh J in *Tyler* and *Theophanous*, there was the potential for his Honour to be criticised for being inconsistent. However, this *prima facie* inconsistency is illusory, with both judgments having the ultimate goal of promoting the values of certainty, legitimacy and confidence in the court. In *Tyler*, McHugh J was advocating for certainty on the issue of service tribunal jurisdiction, and promoted the institutional values by attempting to resolve divisions in the Court. In *Theophanous* and *McGinty*, while McHugh J decreased certainty in the doctrine at issue, his Honour was ultimately attempting to provide certainty as to the

¹⁹⁴ (1994) 182 CLR 104, 206.

¹⁹⁵ Heydon, above n 64, 17.

¹⁹⁶ Stone, above n 184, 42.

interpretative method that the Court uses when construing the *Constitution*. McHugh J's vision as to the limits of the Court's authority in interpreting the *Constitution* required his Honour to reject precedent in order to promote the institutional values of legitimacy and confidence in *Theophanous* and *McGinty*.

C Contribution to 'Ideas' on the Constitution

McHugh J's rejection of precedent in *McGinty* and *Theophanous* may also be linked to the goal of challenging the majority to refine their reasoning as to the source of the implication. In *McGinty*, McHugh J considered that ultimately the majority approach to the implication may prevail – however, until that time his Honour refused to accept their reasoning.¹⁹⁷ Thus, despite the fact that McHugh J did not believe that his own approach would prevail, his Honour continued to reject precedent. It has been suggested that dissent not only provides an opposing view which may be accepted in the future but can also be used to 'stimulate more thorough reasoning across the Court'.¹⁹⁸ If this was a goal of McHugh J, then it is likely that his Honour considers one role of the individual judge is to 'contribute to the storehouse of ideas about a constitution ... to deepen [our] understanding of it'.¹⁹⁹ Especially in the underdeveloped area of law that was the doctrine of freedom of political communication,²⁰⁰ at the very least, his Honour may have been able to

¹⁹⁷ (1996) 186 CLR 140, 236.

¹⁹⁸ Lynch, above n 118, 2.

¹⁹⁹ See Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 295.

²⁰⁰ See Williams, above n 176, 65–66: Williams notes that at the time of *Theophanous* the implication of freedom of political communication remained 'vague and imprecise'.

challenge the majority to answer his criticisms with more thorough and precise reasoning.²⁰¹

V CONCLUSION: A MODERATELY CONSERVATIVE APPROACH

It is first important to recognise that the current analysis is not definitive, as the examination of the values influencing McHugh J's jurisprudence have only been considered through the very limited lens of his Honour's approach to constitutional precedent. The central point for the analysis of McHugh J's approach was the two judgments handed down in 1994, *Tyler* and *Theophanous*. This analysis has attempted to resolve the prima facie inconsistency between these judgments, in order to tease out the values that were important for McHugh J in constitutional law.

The cases where McHugh J deferred to precedent demonstrate that a critical value for McHugh J in constitutional jurisprudence was certainty in the law, particularly so that the government could rely on decisions of the Court. McHugh J also sought to protect values inherent in the Court, so as to allow the Court to effectively perform its role as a constitutional court; these were, in particular, the values of legitimacy and confidence in the Court. Thus, by deferring to precedent, McHugh J demonstrated one theme of his jurisprudence, adherence to principle to promote certainty.²⁰² However, the second theme of his Honour's jurisprudence, respecting individual rights,²⁰³ was not entirely absent. Prior to *Tyler*, in *Nolan*, McHugh J demonstrated a respect for individual rights by adopting the view on service tribunal jurisdiction that provided the greatest protection for individual rights. Also, in *Street*, his Honour was willing to overrule

²⁰¹ See, eg, Rehnquist, above n 59, 374.

²⁰² Guilfoyle, above n 1, 465.

²⁰³ Ibid.

precedent and advocate for an interpretation providing a wider protection of individual rights. What is clear, however, is that when the circumstances of a case brought the two themes of McHugh J's jurisprudence into conflict, his Honour's view of the limited role of the judge in protecting individual rights under the *Constitution* meant that the theme of adherence to principle prevailed.

In rejecting precedent, once the contextual factors are taken into account, it can be seen that McHugh J was not adopting an inconsistent approach to that taken in deferring to precedent, but rather, his Honour was attempting to promote the same values of certainty, legitimacy and confidence. The reason that McHugh J had to reject precedent in order to promote the same values was due to his Honour's view of the limits of legitimate authority that judges have in upholding the *Constitution*. McHugh J believed that the judge has a less activist role to play in interpreting the *Constitution* than most other judges on the bench in the same period. Thus, his Honour was compelled to reject certain methods of constitutional interpretation that had the potential to increase the discretionary power of a judge in interpreting the *Constitution*.

McHugh J's goal in rejecting precedent was to bring back a level of certainty into the methods of constitutional interpretation that could be used, and also to promote the legitimacy and confidence in the Court by keeping constitutional interpretation within certain limits. This again demonstrated the theme of McHugh J's jurisprudence involving adherence to principle, where the 'principle' was what his Honour regarded as the legitimate methods of constitutional interpretation. This strong desire to adhere to principle in order to promote certainty in the law, balanced by a respect for individual rights where, according to his Honour, they can be legitimately protected under the *Constitution*, can be

viewed as a moderately conservative approach to constitutional precedent.

MARTIN KRYGIER'S CONTRIBUTION TO THE RULE OF LAW

CLARENCE LING*

Abstract

Martin Krygier is the Gordon Samuels Professor of Law and Social Theory at the University of New South Wales. He is the son of the prolific Henry Richard Krygier of Quadrant fame and carries on the same anti-Communist legacy. Martin's field of expertise is the Rule of Law in former Communist countries, especially Eastern European countries. Conceptions of the rule of law span from the influential A V Dicey to substantive conceptions like F A Hayek. Both the formal and substantive conceptions have contributed much to understanding the rule of law. The content of conceptions are very flexible. Martin has drawn from many good sources; of note would be Philip Selznick. Martin bridges the gap between formal and substantive conceptions, creating a new subset of rule of law conceptions. Martin's ideas represent the 'middle ground' between formal and substantive conceptions. Martin prefers teleological conceptions, starting with the 'end of the rule of law', and that is the reduction of arbitrariness. By focusing on the purpose of the rule of law, Martin has created a conception that will allow retrofitting institutions and values related to the rule of law, in places where they are less available – his greatest contribution.

I INTRODUCTION

Martin Krygier is the Gordon Samuels Professor of Law and Social Theory at the University of New South Wales.¹ He was born in Sydney

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on 9 February 1949² to famous publisher, journalist and businessman, Henry Richard Krygier (Richard) and his wife, Romaulda Halpern.³ His father, a Polish-Jewish refugee, was also the founder of *Quadrant* magazine.⁴ Richard Krygier was initially sympathetic to Communism, having this sympathy shaken by the Moscow trials of the 'Old Bolsheviks' (1936–38), and 'shattered by the Hitler-Stalin pact of August 1939, the division of Poland between Germany and the Soviet Union and their experience of Sovietisation in Lithuania from June 1940'.⁵ The anti-Communist legacy of the Krygier family began there.

Quadrant is very much a piece of Martin Krygier's past as well as whom his father was, so it deserves some mention as to what it is. The purpose of *Quadrant* is to 'throw down an intellectual challenge to the Left's domination of Australian literary culture'.⁶ It is interesting to note, that Hal G P Colebatch regards the importation of ideas from the Left as a betrayal of *Quadrant's* purpose, criticising especially Robert Manne, whom Colebatch regarded as too Left (and even Communist).⁷ Contrast this with the opinion of Martin, who regarded Robert as doing 'something interestingly and individually different in a more complicated situation',

¹ University of New South Wales, *Staff Directory: Martin Krygier* (2011) <<http://www.law.unsw.edu.au/staff/KrygierM/>>.

² *Martin Krygier* (2011) Pipl <<http://pipl.com/directory/people/Martin/Krygier>>.

³ Peter Coleman, *Krygier, Henry Richard (1917–1986)* (2007) Australian Dictionary of Biography <<http://adb.anu.edu.au/biography/krygier-henry-richard-12760/text23015>>

⁴ Ibid.

⁵ Ibid.

⁶ Hal Colebatch, 'Opinion: Robert Manne and the Quadrant Affair', *News Weekly* (online) 15 October 2011 <<http://www.newsweekly.com.au/article.php?id=4961>>.

⁷ Ibid.

that situation being the ‘loss’ of the Communist enemy in 1989.⁸ Of importance is Martin’s assertion in 2006 that:

[W]e’re a political culture that hunts in packs and there was a tendency once you’re sort of pushed to one side in popular polemics for *Quadrant* people to actually quite like the role of pariah and being the anti-pack pack. I think that that has continued with a vengeance over the Aboriginal issue and many other things in recent years and it has dismayed me and it’s why I’m not associated with *Quadrant* now.

In some ways, Martin Krygier has followed his father’s example and gone the extra mile in his own right. Richard Krygier was a law student, no stranger to law.⁹ On several occasions, Martin has admitted his father’s profound influence in his life and work.¹⁰ Martin is a contemporary Australian legal philosopher who has written numerous works concerning the rule of law, Marxism, and post-Communism in Eastern European countries.¹¹ This is much an extension of his father’s anti-Communism,¹² though it has also acquired its own specific character. Indeed, Martin Krygier is well aware of the horrific legacy of Nazism and Communism, and has recounted briefly his family’s experience, from and following the Nazi-Communist experience in a number of publications in his father’s *Quadrant*.¹³ One can imagine his family spending uncountable nights over many meals detailing their family’s loss due to

⁸ ‘How Martin Krygier ambushed the Quadranters...’ (2006) Floating Life 4/06 ~ 11/07 <<http://ninglun.wordpress.com/2006/09/29/how-martin-krygier-ambushed-the-quadranters/>>

⁹ Ibid.

¹⁰ Martin Krygier, ‘The Sources of Civil Society I’ (1996) 40(10) *Quadrant* 12, 13; Martin Krygier, ‘The Sources of Civil Society II’ (1996) 40(11) *Quadrant* 26, 31.

¹¹ University of New South Wales, above n 1.

¹² Most obviously seen in Richard Krygier’s founding of *Quadrant*.

¹³ Martin Krygier, ‘Does Australia Need a Racial Vilification Law?’ (1994) 13(11) *Quadrant* 20, 24; Krygier, ‘The Sources of Civil Society I’, above n 10, 13.

Communism, and making sure he himself does not become a Communist. Yet, there is a further personal element to Krygier's views on Communism. Although he has many friends affected by Marxism,¹⁴ his family and personal convictions have clearly shaped his anti-communist worldview¹⁵ and his academic work, which, as mentioned before, is primarily about rule of law and, in particular, the rule of law in post-Communist societies and the like.¹⁶

Krygier has received a Polish Knight's Cross and is currently co-director of the Network of Interdisciplinary Studies of Law, as well as contributing editor to *Jotwell* and editorial board member of *Hague Journal on the Rule of Law*; *History and Methodology*, *East-West*; *Jus et Lex*; *Ratio Juris*; *Theoretical Studies*; and *East Central Europe*.¹⁷ He is also a fellow at the *Academy of the Social Sciences in Australia*, and Co-Director of the European Law Centre, University of New South Wales.¹⁸ He was a past president of the Australian Institute of Polish Affairs from 1997–2001.¹⁹ Finally, Krygier is a Vice-President of the Australian Society of Legal Philosophy.

Rule of law is an important ideal of legality. This research essay will critically analyse Krygier's contribution to the subject of rule of law. Part

¹⁴ Martin Krygier, 'Marxism, Communism, and Narcissism' (1990) 15 *Law and Social Enquiry* 709, 730.

¹⁵ See generally, *ibid*.

¹⁶ University of New South Wales, above n 1. If you look at Martin Krygier's UNSW webpage, a significant proportion of his work has 'rule of law' in its titles and some are clearly on post-communism or transitional society, see, eg, Adam Czarnota, Martin Krygier and Wojciech Sadurski, *Rethinking the Rule of Law after Communism: Constitutionalism, Dealing with the Past, and the Rule of Law* (Central European University Press, 2005).

¹⁷ University of New South Wales, above n 1.

¹⁸ Academy of the Social Sciences in Australia, *Professor Martin Krygier* (2011) <<http://www.assa.edu.au/fellowship/fellow/416>>.

¹⁹ Australian Institute of Polish Affairs, *Expanding the Dialogue: Ten Years of the Australian Institute of Polish Affairs* (2001) <<http://www.aipa.net.au/aipa/expandingdialogue.pdf>> 10.

II will discuss what the rule of law means. I intend to demonstrate that the rule of law comes in many varieties and most conceptions have something to contribute to an understanding of the subject, although it is subject to conflicts between themselves. I wish to highlight some of the possible limitations of the rule-of-law ideal as well. Part III discusses Krygier's contribution to the rule of law. It provides a 'genealogy of ideas' by pointing out some figures who have exercised a significant influence on the formation of Krygier's ideas, and how they have influenced the debate on the rule of law and Krygier's work. Part IV discusses Krygier's opinion of rule of law. Its purpose is to complete the picture with a summary of Krygier's theory and to give an understanding of what his conception of the rule of law implies. I will be focusing on his current perception about this legal phenomenon because Krygier has somehow revised his work over the last two decades or so, particularly after the fall of communism in Eastern Europe. Finally, Part V provides a conclusion of the work.

II WHAT THE RULE OF LAW MEANS

'The rule of law is a quintessentially jurisprudential topic'.²⁰ To study it, one must take 'into account historical, cultural and sociological contingencies'.²¹ The rule of law, in the words of Philip Selznick, is 'not a recipe for detailed institutional design'.²² 'It represents rather a cluster of values which might inform such design, and which might be – and have been – pursued in a variety of ways'.²³ We must first explore what

²⁰ Philip Selznick, 'Legal Cultures and the Rule of Law' in Martin Krygier and Adam Czarnota (ed), *The Rule of Law after Communism* (Dartmouth, 1999) 21, 21.

²¹ Ibid.

²² Martin Krygier, 'Ethical Positivism and the Liberalism of Fear' in Tom Campbell and Jeffrey Goldsworthy (ed), *Judicial Power, Democracy and Legal Positivism* (Dartmouth, 1999) 59, 64.

²³ Ibid.

is the rule of law before we can understand Krygier's work. I shall start with what Krygier says 'is the most influential account of the rule of law in English':²⁴ AV Dicey's famous conception of the rule of law. I think most people will agree with his description. The rule of law in general, is seen as encompassing these three features:

- 1 the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government ...
- 2 equality before the law, or the equal subjection of all classes to the ordinary law of the land by the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of ordinary tribunals ...
- 3 as a formula for expressing the fact that with us the law of the constitution ... are not the source but the consequence of the rights and individuals, as defined and enforced by the Courts ... thus the constitution is the result of the ordinary law of the land.²⁵

In short, the three elements are:

- 1 supremacy of law;
- 2 equality before the law; and
- 3 government by law.

²⁴ Martin Krygier, 'The Rule of Law' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 1, 4.

²⁵ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan and Co, 8th ed, 1926) 198–9.

Dicey's formula represents the key and common concern of the rule of law, that is, a concern about freedom from arbitrariness. There are many other conceptions on what the rule of law is. There are, however, two basic types of conception. These are substantive and formal conceptions. Formal conceptions only deal with 'specific, observable criteria' in law or the legal system, that is, the 'formal' requirements for legality.²⁶ A V Dicey's rendition is rather a formal conception. Paul Craig sums it up as:

Formal conceptions of the rule of law do not ... seek to pass judgement upon the actual content of the law itself. They are not concerned with whether the law is in that sense good law or a bad law, provided that formal precepts of the rule of law are themselves met.²⁷

Substantive conceptions go beyond formal conceptions of the rule of law.²⁸ Craig says:

Certain substantive rights are said to be based on, or derived from, the rule of law. The concept [substantive rule of law] is used as foundation for these rights, which are then used to distinguish between 'good' laws, which comply with such rights, and 'bad' laws, which do not.²⁹

In this sense, substantive conceptions are those that include concepts of 'justice' or 'fairness'.³⁰ This approach is not necessarily concerned with

²⁶ Matthew Stephenson, *Rule of Law as a Goal of Development Policy* (2005) The World Bank <<http://go.worldbank.org/DZETJ85MD0>>.

²⁷ Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467, 467.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Stephenson, above n 26.

formal requirements of legality, but the realisation of a 'substantive goal' within the legal system.³¹ The World Bank says:

Unlike the formal approach, which eschews value judgements, the substantive approach is driven by a moral vision of the good legal system, and measures the rule of law in terms of how well the system being assessed approximates this ideal.³²

Another famous rendition is from Hayek, who is responsible for a substantive conception of the rule of law. This conception distinguishes laws from commands.³³ Laws are 'general rules that everybody obeys'. It 'does not necessarily presuppose a person who has issued it' and is differentiated from a command 'by its generality and abstractness'.³⁴ 'Law in its ideal form might be described as a "once-and-for-all" command that is directed to unknown people and that is abstracted from all particular circumstances of time place and refers only to such conditions as may occur anywhere and at any time'.³⁵ The generality of law is a key feature in Hayek's rendition. Hayek also identified a key feature of the rule of law:

The ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made ... the rule of law is not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal. It will be effective only in so far as the legislator feels bound by it ... it will not prevail unless it forms part of the moral tradition of the

³¹ Ibid.

³² Ibid.

³³ Friedrich August von Hayek, *The Constitution of Liberty* (University of Chicago, 1960) 131.

³⁴ Ibid.

³⁵ Ibid.

community, a common ideal shared and unquestioningly accepted by the majority.³⁶

Krygier's work is characterised in making the rule of law part of the 'moral tradition' of post-Communist societies. This is of course a difficult task where the rule of law has systematically disappeared as in communist societies.

Lon L Fuller's *The Morality of Law*, presents the key formal ingredients of the rule of law. Fuller's eight conditions a legal system to comply with the rule of law are that laws must be:

- 1 general;
- 2 made public;
- 3 non-retroactive;
- 4 comprehensible;
- 5 non-contradictory;
- 6 possible to perform;
- 7 relatively stable; and
- 8 administered in ways congruent with the rules as announced.³⁷

To further demonstrate the flexibility of rule of law conceptions, I shall give a brief account of Michael Oakeshott's conception of the rule of law, which is a formal conception. What is significant about Oakeshott, is that the foundation of his conception is more philosophical than legal.³⁸ Oakeshott is one of the 'most important philosophical voices of the

³⁶ Ibid 181.

³⁷ Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianlugi Palomblla and Neil Walker (ed), *Relocating the Rule of Law* (Hart Publishing, 2009) 45, 45.

³⁸ Guri Ademi, 'Legal Intimations: Michael Oakeshott and the Rule of Law' (1993) (3) *Wisconsin Law Review* 839, 839.

twentieth century'³⁹ and there has been many books written by him and in honour of him. It is thus useful to contrast his works with Krygier's, to show why Krygier's approach to the rule of law is superior, and I will briefly do so later. Oakeshott viewed the rule of law as best understood within three inter-related concepts. The first is that 'all human relationships and transactions take place within two distinct concepts of rules: instrumental and non-instrumental'.⁴⁰ 'The rule of law is an expression of adverbial, non-instrumental rules'. Adverbial means that 'law acts like the rules of grammar in language'⁴¹. The 'grammar' of law gives it validity, and the system of law, like any language, 'is open to interpretation and change'⁴². Oakeshott's other two concepts are:

Second, both instrumental and non-instrumental adverbial rules are derived from a history of human practices: prudential and moral. Oakeshott argues that non-instrumental rules are derived from a history of moral practices. Finally, human practices, and consequently the rule of law, find their full expression in one of two modally distinct understandings of the state: purposeful enterprise and non-purposeful civil associations. Oakeshott argues that the rule of law is fully expressed in a state taking the form of civil association.⁴³

These examples demonstrate how diverse one's view of what the rule of law can be. It comes as no surprise, therefore, that Krygier can come from a completely different angle and it is still a valid conception of the rule of law. In addition, in each conception an incomplete or perhaps adulterated picture of the rule of law is present. Krygier describes the

³⁹ Paul Franco, *Michael Oakeshott: An Introduction* (Yale University Press, 2012).

⁴⁰ Ademi, above n 38, 839.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid 840.

interaction between the rule of law and other ideals as containing ‘internal tensions and can lead to conflict with commitment to other social ideals, because the ideals themselves are under strain, or because different interpretations of the same ideal, or attempts to realise different ideals, have different institutional logics’.⁴⁴ What then must we do to understand the rule of law in light of so many, sometimes conflicting conceptions? How do we reconcile the interaction of the rule of law with other ideals? F A Hayek and Geoffrey de Q Walker have advocated an approach, which Krygier acknowledges, whereby the simplest way to reconcile these ‘tensions’ is to ‘hold fast to one interpretation of one ideal and reject whatever might compromise it in another’.⁴⁵ ‘Another is to minimise the conflict and pretend no price is paid’.⁴⁶ Krygier then suggests another way of reconciliation, and that is ‘more complex, but perhaps more realistic is to acknowledge that the rule of law is not consistent with every value one holds dear, and that, consequently compromises in one or other direction might be unavoidable’.⁴⁷

Krygier recognises that the rule of law is ‘not the only source of good in large modern polities’. This is very true, there are other sources of good such as democracy, constitutionalism, human rights, and other fields like economics. The rule of law is not a means to all ends. It is not ‘automatically better the more you have of it’.⁴⁸ ‘There are countless problems it does not and cannot solve’.⁴⁹ It is very important that a polity

⁴⁴ Martin Krygier, ‘Rule of Law’ in Neil Smelser and Paul Bates (ed), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2001) vol 20, 13 403, 13 407.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Martin Krygier, ‘Marxism and the Rule of Law: Reflections after the Collapse of Communism’ (1990) 15 *Law and Social Inquiry* 602, 645.

have other elements of good in order for things to improve. The rule of law is not a 'panacea'.⁵⁰ The rule of law also can generate problems.⁵¹ Elements of the rule of law 'are nowhere fully realised but are approximated to greater or lesser degree in different societies, among different classes, races, and sectors of social life'.⁵²

III KRYGIER'S CONTRIBUTION TO THE RULE OF LAW

Krygier has written many articles and books for the past thirty or so years. He has been interested in legal sociology for as long or almost as long as he has been writing on law. His writings on legal sociology date back as early as 1982, where he produced an article on H L A Hart entitled *The Concept of Law and Social Theory*.⁵³ In that article, Krygier stresses that not all boundaries between legal philosophy and legal sociology are 'worth preserving, even those that should allow free passage where appropriate'.⁵⁴ This merging of legal philosophy and sociology has been a defining characteristic in Krygier's work. Note that Krygier, as mentioned earlier, is currently co-director of the Network of Interdisciplinary Studies of Law. Ruti Teitel offers a succinct description of his current work in more recent years, saying that Krygier is one of the scholars who have challenged any 'conceptualisation of transitions as exceptional in political life, claiming that the aspiration during transitional periods ought to be based on a general theory about the rule of law'.⁵⁵ The fall of communism since 1989 has dramatically influenced

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Martin Krygier, 'The Concept of Law and Social Theory' (1982) 2 *Oxford Journal of Legal Studies* 155.

⁵⁴ Ibid 180.

⁵⁵ Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69, 93.

Krygier's work. There are numerous reasons for this. For example, we do not have the answers as to how to export the rule of law.⁵⁶ By export, Krygier means to create the presence of rule of law in absent places. The collapse of Communism created 'a gap in Europe's 'conceptual geography' no less significant than that of 1918'.⁵⁷ Krygier describes the post-Communist scenario as 'complex and unpredictable'.⁵⁸ The 'great diversity of and within the countries that constitute the various worlds of post-Communist Europe' contributes to this.⁵⁹ What is more, he says, 'questions posed and answers given tell us more about a particular scholar's intellectual biography than they do about the matter of discussion'.⁶⁰ With regard to post-Communism, 'we did not know the nature of what was to follow, nor is it clear that we know today'.⁶¹

The post-Communist scenario is complex and challenging, and Krygier's work was born out of need. There are vast differences between his work closer to that year and recent work over the past ten years or so. One can see an example of this examining and contrasting his relatively early work of *Marxism and the Rule of Law: Reflections After the Collapse of Communism*⁶² and Krygier's recent work, *The Rule of Law: Legality, Teleology and Sociology*.⁶³ Krygier published *Marxism and the Rule of Law* just a year after the fall of communism in Eastern Europe so his approach to the rule of law was more conventional at this time, only describing it by formal characteristics in this article, having not yet

⁵⁶ Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 57.

⁵⁷ Martin Krygier and Adam Czarnota, 'After Postcommunism: The Next Phase' (2006) 2 *Annual Review of Law and Social Science* 299, 300.

⁵⁸ Martin Krygier, 'Traps for Young Players in Times of Transition' in Martin Krygier (ed), *Civil Passions: Selected Writings* (Black Inc, 2005) 285, 286.

⁵⁹ Ibid 286–7.

⁶⁰ Ibid 288.

⁶¹ Krygier, 'After Postcommunism: The Next Phase', above n 57, 301.

⁶² Krygier, 'Marxism and the Rule of Law', above n 49.

⁶³ Krygier, 'After Postcommunism: The Next Phase', above n 57, 301.

developed his teleological-sociological approach to its current form. Krygier did however, in *Marxism and the Rule of Law*, give a detailed account as to how Marxism is incompatible with the ideal of the rule of law, which I think is one of his most significant contributions but to go into too much detail would be a digression. Krygier has devoted some of his works to the understanding of Marxism's relationship with the rule of law,⁶⁴ reflecting his devotion to the analysis of Communism.⁶⁵ In *Marxism and the Rule of Law*, Krygier's initial conception of the rule of law was:

- a. Government by law. When governments do things, an important source of restraint on power is to do them openly, announce them publicly, in advance, in terms that people can understand; according to laws with which officials are required to comply, which are according to laws with which officials are required to comply, which are overall stable and general, which are interpreted within a relatively stable and independent legal culture of interpretation. When they punish, it should be for offences known to be offenses ahead of time, etc ...

⁶⁴ Martin Krygier, 'Marxism, Communism, and the Rule of Law' in Martin Krygier (ed), *Marxism and Communism: Posthumous Reflections on Politics, Society, and Law* (Poznan Studies in the Philosophy of Sciences and the Humanities, 1994) 135.

⁶⁵ Krygier, above n 14; Martin Krygier, 'Marxism and Bureaucracy: A Paradox resolved' (1985) 20(2) *Politics* 58; Martin Krygier, 'Saint-Simon, Marx and the Ungoverned Society' in Eugene Kamenka and Martin Krygier (ed), *Bureaucracy: The Career of a Concept* (St Martn's Press, 1979) 34; Martin Krygier, 'State and Bureaucracy in Europe: The Growth of a Concept' in Eugene Kamenka ad Martin Krygier (ed), *Bureaucracy: The Career of a Concept* (St Martin's Press, 1979) 1; Martin Krygier, 'Weber, Lenin and the Reality of Socialism' in Eugene Kamenka and Martin Krygier (ed), *Bureaucracy: The Career of a Concept* (St Martin's Press, 1979) 61; Martin Krygier, 'The Revolution Betrayed? From Trotsky to the New Class' in Eugene Kamenka and Martin Krygier (ed), *Bureaucracy: The Career of a Concept* (St Martin's Press, 1979) 89; Martin Krygier, "'Bureaucracy" in Trotsky's Analysis of Stalinism' in Marian Sawer (ed), *Socialism and the New Class* (Australian Political Science Association Monograph, 1978) 46.

- b. Government under law involves a legal/political culture so that even high political officials are confined and confinable by legal rules and legal challenge ...
- c. Rights: ‘ ... Nevertheless, the bare possibility [of a government being illiberal] reminds us that the rule of law is not sufficient for a good society, even though in large complex societies it is necessary for one.’ In other words, the legal order must provide for, and protect zones of, individual freedom from interference, negative liberty.⁶⁶

A close look at Krygier’s rendition of these three aspects of the rule of law will reveal that he was still in the ‘anatomical’ frame of mind, describing what institutions make up for the rule of law. Hence, Krygier initially defined the rule of law as a ‘recipe or précis of ingredients’.⁶⁷ This is in contrast to what he formulates later, which is teleological-sociological and flexible in terms of its contextual application. The original rendition, however, is similar to A V Dicey’s conception mentioned earlier, with both advocating government by law; and equality before the law or government under law as Krygier puts it, although Krygier inserts elements of Fuller’s theory by mentioning that government must announce laws publicly, etc. *Marxism and the Rule of Law* is another example of Krygier’s early work regarding the rule of law, though this specific work overlaps with a discourse of Marxist jurisprudence. In this early work, influences from Philip Selznick and the Marxist historian E P Thompson were already present. Note, however, that Krygier’s interest in Thompson is not because he sympathises with communists. Thompson had made significant observations on the rule of

⁶⁶ Krygier, ‘Marxism and the Rule of Law’, above n 49, 642–3.

⁶⁷ Krygier, ‘The Rule of Law: Legality, Teleology, Sociology’, above n 37, 54.

law in *Whigs and Hunters: The Origin of the Black Act*, which Krygier uses. A quote that Krygier often uses, in one form or another is:

[T]he difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath the law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to me an unqualified human good.⁶⁸

This is from the conclusion of *Whigs and Hunters*. Recognising that this is a fascinating point made by a Marxist, Krygier uses this passage to contrast it with the traditional Marxist views on the rule of law in 'Marxism and the Rule of Law'. Thompson's short passage has been expanded to the embodiment of what defines Krygier's work. Krygier uses Thompson to create an understanding of how the rule of law looks like to a nonprofessional, and draws conclusions that are a significant contribution of Krygier's. Krygier concludes that Thompson understands the rule of law from the end that it achieves, not from its alleged anatomical constitution such as Fuller, Hayek⁶⁹ or most legal philosophers.⁷⁰ Krygier has followed suit.⁷¹

Krygier developed his ideas by borrowing interdisciplinary ideas and concepts. This ability to draw from various fields is one of his major

⁶⁸ Edward Palmer Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin, 1977) 266 cited in Martin Krygier, *Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?* (Working Paper Thesis, University of New South Wales, 2010) 36–7.

⁶⁹ Although Hayek uses the substantive conception and has an end to his conception of the rule of law, Hayek prescribes anatomies for the rule of law, see: Hayek, above n 33, 131. Hence, Krygier places Hayek together with these other formalists not because Hayek does not conceive the end of the rule of law but because Hayek resorts to identifying anatomies of the rule of law to reach his end.

⁷⁰ Ibid 37.

⁷¹ See, eg, Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 45.

achievements. He is clearly contributing to an interdisciplinary understanding of the law. Krygier primarily draws from sociology, but also draws from political science, such as the works of Judith N Shklar. Shklar was a professor of government at Harvard University, she specialised in '18th, 19th and 20th century political and intellectual theory'.⁷² She was the first female president of the largest American professional organisation of political scientists, the 'American Political Science Association'.⁷³ She was exceptionally talented shown by Shklar's MacArthur Foundation fellowship award in 1984.⁷⁴

It is clear that Judith Shklar was an exceptional individual and her ideas are well thought of and researched thoroughly. It is thus appropriate to briefly explore her work and see how Krygier has applied it. Briefly the 'liberalism of fear' is a response of 'damage control' to 'undeniable actualities' such as torture in societies, which threaten us and return even after being almost eradicated in Europe and North America.⁷⁵ Shklar says:

The liberalism of fear, on the contrary, regards abuses of public power in all regimes with equal trepidation. It worries about the excesses of official agents at every level of government, and it assumes that these are apt to burden the poor and weak most heavily ... The assumption, amply justified by every page of political history, is that some agents of government will behave lawlessly and brutally in small or big ways most of the time unless they are prevented from doing so.

⁷² The New York Times, *Obituaries: Judith N Shklar, 63, Professor at Harvard* (19 September 1992) <<http://www.nytimes.com/1992/09/19/obituaries/judith-n-shklar-63-professor-at-harvard.html>>.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Judith Shklar, *Political Thought and Political Thinkers* (University of Chicago Press, 1998) 9.

This definition of liberalism is very much a reason as to why we would want restraint on arbitrary power Krygier takes this from Shklar to conclude from the 'liberalism of fear' that reduction of fear is a social outcome of the rule of law, and he has expanded these social outcomes into four related outcomes.⁷⁶ The focus on the social outcomes of law lends itself to sociology, and shows how Krygier builds a bridge between sociology and law.

Philip Selznick is perhaps the most significant inspiration to Krygier. However, Krygier does not always draw heavily from Selznick but there are considerable references to his work.⁷⁷ Krygier has admitted his influence, saying that his 'conceptual bias is to follow Philip Selznick who, though deeply concerned with identifying the conditions of social and institutional *flourishing* starts'. He also says 'we must secure the conditions of survival or existence, baselines, before we move on to flourishing'.⁷⁸ This is very much what Krygier is trying to do with his work, describing what conditions we need for the realisation of the rule of law. He is interested in creating 'institutional recipes that explain the rule of law'⁷⁹ instead of focusing 'on legal institutions and the norms and

⁷⁶ Martin Krygier, *Four Puzzles about the Rule of Law: Why, what, where? And who cares?* (Working Paper Thesis, University of New South Wales, 2010) 21.

⁷⁷ See Krygier, 'Marxism and the Rule of Law', above n 49, 645 n 32; see generally Krygier, 'Ethical Positivism and the Liberalism of Fear', above n 22; Martin Krygier, 'The Hart-Fuller Debate, Transitional Societies and the Rule of Law' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publisher, 2010) 107; Martin Krygier, 'The Grammar Of Colonial Legality: Subjects, Objects, And The Australian Rule Of Law' in Geoffrey Brennan and Francis Castles (ed), *Australia Reshaped: 200 Years of Institutional Transformation* (Cambridge University Press, 2002) 220; Krygier, 'The Rule of Law', above n 24; Ibid.

⁷⁸ Krygier, 'Marxism and the Rule of Law', above n 49, 43.

⁷⁹ Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 57. Krygier's 'recipe' is not a recipe in any sense. If so, he would be purely formalist, which he condemns. It is a 'recipe that explains the rule of law', not 'a recipe for the rule of law' which means Krygier is not setting out lists of what the rule of law consists of in a legal sense only, that is not what he intends to do. What Krygier means is that he wants to create recipes that explain how the rule of law is realised,

practices directly associated with the rule of law ... a list of elements of such institutions and practices is presented as adding up to the rule of law'.⁸⁰ Philip Selznick is also Krygier's direct predecessor when it comes to analysing law with sociology. Selznick published *Law and Society in Transition: Toward a Responsive Law* in 1978 (reprinted 2001) together with Philippe Nonet. In addition from possibly drawing inspiration from that book and similar Selznick's works, Krygier may have taken from him the importance of legal cultures. Selznick stated:

[T]he rule of law requires a culture of lawfulness, that is, of routine respect, self restraint, and deference ... the rule of law requires public confidence in its premises as well as in its virtues. The premises include a dim but powerful understanding that positive law is always subject to correction by standards of truth and justice. In a rule of law culture, positive law does not have the last word.⁸¹

Selznick's views resonate with what Krygier says of legal orders:

In strong legal orders, such as those of the Western liberal democracies, for example, there are large cadres of people trained within strong legal traditions, disciplined by strong legal institutions, working in strong legal professions, socialised to strong legal values. Western legal orders are bearers of value, meaning and tradition laid down and transmitted over centuries, not merely tools for getting jobs done. Prominent among the values deeply entrenched in these legal orders over centuries are rule of law

which means that it must include extra legal measures. He says we 'do not have recipes' not because we do not, but that these recipes are ineffective, so we effectively have no recipes for explaining the rule of law, though we have recipes for the rule of law.

⁸⁰ Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 48.

⁸¹ Selznick, 'Legal Cultures and the Rule of Law', above 20, 37.

values, and these values have exhibited considerable resilience and capacity to resist attempts to erode them.⁸²

Krygier's recognition of the prevalence of legal values in Western legal orders is about the recognition of the importance of legal culture for the realisation of the rule of law. His observation that these values are resistant to attempts to erode them, is a reflection of Selznick's thinking, that 'positive law does not have the last word'. Selznick's work is influential to Krygier's though he has gone in another direction.

Krygier has noted that Selznick, 'in arguing for a legal order more "responsive" to changing needs, particular circumstances, principles of justice embedded in legal traditions but often not formulated as hard and fast rules, and considerations of justice more broadly'.⁸³ Krygier has extended this observation, drawing from the sociological work of John and Valerie Braithwaite:

[The] Braithwaite[s], for example, compared the regulation of nursing homes in the United States and Australia. The former is based on a large number of very precise and detailed rules; the latter on a small number of vague and value-laden standards. The Braithwaites demonstrate that, contrary to their initial intuitions, the Australian system of "wishy washy and blunt" standards turns out to be far more reliable than the American law of detailed rules. There are many reasons for that, the most important of which is that conscientious staff are empowered and involved in the activity of particularising and satisfying the standards, rather than alienated and tempted to avoid or simply formally to conform to the host of detailed rules, while ignoring the goals which the rules were intended to serve. But there is a negative payoff as well: "Detailed laws can provide a set of signposts to navigate around for those with

⁸² Krygier, 'Ethical Positivism and the Liberalism of Fear', above n 22, 76.

⁸³ Ibid.

the resources to employ a good legal navigator ... Marching under the banner of consistency, business can co-opt lawyers, social scientists, legislators and consumer advocates to the delivery of strategically inconsistent regulation of limited potency.” Standards are often harder to evade.⁸⁴

This lesson from Selznick, and from his own research, may be the reason why Krygier chose not to make something merely a ‘what is’ the rule of law, identifying only the institutional features of the rule of law, but created a ‘how to’ conception, with a recipe of conditions, not just a recipe of description. It is important to note that the ‘recipe’ Krygier espouses is not a ‘recipe’ in any sense, because if it were, Krygier would be no different from anyone else. Krygier’s description of conventional conceptions of the rule of law is starting from means instead of ends.⁸⁵ He thinks that detailing all the institutions associated with the rule of law is unhelpful. This is why he does not favour the anatomical view of the rule of law. We do not need a list of rules for the rule of law; we need standards for the rule of law.

There is also evidence that the foundation of Krygier’s conception has other roots of understanding from Selznick’s work. In *The Moral Commonwealth*, Selznick says:

As applied to institutions, ‘character’ is a broader idea than culture. Culture is the symbolic expression of shared perception, valuation, and belief. Therefore, the idea of ‘organisational culture’ properly emphasises the creation of common understandings regarding purpose and policy. The character of an organisation includes its

⁸⁴ Ibid 79–80.

⁸⁵ Martin Krygier, ‘The Rule of Law: An Abuser’s Guide’ in András Sajó (ed), *The Dark Side of Fundamental Rights* (Eleven International Publishing, 2006) 129, 141.

culture, but something more as well ... Attitudes and beliefs account for only a part of an organisation's distinctive character.

The hallmarks of character are special competence and disability. 'Character' refers to the commitments that help to determine the kinds of tasks an organisation takes on, the opportunities it creates or closes off, the priorities it sets, and the abuses to which it is prone.⁸⁶

I suspect this is why Krygier refers to the 'character' of the institution rather than the 'culture' of the institution in his work. Character is much broader. Augusto Zimmermann also summarises Krygier's emphasis on 'social outcome':

Krygier then suggests that the rule of law is not just a matter of 'detailed institutional design' but also an 'interconnected cluster of values' that can be pursued in a variety of institutional ways. As he also explains, the empirical fact that the rule of law has 'thrived best where it was least designed' provides the best evidence that this legal ideal is actually more about a 'social outcome' (ie the restriction of government arbitrariness) than just a 'legal mechanism'. In essence, Krygier postulates that the achievement of the rule of law rests primarily with extra-legal circumstances of 'social predictability', not just formal-institutional mechanisms.⁸⁷

Krygier's emphasis on 'social outcomes' implies that, to be achieved in actual practice, the rule of law depends not only on institutional measures but also on social or cultural measures, which is therefore a sociological approach in line with Selznick's understanding of the rule of law. The

⁸⁶ Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press, 1992) 321.

⁸⁷ Augusto Zimmermann, 'The Rule of Law as a Culture of Legality: Legal and Extra-Legal Elements for the Realisation of the Rule of Law' (2007) 14(1) *eLaw Journal: Murdoch University Electronic Journal of Law* 10, 25 <https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw_rule_law_culture_legality.pdf>.

discovery of these social outcomes is a significant contribution of his, who has discovered the social ends we need to realise in order to achieve the overarching end of the reduction of arbitrariness. I will explain what these outcomes are later. Please note that social outcomes are not merely pointing to culture. As Selznick says, “‘Character’ refers to the commitments that help to determine the kinds of tasks an organization takes on.”⁸⁸ These social outcomes contribute to the ‘character’ of legality, not merely the ‘culture’ of legality, as a target outcome is a commitment.

Krygier, like Selznick, borrows from sociology. Selznick may or may not have brought to the attention of Krygier the ‘Michels effect’ of means displacing ends, goal displacement.⁸⁹ Krygier has used this concept of goal displacement in his work, adapting the concept to the rule of law.⁹⁰ The ‘Michels effect’ is of the work of Robert Michels, a German political sociologist who examined the experience of European socialist parties and trade unions before World War I, concluding that democracy and socialism are unattainable ideals:

‘The socialists might conquer, but not socialism, which would perish in the moment of its adherent’s triumph’. That was so, he argued, because leadership in democratic organisations is readily and fatefully self-perpetuating. Where collective action is contemplated, delegation of tasks and powers to leaders is indispensable. The unintended result is a concentration of political skills and prerogatives, including control over staff and channels of communication. Furthermore, the position of the leaders is strengthened by the member’s political indifference and by the sense of obligation they have to those who guide them and do the

⁸⁸ Selznick, *The Moral Commonwealth*, above n 86, 321.

⁸⁹ Ibid 330.

⁹⁰ Krygier, ‘The Rule of Law: An Abuser’s Guide’, above n 85, 141–2.

main work ... submit[ting] willingly rather than reluctantly to the widening power of the officials ... [a lack of supervision and participation by] the members free[s] leaders to subvert the aims of the association, whether in their own interests or in the interests of others.⁹¹

The 'Michels effect' is an established example of Krygier's goal displacement, where democracy, as a means of achieving socialism actually displaces the supposed ends of socialism, and something else is achieved instead of socialism's intended ends. Taking a sociological approach, Krygier thus takes what Selznick describes as a 'social science approach', treating 'legal experience as variable and contextual'.⁹² As we will see later, he has adopted the spirit of this approach.

It is clear Krygier is not a one-man show. He refers to many thinkers to and he has built on their ideas. Krygier's contribution is making a unique extension of existing concepts from all kinds of fields, and he has made them his own. We will see elements of his theory below.

IV KRYGIER'S OPINION ON THE RULE OF LAW

Krygier thinks that liberalism is a necessary product of the rule of law, condemning amongst despotic regimes the so-called 'illiberal democracies'.⁹³ The end of the rule of law, indeed its central aim, is according to him to reduce arbitrariness.⁹⁴ As mentioned before, Krygier starts from the end of the rule of law. He is quite strict in emphasising that the end of the rule of law provides for the reduction of arbitrariness,

⁹¹ Philip Selznick, *The Moral Commonwealth*, above n 86, 245.

⁹² Philip Selznick, 'A Social Science Strategy' in Philippe Nonet and Philip Selznick, *Law & Society in Transition: Toward Responsive Law* (Transaction Publishers, 2001) 8, 9.

⁹³ Krygier, *Four Puzzles about the Rule of Law*, above n 76, 24.

⁹⁴ Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 58.

saying: '[M]oreover, if other values are added to one's conception of the rule of law, it would not actually augment my claim that it is those values that we should look first, rather than to institutional structures that too often threaten to be treated as ends themselves'.⁹⁵

Despite this, Krygier accepts that the rule of law is not exclusively formal, and some substantive concept is required, saying in 2001: 'But if power is already substantially constrained by law, the rule of law might tolerate, even on occasion require, that some space be made for wisdom, judgment, particularity, and substantive justice'.⁹⁶ This implies that, assuming he still thinks the same, that he is at an effective level a substantivist, his current conception has not accommodated rights, unlike his earlier conception, or expressly described what is good or bad law. Nevertheless, he is conceptually in between formal and substantive conceptions, saying: 'A middle ground is available, however. It [values besides reduction of arbitrariness] needs to have a special connection with *law*, lest the rule of law come to mean the rule of whatever is good, in which case we have no need for the concept'.⁹⁷ Another way to look at it is that he is a minimalist-substantivist in the same way Fuller embraced the minimum content of the natural law.

Krygier, citing a number of times in his works, has noticed four general conditions to institutional contributions for the rule of law.⁹⁸ These conditions are sociological. They 'need to be fulfilled by whatever

⁹⁵ Ibid.

⁹⁶ Krygier, 'Rule of Law', above n 44, 13 407.

⁹⁷ Krygier, *Four Puzzles about the Rule of Law*, above n 76, 25.

⁹⁸ As early as 2002 in Krygier, 'The Grammar of Colonial Legality', above n 77, 231–2; Krygier, 'The Rule of Law: An Abuser's Guide', above n 85, 134; Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 59–60.

normative and institutional setups available within a society'.⁹⁹ These four conditions in brief are: 'the institutions have to have sufficient *scope*, knowable and understandable *character*, and *administration* coherent with the announced rules; but above all, they have to *count* as a source of restraint and a normative resource usable and used in social life'.¹⁰⁰ Krygier says there are four social outcomes the rule of law must achieve. This is not definitive of arbitrariness, as he has yet to 'provide or find a sufficiently complex and textured analysis of what arbitrariness includes (what degree of caprice? whim? unreasonableness? unreasonedness? discretion? If not all discretion, how much? And so on) and excludes'.¹⁰¹ Whether this is going to be detrimental to the magnitude of his contribution will be addressed later. However, people usually think of legal certainty as the opposite to legal arbitrariness.¹⁰² At the very least, we know what is not arbitrary. Nevertheless, Krygier points out that 'law is an argumentative discipline' and:

if we thus think the more certainty the better, then the argumentative nature of law appears to be a major problem, or at least a different, perhaps inconsistent, value, for law. For legal argument commonly upsets, indeed is often designed to upset, prevailing certainties. The more we can render contentious the possibilities offered by the law, it might seem, the less certain it becomes and so the rule of law suffers.

However, this cannot be the case, 'because the inherent uncertainties of legal interpretation make it impossible and because so many other

⁹⁹ Martin Krygier, 'False Dichotomies, Real Perplexities and the Rule of Law' in András Sajó (ed), *Human Rights with Modesty: The Problem of Universalism* (Martinus Nijhoff, 2004) 251, 263.

¹⁰⁰ Krygier, 'The Rule of Law: An Abuser's Guide', above n 85, 134.

¹⁰¹ Krygier, *Four Puzzles about the Rule of Law*, above n 76, 17.

¹⁰² Ibid 22.

sources of uncertainty in the world render it unavailable as well'.¹⁰³ How then does Krygier reconcile the argumentative nature of law with legal certainty? He has implied that the legal certainty we should seek is not the legal certainty of legal decisions but the legal certainty of social outcome. As mentioned earlier, they are, the four outcomes are the reduction of:

- 1 domination;
- 2 fear;
- 3 indignity, and;
- 4 confusion.¹⁰⁴

Krygier thinks that the application of the rule of law must fit the context of the socio-political environment whereby there is no universal formula but just universal conditions. He thus describes himself as a 'contextual universalist: universal about the value of it, deeply contextual on how to get there'.¹⁰⁵ His reasons are threefold, namely: conceptual, empirical, and practical:

The conceptual reason is this: the rule of law is not a natural object, like a pebble or a tree, which can be identified apart from questions of what we want of it. Nor is it even a human artefact you can point to, like the statement of a legal rule, though its realisation or approximation might depend on such artefacts. The rule of law occurs insofar as a valued state of affairs exists, one to which we gesture by saying the law rules (not a simple notion and not one to be expounded simply by looking up two words in a dictionary, but let it lie for the moment). What we take to be its elements are

¹⁰³ Ibid.

¹⁰⁴ Ibid 27.

¹⁰⁵ Martin Krygier, 'Approaches to the Rule of Law' in Whit Mason (ed), *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge University Press, 2011) 15, 32.

supposed to add up to something, to be good for generating or securing that state of affairs. It is a teleological notion, in other words, to be understood in terms of its point, not an anatomical one, concerned with the morphology of particular legal structures and practices, whatever they turn out to do. For even if the structures are just as we want them and yet the law does not rule, we do not have the rule of law. And conversely, if the institutions are not those we expected, but they do what we want from the rule of law, then arguably we do have it. We seek the rule of law for purposes, enjoy it for reasons. Unless we seek first to clarify those purposes and reasons, and in their light explore what would be needed and assess what is offered to approach them, we are bound to be flying blind.

Krygier is of the opinion that we must know the end of the rule of law because empirical indicators are misleading. For example, take the indicator of judicial independence.¹⁰⁶ ‘Unless independence is assumed *a priori* to be good for the rule of law, the relationship between indicator and indicatee is altogether more problematic than it may seem at first blush’.¹⁰⁷

several post-communist countries quickly institutionalised internal judicial self government and independence from outside interference, as though their ideal of having a judiciary committed to the integrity and rule of law would best be reached by imagining it had already been attained. That made irremovable old, incompetent, corrupt, badly-formed hold-overs from earlier times. Indeed, in some legal orders ‘in transition,’ it seems that rendering judges irremovable was actually *intended*, by the first unrenovated excommunist leaders, to have that result so that if they lost

¹⁰⁶ Krygier, *Four Puzzles about the Rule of Law*, above n 76, 9.
¹⁰⁷ Ibid.

electorally, they would still have their people on the bench, independent of pressures from their opponents.¹⁰⁸

What this means is that sometimes it is better not to give corrupt judges separation from the executive, lest you perpetuate corruption. It may be better to sack the corrupt judges or prevent reappointment before giving them independence. This is an example of Krygier's contextual application.

His practical reason 'for suspicion of accounts of the rule of law that start with institutional means rather than valued ends, follows from':

Goal displacement. This occurs, simply put, when means are substituted for ends, often unconsciously, and people flap about with check lists (and check books), recipes, 'off-the-shelf blueprints', often modelled on alien and distant originals, with scant reflection on the purpose(s) of the rule of law, or the proper purposes of their own enterprise ... Particular institutions and institutional forms are taken to contribute to the rule of law, and focus becomes fixed on those institutions rather than the ends that, sometimes in a dimly remembered or clearly forgotten past, had inspired the development of those very institutions, but which they may well not be serving in any way.

Krygier recognises that 'social and political structures and cultural supports' are needed to have the rule of law, not just 'institutional features'.¹⁰⁹ In other words, 'the rule of law is as much a social and political achievement as it is a legal one'.¹¹⁰ Krygier has also expressly noted that the rule of law is also 'a cultural achievement of universal

¹⁰⁸ Ibid 13.

¹⁰⁹ Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 52.

¹¹⁰ Martin Krygier, 'Compared to What? Thoughts on Law and Justice' (1993) *Quadrant* 49, 52.

significance'.¹¹¹ He says 'law's norms must be socially normative'.¹¹² Krygier says we can only know who has the rule of law by comparison with other societies.¹¹³ He is critical of conventional conceptions of the rule of law. This problem does not escape itself merely because one is using another field of thought to approach the rule of law as we can see that Oakeshott suffers the same problems as the rest. Krygier sums up the problem and solution as:

They *start* with the wrong question, so their answers, however insightful, are often beside the point. The proper place to start, I believe, is with the question *why*, what might one want the rule of law *for*? not *what*, what is it made up of? And that matters, because no sensible answer to the second question can be given until one comes to a view on the first. And what counts as a sensible answer in one place might not be too sensible somewhere else.¹¹⁴

Krygier's rejection of the substantive or formalist box is because formal conceptions 'are often too spare to amount to much', whereas substantive conceptions are 'too rich to allow one to sustain any useful distinction between the rule of law and whatever else you would like to find in a society'.¹¹⁵

We can see Krygier's opinion on the rule of law by what he perceives as misconceptions to the rule of law. He thinks it is a misconception to treat the rule of law 'as a kind of technology, a product to be installed'.¹¹⁶ What the rule of law actually is according to him is not a 'production

¹¹¹ Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 55.

¹¹² Ibid 67.

¹¹³ Ibid 53.

¹¹⁴ Krygier, *Four Puzzles about the Rule of Law*, above n 76, 6.

¹¹⁵ Ibid 25.

¹¹⁶ Krygier, 'Approaches to the Rule of Law', above n 105, 21.

technology’, but an ‘interaction technology’.¹¹⁷ Interaction technology ‘is harder to transplant, harder to generate, with more and more varied effects than production technology’.¹¹⁸ Some legal philosophers, such as Lon Fuller, cited by Krygier, treated law as architecture rather than a technology.¹¹⁹ However:

[N]either technology nor even architecture captures a fundamental truth about what is necessary to catalyse the rule of law: some of its deepest conditions, and even more its most profound consequences, are not found within legal institutions. On conditions, the rule of law grows, needs nurturing, and has to be in sync with local ecologies. It can’t be screwed in though it may be screwed up, and it depends as much on what’s going around it, on the particular things in that ecological niche, as on its own characteristics.¹²⁰

But it is important consider that Krygier’s emphasis on a society’s particular circumstance like culture is not his true focus, as mentioned earlier. He says ‘just as legal institutions are only part of the solution, so culture is only part of the problem. In either case, mistaking the part for the whole is unwise’.¹²¹ Thus, Krygier is more interested in the ‘character’ of legality, not the ‘culture’ of legality, as mentioned earlier. This is so because he analyses the totality of the rule of law, not one aspect only.

He has many reasons why other conceptions of the rule of law are insufficient. I shall go through some of his reasons. Citing Rubin, Krygier says:

¹¹⁷ Ibid 22.

¹¹⁸ Ibid.

¹¹⁹ Ibid 23.

¹²⁰ Ibid 24.

¹²¹ Ibid 29.

The bulk of modern legislation is not, as Lon Fuller thought law to be, 'the enterprise of subjective human conduct to the governance of rules', but rather 'a series of directives issued by the legislature to government-implementation mechanisms, primarily administrative agencies, rather than as a set of rules for governance of human conduct'. A great deal of modern legislation is 'internal' that is, concerned at least initially with administrative agencies rather than individual citizens. Within 'external' legislation, more-over, much is 'intransitive', that is, though concerned ultimately with citizens, it does not specify precisely what rules an agency is expected to state and it 'did not arise out of some lapse of moral vigilance. It is central to our beliefs about the role of the government in solving problems and delivering services'. In relation to this legislation Rubin argues that Fuller's principles are unhelpful, and: Even for transitive statutes, most of Fuller's principles are unhelpful, and 'Even for transitive statutes, most of Fuller's principles are persuasive only when the statute relies on courts as its primary implementation mechanism. When a transitive statute is enforced by an agency, our normative system simply does not make the demands that Fuller perceives.'¹²²

Fuller's lists, as seen above, like, others that follow from Raz and Geoffrey de Q Walker are 'systematically inadequate' according to Krygier.¹²³

Krygier regards the viewpoint that the rule of law does not do its job or what it promises to do, or at a cost too great as neglecting three elementary points.¹²⁴ They are:

First, no one suggests that the ideal achievement of the rule of law, whatever that would be, is possible. The rule of law is something

¹²² Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 56.

¹²³ Ibid 60.

¹²⁴ Krygier, 'False Dichotomies', above n 99, 261.

you either have or not, like a rare painting. Rather, like wealth, one has more or less of it. Whether one has enough of it is a judgment to be made along a continua – multiple continua – not a choice between binary alternatives. One seeks to reduce arbitrariness, to *increase* the sway of the rule of law, not to eliminate the former by installing a new, and fortunately unrealisable dystopia consisting of nothing but the latter. Second, the rule of law is obviously not *sufficient* for good society ... Third, it is not the only game in town. Where other values conflict with it, they need to be taken into account and compromises in pursuit of one or another might be necessary.¹²⁵

Although Krygier stresses contextual application, considering that ‘local knowledge is important’, not all forms of local knowledge are equally helpful in promoting the rule of law. Indeed, some local knowledge represents the problem rather than the solution.¹²⁶ ‘What passes as ‘local knowledge’ can often mislead, just because it is local’.¹²⁷ ‘Many locals in post-communist countries attribute virtues or vices to their specific presents and pasts, which actually can be found in societies without either’.¹²⁸

Krygier’s most practical ideas to date as to how to export the rule of law to transitional society is in his upcoming publication *Violence, Development and the Rule of Law*. He identifies themes and principles for a successful exportation of the rule of law. By heading, they are:

- 1 understand needs [of the rule of law] holistically;

¹²⁵ Ibid 261.

¹²⁶ Martin Krygier, ‘The Death of European Communism and the Birth of ‘Rule of Law promotion’: Socio-legal Reflections’ in Piotr Kosicki (ed), *The Global 1989: Transnational Linkages in a Revolutionary World (tentative title) (forthcoming)* (Central European Press, 2011) 1, 15.

¹²⁷ Ibid 16.

¹²⁸ Ibid.

- 2 put public confidence at the centre;
- 3 confront or co-opt spoilers [of the rule of law] early;
- 4 reform police, the judiciary and corrections as parts of a single coherent *system*;
- 5 subordinate the past to the future;
- 6 foster cross-cutting identities;
- 7 reinforce political change and institution-building with cultural mechanisms and soft power;
- 8 ensure that rhetoric matches realities on the ground; and
- 9 provide protection to the most vulnerable.¹²⁹

It would be impractical to go through summarising every heading, but Krygier frequently uses the Malayan emergency where the then High Commissioner of Malaya, Sir Gerald Templer, played a key role, though he provides other examples. The Malayan Emergency occurred in Malaya, now Malaysia in 1948 when the Malayan Communist Party engaged the government in armed conflict:

Until 1951, however, counter-insurgency progress was slow and uneven. Supported by half a million Chinese 'squatters' on the jungle fringe, the communists were able to sustain their campaign. An enlarged police force and large-scale army 'sweeps' could contain but not eradicate the threat.¹³⁰

The entry of Former High Commissioner Sir Gerald Templer in 1952 changed all that. Many scholars frequently use the Malayan Emergency

¹²⁹ Martin Krygier and Whit Mason, 'Violence, Development, and the Rule of Law' (forthcoming) in George Mavrotas (ed), *Security for Development: Confronting Threats to Survival and Safety* (Global Development Network, 2011) 1, 34–5.

¹³⁰ Karl Hack, 'The Malayan Emergency' (1993) 4 *Twentieth Century British History*, 302, 302.

under Sir Templer as a counter-insurgency model response.¹³¹ It is thus no surprise Krygier uses this as a prime example; analysing counter-insurgency would be useful in bringing the rule of law to transitional society, establishing the rule of law where the legitimacy of government is challenged. This resonates with Afghanistan and Iraq, mentioned in *Violence, Development and the Rule of Law*, and is an indicator that he is shifting focus to transitional society in general rather than solely post-Communist society.¹³²

V CONCLUSION

I can think of one metaphor to succinctly describe Krygier's theory. His theory is very much a 'pure theory of the rule of law' in the same spirit, but not the method, of Hans Kelsen's Pure Theory of Law. I am not saying this because Krygier approaches the concept from solely a legal perspective, nor am I implying he is a positivist, though he does discuss positivism and positivist ideas.¹³³ He does not approach things in a solely legal manner. I say this because he is distilling the values that he claims to involve the rule of law to one single core value: the reduction of arbitrariness. It does not matter that his theory can support other values; those values are incidental to the realisation of reduction of arbitrariness and thus he removes the contaminants of foreign values from the rule of law, reducing it to a single value and making it a pure theory of the rule of law. It does not imply that the approach is strictly legal, but rather it is a 'rule of law theory' making the rule of law a subject in itself, rather than a fragment of political or legal ideal or sociological phenomenon.

¹³¹ See for example, Karl Hack, 'The Malayan Emergency as Counter-Insurgency Paradigm' (2009) 32(3) *Journal of Strategic Studies* 383.

¹³² See also Krygier's other contribution to the Afghan situation in Krygier, 'Approaches to the Rule of Law', above n 105, 15.

¹³³ See generally, Krygier, 'The Concept of Law and Social Theory', above n 53; Krygier, 'Ethical Positivism and the Liberalism of Fear', above n 22.

Even though he approaches to values other than the reduction of arbitrariness in such a manner as to reduce arbitrariness, Krygier's theory is likely to evoke two possible responses: relatively neutral to personal values or extra sensitive. This is not an empirical study so I cannot conclusively say the overall effect of his theory on one's personal views, but these two responses are what I think is possible. No one can deny that the end of the rule of law reduces arbitrariness, so the positivist or even natural lawyer can use it without much problem, or minimal clashes with their values. However, a strict adherence to the realisation of values outside Krygier's purist definition will mean a rejection of his theory. It is very much a one or the other effect, you either think it does not derogate from your view on the rule of law, or you are repulsed by it because it does not contain the good values, for example equality, to the fullest extent, as mentioned earlier; the response would be relatively neutral or extra sensitive.

Krygier's absence of considering the common good, most likely because his conception is somehow purist, is a disadvantage in terms of theories on justice, despite him dedicating some discussion to it.¹³⁴ However, if you were to assess Krygier's work as a 'pure' theory of the rule of law, this is no weakness. The distilling of the rule of law to its rawest elements is a useful contribution in itself.

His conception is more about 'how to' achieve the rule of law in actual practice, beyond 'what is' the rule of law only theoretically. Thus he starts from the end of the rule of law and then sets out conditions which not merely legal institutions like 'separation of powers', 'judicial independence' or even 'constitutionally guaranteed rights'. Rather, as seen earlier, he focuses on 'social outcomes', on 'conditions' for the rule

¹³⁴ Krygier, *Four Puzzles about the Rule of Law*, above n 76, 39–40.

of law rather than what specific legal institutions embody the rule of law. It would be a mistake to believe that Krygier does not devote some thought as to ‘what is’ the rule of law, because he does give some useful insights about this.

Regarding to his observation on standards,¹³⁵ I am inclined to believe that this is a question of causation. Do certain rules invoke the rule of law, or does the rule of law invoke certain rules? We do not know whether specific rules may realise the rule of law, the rule of law being a standard or a cause for the existence of these specific rules. If the rule of law causes us to have these rules, having these rules do not mean you have the rule of law.

Regarding Krygier’s wariness of ‘local knowledge’,¹³⁶ I think he is suggesting that this is probably a form of goal displacement since the local knowledge can distort one’s means away from the end of the rule of law. Hence, Krygier stresses context based on universal values of the rule of law in line with his self-description of being a ‘contextual universalist’. It is definitely the right way to go as I believe his focus on the ends of the rule of law means he can achieve a contextual universalist exportation of the rule of law to transitional societies.

I shall now borrow from philosophy to further illustrate what I think Krygier’s theory is. An autonomous teleology is ‘a teleology not deriving from the agent’s ends’.¹³⁷ ‘An action has an autonomous teleology of this new sort when it involves the use of a machine: the teleology derives from the machine’s purpose rather than from the

¹³⁵ Krygier, ‘Ethical Positivism and the Liberalism of Fear’, above n 22, 79–80.

¹³⁶ Krygier, ‘The Death of European Communism’, above n 126, 15–16.

¹³⁷ Matthew Hanser, ‘Intention and Teleology’ (1998) 107 *Mind, New Series* 381, 395.

agent's'.¹³⁸ To illustrate why Krygier's theory is a machine I will illustrate from a philosophical example:

Suppose an agent decides his ends can be achieved only by acquiring money. He need not work out from scratch how to acquire money, say by figuring out what products others might be willing to buy and then working out how to manufacture such products in his home. *Someone else might already have devised such a plan*, and be willing to pay him for his help in carrying it out. *If our agent accepts such a job, his intentional job-related doings will fit into a teleological ordering, but this ordering will not be of his making. Rather than create the entire teleology himself, he will have tapped into a pre-existing, autonomous teleology.*¹³⁹

He is fabricating a form of autonomous teleology that produces specific results, like a machine. This implies that, being a machine, or more specifically a teleological machine, his teleological machine is not like a car, where there are set inputs, for set outputs eg switching on the light switch switches on the light. Contrast with traditional rule of law conceptions where the rule of law in formal conceptions is presence or absence of a list of characteristics, meaning the inputs are more like a limited set of buttons and switches. Krygier is closer to substantive conceptions where there are a variety of inputs for a single output. What Krygier is doing is creating a very specific kind of machine, a 'teleological software program'. I propose this metaphor for his theory because I believe his theory is very much like a 'software program'. This is because software has a variety of inputs. Some inputs do nothing, whilst others achieve the desired output. Furthermore, the correct operation of the program depends on the right input. The program

¹³⁸

Ibid.

¹³⁹

Ibid 399 (emphasis added).

dictates what to do and what not to do. The program has one purpose, to produce the end of the rule of law, which is the reduction of arbitrariness. A program, much like a computer program, can be limited in its capability. This capability will depend on the 'code' you programme the program with, and this very much describes his work, the 'code' being his various conditions and outcomes.

Krygier may disagree with this metaphor, as it may be too similar to 'technology' in his eyes. However, I think the above analogy is suitable as the various cultures and socio-political structures and legal institutions are like inputs to a particular program of rule-of-law realisation. Moreover, I reiterate in different words; rubbish in, rubbish out. Hence, the correct inputs to Krygier's program will bring the results he promises if his 'code' (his various conditions, themes, principles and social outcomes, an ideological structure) is good.

In this sense, I propose that his understanding the rule of law is like a software program although the dynamic is slightly different. The quality of the output (reduction of arbitrariness) is determined by the quality of the code (legal, social, political, ideological structures, such as legal institutions). Moreover, the input that enters the program (actions that aim to instil the rule of law that interacts with or modifies these structures) determines the output. This being the case, the compatibility of the code depends on the operating system of the program (culture, socio-political environment). The code input and operating system are determinants of whether you get satisfactory output. However, the code input and operating system are not dependant variables of each other. This means you can have good code with bad input or bad code with good input, hence, good structures for the rule of law with ineffective actions and vice versa. Therefore, the code that is suitable for the

operating system depends very much on the operating system, or the structure's compatibility depending on the local culture, socio-political environment. The metaphor of teleological software program encompasses both 'technology' and 'architecture' and is in line with Krygier's observation of the rule of law. You need to update the code of most softwares, (needs nurturing, grows)¹⁴⁰ and 'be in sync with local ecologies'¹⁴¹ (the operating system). And yet, because no local ecology is the same, no operating system is the same, the structures (code) that will work need to be *sui generis*, like software, but unlike the environment of real life software use.¹⁴² Remember, there must still be inputs to produce an output.

Krygier has lamented that he has yet to provide a definition of arbitrariness.¹⁴³ Nevertheless, he has shown his ability to adopt the best of the best, using Philip Pettit's definition:

An act is perpetrated on an arbitrary basis, we can say, if it is subject just to the *arbitrium*, the decision or judgement, of the agent; the agent was in a position to choose it or not choose it, at their pleasure. When we say that an act of interference is perpetrated on an arbitrary basis ... we imply that it is chosen or rejected without reference to the interests, or the opinions, of those affected. The choice is not forced to track what the interests of those others require according to their own judgements

Hayek focuses very much on generality of the law. If one makes judgement based on general rules, one is not making a judgment themselves but applying the rules. I agree with this definition because I

¹⁴⁰ Krygier, 'Approaches to the Rule of Law', above n 105, 24.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Krygier, *Four Puzzles about the Rule of Law*, above n 76, 17.

believe it is the rule of *the* law, hence it excludes the personal bias of a decision maker. Therefore, the lack of a definition of arbitrariness is likely to be of minimal detriment to his theory.

In conclusion, it is hard to find fault with Krygier's conception and he has made useful observations of the rule of law. Krygier advocates the teleological-sociological approach. He is very astute in his observation about the importance of teleology as well as the success of the teleological approach in the fields of physiology, experimental psychology, clinical psychology, and these fields extending indefinitely only indicates that he is on the right track.¹⁴⁴ Krygier's conception can also be described as a 'pure theory of the rule of law', a 'how to get' the rule of law, and a teleological software program. His 'program code' is therefore rather comprehensive. He has identified certain conditions for legal institutions, social outcomes for legal certainty, and identified themes and principles for a successful implementation of the rule of law, but like every program, newer and better versions can come out, you can add new layers to it. This may come as a surprise for him but Krygier's approach to the concept makes him very much like a revolutionary rule-of-law software engineer!

¹⁴⁴ Robert MacLeod, 'Teleology and Theory of Human Behavior' (1957) 125 *Science, New Series* 477, 479.

SHORT ESSAYS

THE IDEA OF THE 'THIRD REICH' ('*DRITTES REICH*') IN GERMAN LEGAL, PHILOSOPHICAL AND POLITICAL THINKING IN THE 20TH CENTURY

GÁBOR HAMZA*

Abstract

The idea that after the 'National Socialist' takeover the German political propaganda strongly supported the naming of their land the 'Third Reich' is a misperception. A circular letter that was issued by the Ministry of People's Education and Propaganda of the German Empire in July 1939 explicitly forbade the official use of 'Third Reich'. In March 1942 the Ministry of People's Education and Propaganda issued a circular letter with provisions for the official name of the 'new Germany'. The same circular letter limits the use of the expression to Germany, emphasising that there is only one Empire and that is Germany.

Following the Christian doctrine of Trinitarianism the three empires can be thought of in a religious and messianic way as follows: the 'First Empire' is related to the Father, the 'Second Empire' to the Son, while the 'Third Empire' to the Holy Spirit. According to such an interpretation the 'Third Empire' would constitute the zenith of history. This 'Third Empire' would follow a distorted era of Christianity that would be realised by the arrival of a new Messiah.

In the preface of his work Das dritte Reich Arthur Moeller van den Bruck emphasises that the notion of the 'Third Empire' is ideological, that rises above reality. According to Moeller van den Bruck only with the elimination of its pseudo-values can Germany fulfil its mission of reviving Europe. It is the duty of the young generation to revitalise the dormant German intellectuals. Only as a result of such a 'revolution' can the 'Third Empire' come into existence. The idea of the 'Third Reich' has quite an influence on the thinking of the conservative cultural philosophers.

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For political and philosophical reasons the national socialist regime isolates itself from the idea of 'Third Reich' already by the end of the 1930s. The 'conservative revolutionary' branch of the 'German Movement' – including all branches of the 'conservative revolution' – was unacceptable as an ideological base for the national socialist rulers. The 'völkisch' branch of the Deutsche Bewegung is an entirely different matter. Of all these different movements the Führerprinzip idea, symbolised by Hans Friedrich Karl Günther, Richard Walter Darré Alfred Ernst Rosenberg became the official ideology of the national socialist Germany, in which the idea of the 'Third Reich' no longer played a role.

I

The idea that after the 'National Socialist' (Nazi) takeover the German political propaganda machine strongly supported the naming of their land (State) the 'Third Reich' (*Drittes Reich*) is a misperception shared by many philosophers, historians, political scientists as well as lawyers all around the world even today. It is much less known that Adolf Hitler himself was never in full support of this expression even though it proved quite effective both before and after the NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei*) takeover.¹ A circular letter (*Rundschreiben*) that was issued by the Ministry of People's Education and Propaganda (*Reichsministerium für Volksaufklärung und Propaganda*) of the German Empire (*Deutsches Reich*) on July 10, 1939 explicitly forbade the official use of 'Third Reich'. According to this circular letter Germany's official name is from this point on 'Greater German Empire' (*Großdeutsches*

¹ During Hitler's official visit to Italy in May 1938, the German press repeatedly referred to the Holy Roman Empire of the German nation (*Heiliges Römisches Reich Deutscher Nation*). See Victor Klemperer, *LTI, La langue du IIIe Reich* (1996) 158; in German original: Victor Klemperer, *LTI – Lingua Tertii Imperii: Notizbuch eines Philologen* (1975).

Reich).² It is worth pointing out that the ‘Greater German Empire’ (*Großgermanisches Reich*) used by the SS cannot be considered official (*offiziell*) either.

Years later on March 21, 1942 the Ministry of People’s Education and Propaganda issued a circular letter with provisions for the official name of the ‘new Germany’ (*neues Deutschland*). It was to be called ‘Empire’, quite possibly modelled after the British Empire.³ The goal of using the expression of ‘Empire’ was to illustrate to the world that the newly acquired lands include territories annexed or occupied by military force by Germany without any international validity, altogether ca 841 000 sq km.⁴ The same circular letter limits the use of the expression to Germany, emphasizing that there is only *one* Empire and that is Germany.⁵ The use of the term ‘Third Reich’, however, implied a ‘serial empire’ which is comparable both in deeds and leaders to the empire, an idea that was entirely incompatible with the self-conscience of the

² In contemporary German legal textbooks the term ‘Greater German Empire’ (*Großdeutsches Reich*) was used instead of Germany. See Ernst Rudolf Huber, *Verfassungsrecht des Großdeutschen Reiches* (Hanseatische Verlagsanstalt, 1939).

³ It is noteworthy that the name of the weekly paper released by Germany for foreign countries between 1940 and 1945 was *Das Reich*. This paper of the Nazi Germany contained a wide range of political, historical and literary information and was in print even in April 1945.

⁴ According to a German official statement the territory of Germany in 1942 without Elsass, Lorraine, Luxembourg, the Czech-Moravian Protectorate (*Reichsprotektorat Böhmen und Mähren*) and Poland (the total size of these lands was 160 000 sq km) was 681 000 sq km. Prior to the *Peace Treaty of Versailles* the size of the ‘Second Reich’ (which is often called ‘altes Reich’) was 540 000 sq km. This substantial change is primarily due to the annexation of Austria (*Anschluß*), the Czech-Moravian regions following the Munich Award (*Münchener Abkommen*) and the Polish regions (eg Warthegau) after the beginning of World War II. After the creation of the ‘Social Republic of Salò’ (*Repubblica Sociale di Salò*) a part of Northern Italy, the so-called ‘*Voralpenland*’ which includes Southern Tirol (*Südtirol*) and the coastline of the Adriatic (*Adriatisches Küstenland*), became part of Germany. It is, however, difficult to decide whether these territorial acquisitions, from a legal viewpoint, were occupied or annexed.

⁵ In legal terminology, primarily in administration, one comes across the euphemistic expression ‘*Verreichlichung*’ quite often.

imperialistic 'national socialism' which fancied to be looked upon as the pinnacle of German history.

II

In a historical sense the 'First Empire' (*Erstes Reich*) was established by Otto I (reigning from 936 until 973) in 962 who was crowned emperor by Pope John XII in Rome. This empire is also known as the Holy Roman Empire (*Sacrum Romanum Imperium, Heiliges Römisches Reich*) which existed until 1806.⁶ The 'Second Empire' (*Zweites Reich*) was founded on January 18, 1871 in Versailles after the Franco-Prussian War and remained the most influential political and military power in Europe until its dissolution in November 1918. In a sense the Weimar Republic (*Weimarer Republik*) can be considered an '*intermezzo*' (*Zwischenreich*) between the 'Second Empire' and the 'Third Empire'.⁷

Following the Christian doctrine of Trinitarianism the three empires can be thought of in a religious and messianic way as follows: the 'First Empire' is related to the Father, the 'Second Empire' to the Son, while the 'Third Empire' to the Holy Spirit. According to such an interpretation the 'Third Empire' would constitute the zenith of history and the perfect symbiosis between the real and ideal, satisfying the

⁶ For the international legal status of the Holy Roman Empire see Friedrich Berber, 'Internationale Aspekte des Heiligen Römischen Reiches' in Peter Lerche et al, *Festschrift für Theodor Maunz: zum 80 Geburtstag am 1 September 1981* (C H Beck, 1981) 17–25. Regarding the relationship between the idea of the *renovatio imperii* and the Holy Roman Empire see András Földi and Gabor Hamza, *A Római jog Története és Intitúciói* (History and Institutes of Roman Law, 17th revised ed, 2012) 114.

⁷ For the most recent literature see Roger Dufraisse, 'Le Troisième Reich' in Jean Tulard et al, *Les Empires Occidentaux de Rome à Berlin* (PUF, 1997) 449.

prophetic requirement of Henrik Ibsen and Gotthold Ephreim Lessing⁸ that the contradiction between Christianity and Graeco-Roman i.e. classical Antiquity be dissolved. This ‘Third Empire’ would follow a distorted era of Christianity that would be realised by the arrival of a new Messiah.

III

It is furthermore worth mentioning that in Ernst Krieck’s *Die deutsche Staatsidee* (1917) the ‘Third Empire’ appears not as a historical or political, but rather as a moral idea. Krieck alludes to Johann Gottlieb Fichte (1762–1814), the author of *Reden an die deutsche Nation*, a work that was rather influential in the latter’s era. By 1919 Dietrich Eckart uses the ‘Third Empire’ with a political and nationalistic content.⁹

Ernst Fraenkel (1898-1975) a renowned lawyer who immigrated after the ‘national socialist’ takeover (*nationalsozialistische Machtergreifung*), quite rightly uses the term *Doppelstaat* (Dual State) to describe the autocratic national socialist system, emphasising the double nature of the national socialist political rule. To insure the normal functioning of the economy a *Normenstaat* is in effect in the areas of civil, trade, corporate and tax law. On the other hand only professional experience, ie, knowledge plays a part in securing political power (*Maßnahmenstaat*).¹⁰

⁸ Gotthold Ephraim Lessing, *De L’education du Genre Humain* (Claude Joseph Tissot, trans) 86. The author foretells of the ‘new eternal Gospel’, which means the ‘third era’ (at 90).

⁹ It is worth pointing out that the title of Stefan George’s (1868–1933) work is *Das neue Reich* in which the expression ‘*völkisch*’ occurs.

¹⁰ See Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford University Press, 1941). This work only appears in German translation in 1974 (*Der Doppelstaat*). For Ernst Fraenkel’s view of the state see: Alexander von Brünneck, ‘Ernst Fraenkel (1898–1975), Soziale Gerechtigkeit und

IV

In the preface of his work Arthur Moeller van den Bruck (1876–1925) emphasises that the notion of the 'Third Empire' is ideological (*Weltanschauungsgedanke*), that rises above reality. Moeller van den Bruck's work quickly becomes widely known in Germany and has a large influence on the thinking of the young intellectual class with nationalistic feelings.¹¹ The disappointment felt after the very harsh political and economic terms of the *Peace Treaty of Versailles* (*Versailler Friedensvertrag*) that were imposed on Germany after the First World War undoubtedly helped shape the thinking of this class. The same work only very slowly becomes known outside of Germany.

The Solingen-born author, who came partly from a traditional Prussian military family, was greatly influenced by the philosophy of Friedrich Nietzsche (1844–1900). His affinity to the Pan-German ideas (*Pangermanismus*) is also quite strong. He is rather well acquainted with the most influential European countries, since he visited England, France, Austria, Italy and Russia between the turn of the century and the outbreak of the First World War. He was never really concerned about the unique ethnic problems of the Austro-Hungarian Monarchy. With the exception of the Austrian-Hungarian Dual Monarchy (*Doppelmonarchie Österreich-Ungarn*) and Germany he vehemently criticises the major Western European powers, especially their political system and structure.

pluralistische Demokratie' in Jürgen Seifert, *Streitbare Juristen, Eine andere Tradition* (Nomos, 1988) 415, 415–25.

¹¹ In Hans Schwarz, *Das dritte Reich* (Hanseatische Verlagsanstalt, 3rd ed, 1931) the author emphasises that National Socialism accepts the name 'Third Reich' and named the federation's paper *Oberland* based on the title of Arthur Moeller van den Bruck's work.

To him the ideal ‘power’ is Germany, his homeland, without which – according to him – no stability can or will exist in Europe.

The conservative philosopher feels antipathy for the Western democracies primarily towards France and England. He introduces the democratic system of these countries in an ironic belittling way. According to him it is only a fiction that the nation (*natio*) is made up of formally equal individuals. Arthur Moeller van den Bruck is convinced that Germany is predestined to lead Europe for the historical ties it has with the Holy Roman Empire (*Sacrum Romanum Imperium, Heiliges Römisches Reich*). He states that in its history the Holy Roman Empire was never able to amalgamate itself into a real political community (*politische Gemeinschaft*). The Holy Roman Empire is almost exclusively dominated by the notion of territoriality (*territorialitas*), the result of which is centurial territorial dismemberment. This limits the development of German ethnic identity. The birth of the ‘Second-Empire’ – despite the involvement of the political unity – failed to change this situation. The state further remains autocratic and is viewed as a ‘foreign body’ by its citizens.

Moeller van den Bruck also condemns the Weimar Germany, in which all of the political views are superficial and not reflective of society. He strongly criticises the *Weimar Constitution* of 1919 as well, since in his opinion it is unable to provide the united Germany with an acceptable constitutional framework. Only with the elimination of its pseudo-values can Germany fulfil its mission of reviving Europe, something it is obligated to do with its rich ties to the Holy Roman Empire. It is the duty of the young generation to revitalise the dormant German intellectuals. They have to intuitively oppose and revolt against the deceiving values.

Only as a result of such a 'revolution' can the 'Third Empire' come into existence.

The birth of the Third Empire, however, automatically assumes the territorial unification of the German ethnic group that is the termination of the system of the *Peace Treaty of Versailles*. The substantial growth of the German population can provide the nation with the necessary strength to attain its goal.

V

It is quite interesting from the viewpoint of the 'Third Reich' to briefly analyse the *Weimar Constitution* art 61. According to this article German-Austria after joining Germany receives proportional representation in the Imperial Council (*Reichsrat*). Even until the accession German-Austria (*Deutsch-Österreich*) is endowed with the right of consultation. Later Germany was forced to declare the passage void. According to *Peace Treaty of Versailles* art 80 (*Versailler Friedensvertrag*) Germany binds itself to acknowledging and respecting the independence of Austria. Austria's independence is inviolable. Only with the consent of the League of Nations (*Völkerbund*) can the status of Austria be modified.

This condition, however, led the peace conference to the inclusion of article 88 in the text of the third draft of the State treaty (*Staatsvertrag*) signed with Austria (*Deutsch-Österreich*) on September 10, 1919 in Saint-Germain-en-Laye. According to this article Austria's (*Deutsch-Österreich*) independence is inviolable and is always dependant on the consent of the League of Nations. This article of the State treaty is in unison with the decree that Austria must make a commitment to refrain

from any action that could directly or indirectly threaten its independence.

It must be emphasised that this section opens the floor to a very wide range of interpretations. The expression ‘Jesuit section’ used by John Maynard Keynes is quite telling of this section.¹² It was viewed positively by the followers of Pan-Germanism, since it left the door open for the unification with Germany (*Anschluß*) through a rather peculiar interpretation.

VI

The emphasis of Moeller van den Bruck’s philosophy is on the social or more specifically nationalistic demagogy. According to Arthur Moeller van den Bruck the integration of the peripheral classes into society and the German nation would be the solution to serious differences within the society of the Weimar Republic. Closely related to this idea, of course, is the goal of developing a national identity as soon as and as efficiently as possible. All this is a kind of anti-capitalist reaction and a significant contribution to the conservative and heterogeneous trend of both the conservative and the popular revolutions. The author of *Das dritte Reich* is an active supporter of only the first one.

Moeller van den Bruck’s idea of a ‘perfect’ empire has already been present in Lessing’s and Ibsen’s thoughts concerning the ‘Third Reich’, but was influenced primarily by Gerhard von Mutius’ value-ideal world

¹² The decision, formulated by the Supreme Council on December 16, 1919 deals with the interpretation of the mentioned article. It was sent to chancellor Karl Renner on the same day with a *lettre d’envoi*, that included the Allied Powers’ guarantee for the territorial integrity of Austria.

view.¹³ Despite the rejection of modern liberalist ideals and the formulation of a plan for a 'new European order', the leaders of Germany's political and ideological life refused to accept Arthur Moeller van den Bruck's idea of the 'Third Empire' that was originally trademarked by idealistic rather than politically relevant thoughts, ideas. This general hostility was further reinforced by the publication of a strong critique of Moeller van den Bruck's views in 1939. It is also worth mentioning that the expression 'Prussian style' (*Preußischer Stil*) comes from Arthur Moeller van den Bruck. The ideas of the conservative intellectual philosopher are especially popular with the conservative German 'national' intellectuals.¹⁴ During the Great Depression of the early 30's Moeller van den Bruck is often cited by many adherents of this group.

VII

Followers of the idea of conservative revolution are the writers, historians, economists and lawyers who had close ties with the *Die Tat* cultural journal published by Ernst Horneffer in Jena between 1909 and 1939. A majority of these people consider themselves to be the intellectual successor of Horneffer in some way.¹⁵ After Ernst Horneffer, Eugen Diederichs (1867–1930) takes over as the magazine's editor. During Diederich's editorial years the paper gains a more religious, social and cultural political appearance. From April 1913 the sub-title of *Die*

¹³ See Gerhard von Mutius, *Die drei Reiche* (Weidmann, 1920) 226. Von Mutius writes: 'One who frees himself of his own self stands in the Third Reich.' ('*Wer sich von seinem Selbst geschieden hat, der steht im dritten Reich.*')

¹⁴ Carlo Schmid writes in his memoirs, that in the 1930s the members of Tübingen Wiking-Bund, a nationalistic student group, read the works of Moeller van den Bruck. See Carlo Schmid, *Erinnerungen* (Scherz Verlag, 1979) 143.

¹⁵ Essays and critiques were published by distinguished writers and philosophers such as *Hermann Bahr* (1863–1934), *Paul Ernst* (1866–1933) and *George Simmel* (1858–1918) in *Die Tat*.

Tat becomes *Social-religiöse Monatschrift für deutsche Kultur*, reflecting well the changes in ideology of the paper. During the First World War the paper is out of print.

In 1921 the sub-title of *Die Tat* is changed by Diederichs to *Monatschrift für die Zukunft deutscher Kultur*, implying a change in style once again. The goal of the paper is changing Germany's political and cultural life.¹⁶ The articles published in the *Die Tat* welcome the fall of the empire and follow a new socio-religious aristocratic thinking. Eugen Diederichs provides space for both the national socialists and the liberals.¹⁷ The 'community of people' (*Volksgemeinschaft*) wishes to bring a halt to the social and political decline of the bourgeoisie (*Bürgertum*) through the simultaneous creation of a national socialist and authoritarian state. Eugen Diederichs furthermore demands a 'revolution from the top' (*Revolution von oben*).

VIII

It is necessary to mention Eugen Rosenstock who further developed the ideas of Eugen Diederichs. His work on the European revolutions, published in the early 1930's is quite influential. The same can be said about economist Ferdinand Friedrich Zimmermann alias (under pseudonym) Ferdinand Fries (1898–1967)¹⁸ who uses facts to

¹⁶ According to Diederichs the current leading bourgeoisie (*bisher geistige Schicht des Bürgertums*) cannot be the carrier of culture in the future. (*Träger der Kultur nicht walten kann*). See Eugen Diederichs, 'Die neue "Tat"' (1929) 7 *Die Tat*, 481.

¹⁷ Klaus Fritsche, *Politische Romantik und Gegenrevolution: Fluchtwege in der Krise der bürgerlichen Gesellschaft: Das Beispiel des 'Tat'-Kreises* (Suhrkamp, 1976) 45.

¹⁸ Ferdinand Fries (Ferdinand Friedrich Zimmermann) studied economics and philosophy at the Berlin University. He joined the magazine *Die Tat* in 1931. Ferdinand Fries published in 1931 the book titled *Das Ende des Kapitalismus*. He was author also of the works *Die Wende der Weltwirtschaft* (1937), *Die soziale*

demonstrate the serious crisis of capitalist production. According to him the solution to this problem is an authoritarian economic system. Rosenstock is further disturbed by the gradual impoverishment of the middle-class, and the drastic strengthening of a rather small elite in the political and cultural life of Germany.

This evermore-powerful group barely constitutes one-tenth per cent of a 60 million large Germany, yet it seems to create an unbridgeable gap between itself and the rest of society. Eugen Rosenstock believes that the only solution to this problem is not only economic expansion, but also a substantial increase in exports. In order to achieve this Germany needs to become self-sufficient economically and must switch to an authoritarian system politically.

IX

Carl Schmitt (1888–1985), a renowned professor of law and the author of the well-known work *Der Hüter der Verfassung* (1931) was also a person with close ties to the *Die Tat*. In this greatly influential work, through closely studying the Weimar Republic, he reaches the conclusion that in historic dimensions the state becomes ‘overpowering’, directly leading to the rise of a totalitarian state. In many respects Carl Schmitt’s *Gegenspieler* is Hermann Ignatz Heller (1891–1933) who quite appropriately writes that the need for a strong person is the bourgeoisie’s way of expressing its desperation. Through the strengthening of the working masses they feel that not only they own political and economic interests, but also the entire European culture is threatened. The only

Revolution (1942), *Der Umsturz der Gesellschaft* (1950), and *Abenteuer des Abendlandes* (1951). His works found large repercussion in Germany.

thing left for the desperate bourgeoisie is to place all their faith into a strong person.¹⁹

Hermann Heller, who becomes a full professor of public law at Frankfurt am Main University in 1932, is a committed supporter of the Weimar Republic. The fact that in the same year he was the legal representative of the faction of the social democrats of the Prussian provincial diet in the so-called *Preußenschlagverfahren* seems to only reinforce this fact. It must be pointed out that Heller thinks that the modern state and its era are entirely incompatible with the class-stratification. As he indicated in his rather fragmented work, *Staatslehre* which was published after his early death, a modern state is both a social and democratic constitutional State that by definition excludes the possibility of a strong person-led authoritarian state.²⁰

X

Certainly worth mentioning is Hans Zehrer, who became the editor of the *Die Tat* in October 1929.²¹ He is regarded as a supporter of the ‘conservative revolution’ and the opponent of parliamentary democracy.

¹⁹ Hermann Heller writes:

Von grosser Wichtigkeit ist es, dass neufeudale Kraftpose und den Schrei nach dem starken Mann als den Ausdruck einer Verzweiflungsstimmung des Bürgers zu erkennen. Erschreckt durch das Avancieren der Arbeitermassen, glaubt er nicht nur seine eigenen politischen und ökonomischen Herrschaftsansprüche bedroht, sondern sieht zugleich das Ende der gesamten europäischen Kultur nahe. [...] Begreiflich, dass diesem verzweifelten Bürger nur die Hoffnung auf den starken Mann übrig bleibt.

Hermann Heller, *Rechtsstaat oder Diktatur?* (Mohr, 1930) 17–18.

²⁰ For the importance of Heller’s view of the social state with respect to the German constitutional thinking, see Christoph Müller, *Staatslehre in der Weimarer Republik: Hermann Heller zu ehren. hrsg. von Christoph Müller u. Ilse Staff* (Suhrkamp, 1985).

²¹ Adam Kuckhoff took over editing the *Die Tat* from Diederichs in April 1928. Kuckhoff only worked at the journal for one year. In August 1943 he was executed by the Nazis as a member of the ‘Rote Kapelle’.

After World War II Zehrer becomes the editor-in-chief of the *Die Welt*, and modifies the sub-title (*Monatsschrift zur Gestaltung neuer Wirklichkeit*) established by his predecessor Adam Kuckhoff. In 1932 he adds the adjective 'independent' (*unabhängig*) to the original subtitle. The *Die Tat* becomes the intellectual interpretative forum for national socialist ideas although keeping a distance of from Hitler and underestimating the dangerousness of the Nationalsozialistische Deutsche Arbeiterpartei (NSDAP). As the solution to the instable political and economic system of the Weimar Republic, Hans Zehrer envisioned a new system, the 'Third Reich', as a fundamentally different, religion-based corporate political system.

This new system, which is in essence a 20th century version of Luther's directorate, would be led by a new elite with 'folk roots'. In Zehrer's opinion only a return to the Lutheran Reformation can stop both communism and National Socialism from fulfilling their ultimate goal of establishing an authoritarian system. In accordance with Zehrer's interpretation the 'Third Reich' would have an eschatological political structure that had its foundations in the Reformation.

XI

The intellectuals of the *Die Tat*, especially Giseler Wirsing, the person who becomes the editor of the review after the Nazi takeover in 1933, concentrate on Germany's relations with Central Europe. Starting 1934/35 Wirsing shortens the review sub-title to *Unabhängige Monatsschrift*. This is 'confirmed' or seems to be confirmed by the unique, yet already true fact that the 'transformation of reality' has already taken place. From 1936 the word 'independent' disappears and only '*Deutsche Monatsschrift*' appears on the cover of the paper.

In March 1939 the publication of the *Die Tat* comes to an end by merging with the ‘*Das XX. Jahrhundert*’ magazine. Despite the political and ideological changes it has gone through the years the *Die Tat* becomes very popular in Germany, especially during Zehrer’s editorial years. The circulation of the paper reaches a yet unprecedented 30 000 copies. In addition Tat-clubs (*Tat-Kreise*) are born all throughout Germany, forming intellectual debate forums.

According to Giselher Wirsing, Germany’s future is primarily influenced by South-Eastern Europe (*Südost-Europa*). He is convinced that the goal of Germany’s enemies or perceived enemies is to encircle the country. It is for this reason that Germany needs to establish a closed national ‘living-space’ (*Lebensraum*). He is convinced that self-sufficient German economy should open towards South-Eastern Europe instead of the increasingly hostile financial world. At the same time Wirsing, similarly to most of his colleagues of the *Die Tat*, does not wish to continue or renew the old policy of annexation.

Giselher Wirsing essentially revives the *Mitteuropa-Plan* (1848–50) which states that Germany’s expansion should be directed towards Central Europe instead of the West. This latter option has been limited, anyway, by the Locarno Treaty in 1925. The ultimate goal of the expansion is to establish the so-called *Großwirtschaftsraum* (Greater Economic Space). The *Mitteuropa-Plan* is generally associated with Friedrich Naumann (1860–1919). However, it was the Prussian-born Karl von Bruck (representative of Trieste in 1848 in the Viennese

Parliament and financial minister of Austria between 1855-1859) who first developed the financial aspect of the plan.²²

XII

Moeller van den Bruck was the intellectual centre for the other group of intellectuals who sympathised with the idea of 'conservative revolution'. These people were united under the Berlin-based *Juni-Club* and were led by Moeller van den Bruck's friend Heinrich von Gleichen. There is a close relationship between the *Juni-Club*, organised around figures of Moeller van den Bruck, Heinrich von Gleichen and Martin Spahn from Berlin and the *Deutscher Hochschulring* (DHR), an organisation established and actively participating at most German universities after World War I.²³ The *Ring-Bewegung* is primarily characterised by conservatism, a nationalistic attitude and – due to disorientation – a trend-seeking at the beginning. The ties are particularly strong in Berlin which is illustrated by the fact that the centres of the *Hochschulring* are in the headquarters of the *Juni-Club*. The *Juni-Club* is rather active in Berlin, in particular it exhibits educational activities of political nature. In November 1922 Martin Spahn, one of the leading figures of the *Juni-Club* establishes a 'Political Collegium', where he regularly organises lectures. From 1923 the Collegium's name changes to 'Hochschule für nationale Politik', where he holds private 'university' classes. These classes are visited primarily by youth who sympathise with nationalist

²² It must be mentioned that Constantin Frantz, a political opponent of Otto von Bismarck, feels nostalgic towards the Holy Roman Empire. According to Frantz the three 'Germanies' (Prussia, Austria, and the 'third Germany'), which include the South and Central German states, may provide the real defence against the French and Russian expansion. Frantz's idea is anti-Nazi and was rather popular in German circles outside of Germany. See François Genton, *L'Europe Centrale, une idée neuve*, (1997) 362.

²³ At some universities the name of the *Deutscher Hochschulring* is *Hochschulring Deutscher Art* (HDA).

ideals, such as Werner Best, a lawyer and one of the most well-known national socialists having a law degree.²⁴

A prominent member of the *Juni-Club* is Edgar Jung. The Austrian economist, philosopher and sociologist, through the influence of Othmar Spann (1878-1950), propagates the rebirth and revival of the Holy Roman Empire of the German Nation.²⁵ This view is quite similar to Moeller van den Bruck's call for the establishment of the 'Third Reich', since both of them reach back to the Holy Roman Empire for ideological support. Without going into an extensive analysis of the question, it must be pointed out that the linking of the Holy Roman Empire with the Germans as an ethnic group is entirely unhistorical.

XIII

Even based on this brief summary it can be ascertained that the idea of the 'Third Reich' dates back a long time. In traces it is already present in Fichte's ideas. The idea of the 'Third Reich' has quite an influence on the thinking of the conservative cultural philosophers, primarily Arthur Moeller van den Bruck. It is also present in the works of the era's influential literary, political and economic scholars. However, not even the often eschatological 'Third Reich' is a uniformly interpreted idea.

²⁴ See Ulrich Herbert, *Best: Biographische Studien über Radikalismus, Weltanschauung und Vernunft: 1903–1989* (Dietz, 2nd ed, 1996) 55.

²⁵ In contrast with Adam Smith and David Ricardo's liberal economics Othmar Spann, the founder of social economics and universalism in philosophy, develops a new view for studying the so-called *Ganzheitslehre*. In his opinion the construction of a 'real state' (*wahrer Staat*) assumes the new, profession-based establishment of the economy and the state (*Ständestaat auf berufsständiger Grundlage*). Through opposing the various trends of liberalism and Marxism, Spann exerts great influence on the conservative Austrian thinkers. Following the *Anschluß*, Spann was stripped of his professorship in Vienna. Thereafter he took an active part in the formulation of the so-called *Korneuburger Eid*, an oath of the 'Austrofascist' *Heimwehr*.

For political and philosophical reasons the national socialist regime isolates itself from the idea of 'Third Reich' already by the end of the 1930s. The 'conservative revolutionary' branch of the *Deutsche Bewegung* (German Movement) – including all branches of the 'conservative revolution' – was unacceptable as an ideological base for the national socialist rulers. The 'völkisch' branch of the *Deutsche Bewegung* is an entirely different matter. This latter one cannot be considered a uniform movement either, since it includes the *Schwarze Front* trend that later came into conflict with the national socialist ideals and the *Landvolkbewegung*,²⁶ a movement unfolding at the end of the 1920s in Schleswig-Holstein and one that wobbles between anarchy and corporatism as well. Of all these different movements, ie, 'trends', the *Führerprinzip* idea, symbolised by Hans Friedrich Karl Günter (1891–1968), the influential representative of the racist theory (*Rassentheorie*), Richard Walter Darré (1895–1953), Reich Minister of Food and Agriculture and Alfred Ernst Rosenberg (1893–1946), leader of the Foreign Policy Office of the NSDAP, became the official ideology of the national socialist Germany, in which the idea of the 'Third Reich' no longer played a role.

²⁶ Here we point out that the trend represented by Ernst Niekisch is part of the *Deutsche Bewegung*'s 'völkisch' revolutionary branch. Ernst Niekisch is also one of Moeller van den Bruck's students.

THE MRRT CHALLENGE AND IMPLICATIONS FOR FEDERALISM IN AUSTRALIA

EMILY CROFTS*

I INTRODUCTION

On 22 June 2012 iron ore mining company Fortescue Metals Group Limited ('FMG') and related companies filed a Writ of Summons and Statement of Claim in the High Court challenging the Commonwealth Government's newly introduced *Minerals Resource Rent Tax Act 2012* (Cth) ('MRRT Act') and various Acts imposing the MRRT Act ('Imposition Acts') on constitutional grounds.¹ The MRRT Act came into effect on 1 July 2012 and imposes a Minerals Resource Rent Tax ('MRRT') on 'super profits' made in the mining and sale of the 'taxable resource' – namely coal and iron ore.² FMG allege the MRRT Act and Imposition Acts (collectively 'the Acts'); discriminate between the States contrary to the *Constitution* s 51(ii), curtail State sovereignty, give preference to one State over another contrary to the *Constitution* s 99 and restrict a State's ability to encourage mining contrary to the *Constitution* s 91.³ Accordingly they consider the Acts are not valid laws of the

* Student, Murdoch University. This essay was selected for publication as a highly distinguished essay that was written for assessment as part of the Constitutional Law unit at Murdoch University prior to the judgment being delivered by the High Court.

¹ Corrs Chambers Westgarth Lawyers, *Writ of Summons* (22 June 2012) <<http://resources.news.com.au/files/2012/06/22/1226405/873033-aus-file-writ.pdf>>.

² *Minerals Resource Rent Tax Act 2012* (Cth) ('MRRT Act').

³ Corrs Chambers Westgarth Lawyers, *Statement of Claim* (22 June 2012) <<http://resources.news.com.au/files/2012/06/22/1226405/873033-aus-file-writ.pdf>>; Fortescue Metals Group Limited, *Minerals Resource Rent Tax: Fortescue Launches*

Commonwealth and seek declarations that sections which impose the tax are not valid laws or alternatively that the Acts have no valid application on iron ore mining in Australia.⁴ The Commonwealth believes the Acts are constitutionally valid and they are simply exercising their taxation powers as per the *Constitution*.⁵ This essay will outline and elaborate on the four grounds of challenge stated above, argue the challenge has low prospects of succeeding, and discuss the predominant implications of concern for federalism in Australia.

II POTENTIAL GROUNDS OF CHALLENGE AND PROSPECTS OF SUCCESS

FMG are challenging the Acts on four constitutional grounds which will be discussed below. They also considered a fifth ground; the Acts conflict with the *Constitution* s 114 which prescribes that the Commonwealth cannot 'impose any tax on property of any kind belonging to a State'.⁶ This ground was not pursued as they considered they would be unsuccessful given the careful drafting of the Acts by the Commonwealth to contort the legislation so that it avoids contravening s 114.⁷

Constitutional Challenge to MRRT (22 June 2012) <http://www.fmgl.com.au/investors_and_media/Minerals_Resource_Rent_Tax>.

⁴ Ibid.

⁵ Email from Australian Government Treasury (Resource Taxation Unit) to Unknown, 7 November 2011, 1 <<http://treasury.gov.au/Access-to-Information/DisclosureLog/2012/Constitutional-legality-of-the-MRRT-tax-and-the-PRRT>>.

⁶ Peter Huston, Peter Meurs and Julian Tapp, 'Fortescue Press Conference' (Press Conference, 22 June 2012) <<http://www.abc.net.au/site-archive/rural/news/content/201206/s3531248.htm>>.

⁷ Ibid.

A Discrimination Between States

The first ground of challenge is that the Acts discriminate between the States in conflict with the *Constitution* s 51(ii).⁸ This section of the *Constitution* gives the Commonwealth power to legislate in relation to taxation provided it does not discriminate between the States.⁹ The *Constitution* gives States power to collect royalties in relation to their assets and property, in this case in relation to minerals located within their State.¹⁰ Various legislation has been enacted by the States to enable the levying and adjustment of such royalties.¹¹

The MRRT provides a mechanism whereby the Commonwealth credits a mining company ('miner') with any royalties paid to a State against any MRRT liability.¹² Given different royalty rates are payable in different States, the MRRT payable by a miner in one State will differ from that in another. Furthermore if a State decides to increase, decrease, graduate, exempt or defer royalty payments, a miner in that State will be liable to pay a higher or lower amount of MRRT than otherwise would be the case and relative to a similar company with the same production in another State, all other things being equal. For these reasons, FMG argue the Acts discriminate between the States.

Prospects of success under this ground are low. In refuting the assertion of discrimination the Commonwealth will likely argue the Acts simply

⁸ Corrs Chambers Westgarth Lawyers, *Statement of Claim*, above n 3; Fortescue Metals Group Limited, above n 3.

⁹ *Commonwealth of Australia Constitution Act* s 51(ii) ('*Constitution Act*').

¹⁰ *Constitution*; John Freebairn and John Quiggin, 'Special Taxation of the Mining Industry' (2010) 29 *Economic Papers* 384, 394.

¹¹ See, eg, *Mining Act 1978* (WA); *Mineral Resource Act 1989* (QLD).

¹² *MRRT Act* div 10-5; Lindsay Hogan, 'Non-renewable Resource Taxation: Policy Reform in Australia' (2012) 56 *Australian Journal of Agricultural and Resource Economics* 244, 247.

take the States royalties as they find them with varying rates and different methods of calculation.¹³ Any difference of MRRT payable between the States, for an equivalent circumstance, is a product of the different royalty regimes and not a product of the Acts.¹⁴

Taylor J stated in *Conroy v Carter*¹⁵ ‘...a law with respect to taxation cannot, in general, be said so to discriminate if its operation is general throughout the Commonwealth even though, by reason of circumstances existing in one or other States, it may not operate uniformly.’¹⁶ Whilst the MRRT payable may vary depending on the level of royalty this does not amount to discrimination. It is essentially no different to a tax deduction say the cost of labour inputs varying between the States for ordinary company tax.

B *State Sovereignty*

The second ground is the Acts curtail State sovereignty in conflict with the *Melbourne Corporation* principle.¹⁷ This constitutional law principle implies that the Commonwealth cannot introduce laws that discriminate against States or restrict control and/or function of the States.¹⁸

States can increase, decrease, graduate, exempt or defer royalty payments to encourage or discourage certain outcomes such as economic

¹³ Email from Australian Government Treasury (Resource Taxation Unit) to Unknown, 7 November 2011, 1 <<http://treasury.gov.au/Access-to-Information/DisclosureLog/2012/Constitutional-legality-of-the-MRRT-tax-and-the-PRRT>>.

¹⁴ Ibid.

¹⁵ (1968) 118 CLR 90.

¹⁶ *Conroy v Carter* (1968) 118 CLR 90, 101.

¹⁷ Corrs Chambers Westgarth Lawyers, *Statement of Claim*, above n 3; Fortescue Metals Group Limited, above n 3; Huston, Meurs and Tapp, above n 6.

¹⁸ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; Anne Twomey, ‘Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind One Another’ (2003) 31 *Federal Law Review* 507, 508–9.

development, mineral production, mineral sales, mining investment, stimulating one mineral over another and competitiveness with other States and even Countries.¹⁹ Given a miner is credited back royalties paid to the State by the MRRT (when in ‘super profit’), essentially they will remain in a similar position regardless of alteration of royalties by a State. As such the Acts curtail a State’s ability to use royalties to send the above listed economic signals and therefore their sovereignty.

This is the stronger ground but still difficult to sustain. To be found constitutionally invalid the Acts must destroy or impair the States existence or functioning.²⁰ This appears a high threshold. Whilst the MRRT potentially does curtail a State’s ability to use royalties as an economic signal, arguably in practice it would not be sufficiently significant. Given the ‘super profit’ threshold and the other adjustment mechanisms in the MRRT (treatment of capital, valuations and the like)²¹ other miners, even in the same State, may well not have to pay the MRRT during the same time frame and therefore will still pay the royalty. Early indications appear that few miners, if any, will have a MRRT liability even in the recent period of relatively high iron ore and coal prices.²² Accordingly the practical impact, if any, is not substantial enough to ‘destroy’ or ‘impair’ and therefore not sufficiently material to discriminate or undermine the State’s sovereignty.

¹⁹ Corrs Chambers Westgarth Lawyers, *Statement of Claim*, above n 3.

²⁰ *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 217 (‘*Queensland Electricity Commission*’); *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 231 (‘*Australian Education Union*’).

²¹ *MRRT Act*.

²² BDO Corporate Tax Pty Ltd, Submission to Senate Standing Committee, Parliament of Australia, 21 December 2011; Huston, Meurs and Tapp, above n 6.

C *Preference to One State Over Another*

The third ground is the Acts give preference to one State over another conflicting with the *Constitution* s 99.²³ This section prohibits the Commonwealth introducing laws or regulations relating to trade, commerce or revenue that give preference to one State over another.²⁴

This is a very similar argument to the discrimination/sovereignty argument in Part II(B) above however the negative effect here is one State is preferenced over another. All other things being equal, a miner in a State that imposes a higher royalty rate will pay less MRRT so is preferenced over the equivalent circumstance in another State that pays a lower royalty. The cumulative effect of this preference may be a significant preference towards the higher royalty State.

As an example – the same company mining iron ore in two States deciding where to allocate resources. Prior to the MRRT the more likely option would be to allocate resources to the State that imposes a lower rate of royalty. Subsequent to the MRRT's introduction the mining company could consider the State that imposes a higher royalty rate the more favourable option given they will be paying less MRRT and will be credited royalties. Therefore the MRRT has a greater impact upon the State that imposes lower royalties and it could be said that the MRRT preferences a State that imposes higher royalties.

This ground of challenge is unlikely to succeed for the same reasons outlined above in Part II(A). Any inequality between MRRT payable by miners in different States is a product of the differing royalty regimes in

²³ Corrs Chambers Westgarth Lawyers, *Statement of Claim*, above n 3; Fortescue Metals Group Limited, above n 3.

²⁴ *Constitution* s 99.

each State and not the Acts. The MRRT does have an equalising effect in some circumstances but this is unlikely to be accepted as so substantial as to amount to preferencing one State over another.

D *Aid and Bounty*

The fourth ground is the Acts restrict a State's ability to encourage mining conflicting with the *Constitution* s 91.²⁵ Section 91 establishes that States can grant aid to or a bounty on mining.²⁶ This argument is very similar to discrimination/sovereignty in Part II(B) above. The effect of decrease or exemption of royalties by a State to aid a miner is diluted because the MRRT payable by the miner increases so they pay a similar net amount. Therefore States ability to adjust royalties as an economic stimulus is diminished.

Prospects of success can be argued in the same way as in Part II(B) above. Using royalties to encourage mining is a subset of sovereignty. For a successful outcome it must be demonstrated that the MRRT will 'destroy' or 'impair' the States existence or functioning.²⁷ For reasons stated above, in practice the MRRT will unlikely be sufficiently material to meet this test.

III IMPLICATIONS FOR FEDERALISM IN AUSTRALIA

'Federalism' describes a system where governmental power is shared between a central or federal government having power over the whole country, and regional governments having power over their respective

²⁵ Corrs Chambers Westgarth Lawyers, *Statement of Claim*, above n 3; Fortescue Metals Group Limited, above n 3.

²⁶ *Constitution* s 91.

²⁷ *Queensland Electricity Commission* (1985) 159 CLR 192, 217; *Re Australian Education Union* (1995) 184 CLR 188, 231.

regions.²⁸ Australia implemented a federal system by creating the Commonwealth and various State Governments.²⁹ The drafters of the *Constitution* outlined the specific powers of the Commonwealth and left all other powers to the States.³⁰

The balance of power between the Commonwealth and States is critical, and in particular the decentralisation of power where the sovereign States are autonomous and hold all powers other than those that are necessary to be held by the central government.³¹ Benefits include; greater protection of citizens' rights,³² laws suited to local needs, which often results in greater citizen satisfaction,³³ and competition between the States which results in other States adopting models or parts of models that work well.³⁴ The more centralised power becomes, the less efficient our federal model operates.³⁵

It could be argued taxing miners' profits is merely a revenue raising exercise for the Commonwealth, they are not seeking to control how the profit is made or how the companies operate, and therefore there are no implications for federalism. However this is taken a step further given the MRRT will credit miners for any State royalties (assuming in super profits). Royalties influence on miners' production decisions will be diminished, as discussed above. In respect of government take they will also look to the Commonwealth. The Acts have the effect of at least

²⁸ *LexisNexis Concise Australian Legal Dictionary* (LexisNexis Butterworths, 4th ed, 2011).

²⁹ Robert Carling, 'First Principles' (2012) 28(2) *Policy* 8, 9.

³⁰ *Ibid.*

³¹ Kenneth Wiltshire, 'Australia's New Federalism: Recipes for Marble Cakes' (1992) 22 *Publius* 165, 166.

³² James Allan, 'The Case for Federalism' (2012) 28(2) *Policy* 14, 15.

³³ *Ibid* 14.

³⁴ *Ibid* 16.

³⁵ *Ibid.*

partially centralising decisions over iron ore and coal mining that used to solely be dealt with by the States. Those benefits of decentralisation listed above are now slightly diminished.

Another essential feature of federalism is the sovereignty of the Commonwealth and State Governments.³⁶ By imposing the Acts the Commonwealth is not directly collecting and taking away revenue (royalties) generated by the States as the States are free to charge and indeed change royalties. These are paid by the miners but credited by the Commonwealth through the MRRT mechanisms. As per the discussion in Part II(B) above there is a marginal undermining of State sovereignty.

However press reports indicate the Commonwealth has also threatened to offset any royalty increases against GST distributions and/or Commonwealth grants for capital spending on infrastructure and the like.³⁷ Evidence of this would amount to a greater undermining of State sovereignty. It would have been more consistent with Australia's federalism for the Commonwealth to have negotiated an agreement with the States for a MRRT to completely replace royalties with a guaranteed redistribution via grants and the like to each of the States prior to legislating. Over time the Commonwealth has incrementally assumed responsibility for functions previously controlled by States, sometimes by agreement and sometimes not.³⁸ For reasons outlined above the MRRT is another example without agreement. Perhaps no single example is fundamental to Australian federalism however cumulatively the arguments that the advantages are being lost become compelling.

³⁶ Robert Carling, above n 29, 9.

³⁷ 'Wayne Swan 'bullying' states over MRRT: Colin Barnett', *PerthNow* (online), 22 August 2012 <<http://www.news.com.au/national/wayne-swan-bullying-states-over-mrrt-colin-barnett/story-fndo4e3y-1226455705635>>.

³⁸ Robert Carling, above n 29, 10.

IV CONCLUSION

FMG's challenge of the Acts on four constitutional grounds is unlikely to succeed. The strongest ground of challenge appears to be the potential curtailment of State sovereignty as theoretically some impediment may be demonstrated. Whether this is material in practice is likely to be the question.

In the likely event the challenge does fail, FMG along with other miners will be liable to pay the MRRT.³⁹ However, early indications appear that few miners, if any, will have a practical liability due to the way the MRRT is calculated.⁴⁰ It seems improbable that a complex and inefficient tax that raises little revenue for the Commonwealth will not ultimately be resolved at a political level.

The Acts also impact upon essential features of federalism in Australia. By crediting back to miners any royalties paid (when in 'super profit') the effectiveness of royalties as being a tool for States to influence miners is diminished. Arguably it centralises power and affects State sovereignty, however only marginally.

V POSTSCRIPT

Since the time of writing, on 7 August 2013 the Full Court of the High Court of Australia unanimously dismissed FMG's (together with the States of Western Australia and Queensland intervening in support) proceedings therefore deciding the Acts are constitutionally valid.⁴¹ In lengthy reasoning several judges traversed the history of the relevant

³⁹ *MRRT Act*.

⁴⁰ BDO Corporate Tax Pty Ltd, above n 22; Huston, Meurs and Tapp, above n 6.

⁴¹ *Fortescue Metals Group Ltd v Commonwealth* [2013] HCA 34.

sections of the *Constitution* and similar Articles in the *United States Constitution* back to drafting stages and discussed the significant superior court decisions over time.⁴²

The grounds of challenge relating to the *Constitution* ss 51(ii) and 99 (discussed above in Parts II(A) and (C)) failed as the Court found the Acts did not discriminate between the States or give preference to one state over another.⁴³ The High Court held that the Acts, of themselves, are uniform in their prescription and different outcomes are appropriate and adapted to a proper objective or resulting from different circumstances in different States (that is, State royalty schemes).⁴⁴ Therefore they were found not to amount to ‘discrimination’ or ‘preference’ as defined in the *Constitution*.⁴⁵

The Full Court also rejected arguments relating to the *Constitution* s 91 and the *Melbourne Corporation* principle (discussed above in Parts II(B) and (D)) as the Acts are directed at the Mining Companies not the States, and do not impede on the functioning of the States.⁴⁶

As anticipated all arguments put forward by FMG found little favour as evidenced in the reasons and by the unanimous decision to reject.⁴⁷ It was considered above, whilst unlikely to succeed, the strongest argument may be the ground relating to the *Melbourne Corporation* principle (Part II(B) above). However the Court did not spend much time on this ground in rejecting it.⁴⁸ Rather they spent a lot of time considering the ground

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

relating to s 51(ii) (Part II(A) above).⁴⁹ It would appear the Court considered this was the stronger of the failed arguments.⁵⁰

⁴⁹ Ibid.

⁵⁰ Ibid.

HANS Kelsen's THEORY AND THE KEY TO HIS NORMATIVIST DIMENSION

KENDRA FREW*

I INTRODUCTION

Writers have both praised and criticised Hans Kelsen's work, however all would agree that he is 'a theorist to be reckoned with.'¹ The focus of this research paper is to critically examine whether the key to the normative dimension of Kelsen's 'Pure Theory of Law', first published in his book of the same name in 1934, is a neo-Kantian or regressive version of Kant's transcendental argument. This paper will begin by outlining Kelsen's theory and discuss the 'middle-way' approach he adopts between the traditional theories of natural law and legal positivism.² This paper will then outline Kant's transcendental argument and apply the dimensions of Kelsen's neo-Kantian or regressive version to this argument. This paper will demonstrate how Kelsen's system of basic norms apply to Kant's transcendental argument and conclude with a statement as to the problems inherent in Kelsen's application of the neo-Kantian or regressive version of Kant's theory.

* Student, Murdoch University. This essay was selected for publication as a highly distinguished essay that was written for assessment as part of the Legal Theory unit at Murdoch University.

¹ Stanley Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law' (1992) 12 *Oxford Journal of Legal Studies* 311, 312.

² Ibid.

II KELSEN'S PURE THEORY OF LAW

Paulson states that 'Kelsen would have his Pure Theory of Law understood as a theory of legal cognition, of legal knowledge' and that 'the sole aim of the Pure Theory is cognition or knowledge of its object, precisely specified as the law itself.'³ Kelsen believed that utilising 'alien' disciplines such as ethics, theology, psychology and biology to answer legal questions have led legal theorists astray and hence his 'pure' theory of law must be sharply distinguished.⁴ Kelsen wished to create a 'science of law' which ought to be 'distinguished from the philosophy of justice on the one hand and from sociology, or the cognition of social reality, on the other.'⁵ Thus Kelsen's pure theory 'provides the basic forms under which meanings can be known scientifically as legal norms.'⁶ These legal norms form a 'normative system' which requires that individuals conform to the modes of behaviour stated in each of these norms, ie an 'ought' proposition.⁷ This normative system is expressed in a hierarchical structure where the validity of a legal norm is inferred from a higher order norm, whose validity is thus derived from an even higher order norm and so on until it reaches the highest order norm, through a direct appeal to the Constitution, which is the source of the validity of all the derivative norms, ie the *Grundnorm* or 'origin-norm.'⁸ The premise on which Kelsen bases this validity has been the subject of much

³ Ibid 313.

⁴ Ibid.

⁵ Hans Kelsen, *What is Justice?* (California University Press, 1957) 266 quoted in Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 72.

⁶ Michael Freeman, *Introduction to Jurisprudence* (Sweet & Maxwell, 8th ed, 2008) 307 quoted in Zimmermann, above n 5, 73.

⁷ Peter Langford and Ian Bryan, 'Hans Kelsen's Concept of Normative Imputation' (2013) 26 *Ratio Juris* 85.

⁸ Andreas Kalyvas, 'The Basic Norm and Democracy in Hans Kelsen's Legal and Political Theory' (2006) 32 *Philosophy & Social Criticism* 573, 577.

discussion and criticism, particularly by his main intellectual opponent, Carl Schmitt, who mockingly comments that a legal norm is ‘valid if it is valid and because it is valid.’⁹ Kelsen’s validity theory and its transcendental application will be discussed further below.

Kelsen distinguishes his pure theory of law from both traditional natural law theory and traditional legal positivism, and instead identifies his theory as a ‘middle-way’ between the two traditional theories.¹⁰ Historically, natural law theory is subject to moral constraints while empirico-positivist theory is seen as part of the world of fact.¹¹ Kelsen rejects both theories, stating that neither are defensible and thus produces his alternative theory of pure law, one which is free from the ‘foreign elements’ of either theory, ie matters of morality and matters of fact.¹² *Pure Theory of Law* is Kelsen’s attempt to combine the separability of law and morality (or ‘separation thesis’) with the separability of law and fact (or ‘normativity thesis’).¹³ The separation thesis is the usual domain of legal positivism and the normativity thesis reflects a classical part of natural law theory, hence the combination of both theses effectively adopts a Kantian or neo-Kantian middle-way or, as Kelsen put it *mittelweg*, between the two theories.¹⁴ Kelsen’s alternative theory, however, is not a reflection of Kant’s moral or legal philosophy as, in fact, Kelsen saw himself as a champion of legal positivism, but rather

⁹ Carl Schmitt, *Die Verfassungslehre* (Duncker and Humblot, 1928) 9 quoted in William Scheuerman, ‘Carl Schmitt’s Critique of Liberal Constitutionalism’ (1996) 58 *Review of Politics* 299, 303.

¹⁰ Paulson, ‘The Neo-Kantian Dimension of Kelsen’s Pure Theory of Law’, above n 1, 312.

¹¹ Ibid 314.

¹² Ibid 314–15.

¹³ Stanley Paulson, ‘On the Puzzle Surrounding Hans Kelsen’s Basic Norm’ (2000) 13 *Ratio Juris* 279, 282.

¹⁴ Ibid 281–2.

Kant's ability to develop a 'middle-way' in his transcendental argument,¹⁵ to which this paper will now turn.

III KANT'S TRANSCENDENTAL ARGUMENT

Kant is known for retaining some of the terminology of the medieval transcendentals, while rejecting the general features of the classification,¹⁶ such as his disregard for God-given natural law in his formulaic development of the 'categorical imperative.'¹⁷ Instead, Kant uses 'transcendental' to identify the conditions of possible cognition.¹⁸ In *Critique of Pure Reason*, Kant writes that he is using the term to speak of cognition or knowledge that is concerned 'not so much with the objects of cognition as with how we cognise objects, insofar as this may be possible *a priori*.'¹⁹ Kant refers to the study of *a priori* knowledge as transcendental metaphysics.²⁰ Thus Kant's transcendental argument asks how such knowledge or cognition is possible.²¹ Similarly, Kelsen retains something of the terminology of fundamental norms, through his basic norm (*Grundnorm*), but rejects the import of the norms as they are

¹⁵ Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 320–3.

¹⁶ Paulson, 'On the Puzzle Surrounding Hans Kelsen's Basic Norm', above n 13, 283.

¹⁷ Zimmermann, above n 5, 36. For a discussion of Kant's formula of universal law and moral duty (ie the 'categorical imperative' or 'ought' proposition) see Patricia Kitcher, 'Kant's Argument for the Categorical Imperative' (2004) 38 *NOÛS* 555.

¹⁸ Paulson, 'On the Puzzle Surrounding Hans Kelsen's Basic Norm', above n 13, 283.

¹⁹ Immanuel Kant, *Critique of Pure Reason* (Norman Kemp Smith trans, Macmillan, 1929) [trans of: *Critic der Reinen Vernunft* (first published 1781)] B25 quoted in Paulson, above n 1, 323; Paulson, above n 13, 283.

²⁰ Anthony Kenny (ed), *The Oxford Illustrated History of Western Philosophy* (Oxford University Press, 1994) 168.

²¹ Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 323.

understood in the traditional sense, ie from a moral standpoint.²² Thus, Kelsen utilises Kant's metaphysical, or abstract, transcendental argument of legal cognition on which to base his theory of the fundamental, or basic norm. It is important to note here, as Paulson does,²³ that Kelsen makes it clear that his theory does not follow the progressive version of Kant's transcendental argument, but rather the regressive or neo-Kantian version. The following is an explanation of this premise.

IV NEO-KANTIAN OR REGRESSIVE DIMENSIONS OF KELSEN'S THEORY

In *Pure Theory of Law* Kelsen clearly dissociates his theory with a progressive version of Kant's transcendental argument by stating that '... the Pure Theory is well aware that one cannot prove the existence of the law as one proves the existence of natural material facts and the natural laws governing them ...'²⁴ Instead, Kelsen relies on the neo-Kantian or regressive version which takes, as its starting point, the assumption that one *already has* the knowledge or cognition of legal propositions.²⁵ In his later works, Kelsen explains this concept by stating that

[o]ne can distinguish between lawful and unlawful command acts
and objectively interpret interpersonal relations as legal relations,

²² Ibid.

²³ See *ibid*; Paulson, 'On the Puzzle Surrounding Hans Kelsen's Basic Norm', above n 13, 283, 287.

²⁴ Hans Kelsen, *Pure Theory of Law* (California University Press, 1967) 16 [trans of: *Reine Rechtslehre* (first published 1934)] quoted in Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 328; Paulson, 'On the Puzzle Surrounding Hans Kelsen's Basic Norm', above n 13, 283.

²⁵ Paulson, 'On the Puzzle Surrounding Hans Kelsen's Basic Norm', above n 13, 284.

specifically, as legal duties, rights, and powers, *only if* one presupposes the basic norm ...²⁶

As an illustration of this point, Paulson outlines Kelsen's regressive version of the transcendental argument in three phases; starting with a person's cognition of legal norms (which is given), then ensuring that the cognition of legal norms is possible only if the category of normative imputation is presupposed (ie the transcendental premise) and thus concluding, therefore, that the category of normative imputation is presupposed (ie the transcendental conclusion).²⁷ Kelsen compares the category of imputation with causation, stating that the '...laws of nature link a certain material fact as cause with another as effect [ie causation], so [do] positive laws link legal condition with legal consequence [ie imputation] ...'²⁸ Thus, Kelsen interprets Kant's transcendental argument in the same way as the neo-Kantians, that is in a backward or regressive sense – from a theory that is already cognised (given) to the presupposed category or principle.²⁹

V KELSEN'S BASIC NORM AND THE NEO-KANTIAN OR REGRESSIVE TRANSCENDENTAL ARGUMENT

According to Scheuerman, 'Kelsen's theory represented the most important mid-twentieth-century effort to construct an identifiably neo-

²⁶ Hans Kelsen, 'On the Basis of Legal Validity' (1981) 26 *American Journal of Jurisprudence* 178 quoted in Paulson, above n 1, 328; Paulson, above n 13, 287.

²⁷ Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 326; Paulson, 'On the Puzzle Surrounding Hans Kelsen's Basic Norm', above n 13, 288.

²⁸ Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley Paulson trans, Clarendon Press, 1992) s11b [trans of: *Reine Rechtslehre* (first published 1934)] quoted in Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 326.

²⁹ Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 330.

Kantian legal theory.’³⁰ Kelsen’s characteristically neo-Kantian delineation of *Sein* (is) from *Sollen* (ought) formed the basis of his middle-way approach (discussed above) whilst, at the same time, distinguished his system of norms from any discussions of morality, ethics and questions of substantive justice.³¹ This distinction between ‘is’ and ‘ought’ helped establish, inter alia, the validity of Kelsen’s legal norms.³² As has been addressed above, Kelsen’s system of norms formed a hierarchical structure whereby the validity of the basic norm is simply *assumed*, which is unsatisfactory as it does not answer the question as to *why* the norm is valid. Kelsen, himself, does not provide any clarification within his work, but could argue that Kant’s universal ‘categorical imperative’ to obey authority is justification enough of the validity of the basic norm.³³ Paulson states that to understand the validity of Kelsen’s basic norm, the neo-Kantian or regressive version of Kant’s transcendental argument must be implicit in the basic norm.³⁴ Hence, where Kelsen introduces his notion of normative imputation as his fundamental category, he implicitly introduces a transcendental argument to demonstrate this fundamental category as a presupposition.³⁵ Kelsen describes the basic norm as a ‘transcendental-logical presupposition’

³⁰ William Scheuerman, ‘Realism and the Kantian Tradition: A Revisionist Account’ (2012) 26 *Industrial Relations* 453, 458.

³¹ Ibid.

³² Paulson, ‘The Neo-Kantian Dimension of Kelsen’s Pure Theory of Law’, above n 1, 324.

³³ Zimmermann, above n 5, 74. See Alida Wilson, ‘The Imperative Fallacy in Kelsen’s Theory’ (1981) 44 *Modern Law Review* 270 for a discussion on the irreconcilability of the origin and validity of Kelsen’s system of norms.

³⁴ Paulson, ‘The Neo-Kantian Dimension of Kelsen’s Pure Theory of Law’, above n 1, 325.

³⁵ Ibid 325–6.

which enables the scientific study of the objective validity of his legal system of norms.³⁶

Therefore, in general, the issuance of legal norms, compliance with them, and their application of sanctions for non-compliance is possible only if the fundamental legal category of imputation is presupposed.³⁷ Paulson holds that no matter how Kelsen's neo-Kantian argument on behalf of the fundamental legal category is formulated or constructed, it still remains problematic.³⁸ The main problem being that the second premise of the three-phase argument outlined above claims too much in that the only way to support a normativist legal theory were by way of the category of imputation.³⁹ Kantians would argue though that ruling out all possible alternatives to Kelsen's category of normative imputation is tantamount to the *progressive* version of the transcendental argument; an argument which Kelsen did not have in mind when developing his theory.⁴⁰ Therein lies the problem because it appears that, as Kelsen had no intention of using the progressive version, he is using the regressive version independently of the progressive version which robs it of its transcendental force.⁴¹ Where the transcendental element is lost, the regressive version thus reverts to a scheme of analysis or, more simply, as a *legal point of view*.⁴² These problems aside, Paulson still maintains that

³⁶ Kalyvas, above n 8, 575.

³⁷ Stanley Paulson, 'Hans Kelsen's Earliest Legal Theory: Critical Constructivism' (1996) 59 *Modern Law Review* 797, 811.

³⁸ Ibid 811–12. See Stanley Paulson, 'Arriving at a Defensible Periodization of Hans Kelsen's Legal Theory' (1999) 19 *Oxford Journal of Legal Studies* 351 for an account of the period between 1960–2 where Kelsen identified the problems associated with his theory and abandoned neo-Kantianism precepts in his transcendental approach.

³⁹ Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 331.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid 332.

Kelsen's neo-Kantian foundation of his legal theory is work that counts as one of the most provocative efforts of our time in coming to terms with the perennial problems of legal philosophy.⁴³

VI CONCLUSION

Kelsen based his pure theory of law, not on sociological considerations, but on the strict science of law itself. His pure theory reflects Kant's transcendental argument on legal cognition without adopting Kant's moral or legal philosophy. In applying the transcendental argument, Kelsen adopts a neo-Kantian or regressive version of Kant's theory which assumes that one already has knowledge or cognition of legal propositions. This assumption forms the basis of the validity of Kelsen's system of norms, supported by the presupposition of the category of normative imputation, ie the link between legal condition and legal consequence. As his critics point out, Kelsen does not provide clarification as to why these norms are valid, but relies instead on his 'ought' proposition (acting as a categorical imperative to obey authority) to justify the validity of the basic or ultimate norm. Although Kelsen's theory is viewed by some as problematic, it is still considered among many as important work in the field of legal philosophy.

⁴³ Paulson, 'Hans Kelsen's Earliest Legal Theory: Critical Constructivism', above n 37, 812.

BOOK REVIEWS

BOOK REVIEW: AUGUSTO ZIMMERMANN – WESTERN LEGAL THEORY: HISTORY, CONCEPTS AND PERSPECTIVES

JAMES ILLICH^{*}

Jurisprudence is a challenging area of study. It requires one to reflect on complex legal issues that have troubled jurists, philosophers, sociologists, economists, theologians, legislators and the broader community for millennia. In *Western Legal Theory: History, Concepts and Perspectives*, Dr Augusto Zimmermann provides an accessible ‘interdisciplinary approach to legal analysis’ so as to lead to ‘the type of reflective critical self-awareness that is so fundamental to anyone who is or wishes to become a successful member of the legal community’.¹

The approach Zimmermann takes is to explore and critique the development of Western jurisprudence from the Ancient Greeks to the postmodern legal theorists. This engaging journey commences with a discussion of natural law theory. It is shown that throughout the course of history, scholars such as Aristotle, Aquinas, de Bracton, Coke and Locke have justified resistance to tyrannical rule on the ground of invariable laws and moral standards that no person, even a monarch, may violate. In this analysis, Zimmermann states that natural law theory has heavily influenced the rule of law and that the advancement of natural law ‘owes much to the advent of Christianity’. Although discussing how

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¹ Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) xv.

Grotius made the secularisation of natural law possible, and how Kant later disregarded ‘God-given natural law’, Zimmermann criticises the inevitable subjectivity of Kantianism. He contends that ‘[t]o a certain degree the concept of natural law must of necessity be transcendental in its provenance to make proper sense’.²

Legal positivism is considered in chapter two. Although highlighting ‘the positivist premise that law can be separated from morality’, Zimmermann explains that not all legal positivists are ‘unconcerned about matters of justice and morality’.³ By way of example, he describes how Bentham, although deriding natural law and calling it ‘nonsense above stilts’, supported progressive causes such as the abolishment of slavery. However, Zimmermann makes it clear that legal positivist support for a Hobbesian ‘Leviathan’, or Austinian sovereign possessing absolute authority, poses grave risks to liberty. It is apparent that Zimmermann is deeply sceptical of the legal positivist notion that ‘it is the validity of the exercise of a legal power, not the legality of the law in which the exercise manifests itself, which is all important’.⁴

Chapter three addresses what Zimmermann regards as a reluctance of many legal scholars ‘to acknowledge or at least address extra-legal aspects that ... appear to undermine the success or failure of the realisation of the rule of law’.⁵ His contention that the ‘practical achievement [of the rule of law] appears to require a proper culture of legality’ is highly persuasive.⁶ Zimmermann warns that ‘the realisation of rule of law seems to depend upon a socio-politico-cultural milieu’

² Ibid 38.

³ Ibid 54.

⁴ Ibid 82.

⁵ Ibid 83.

⁶ Ibid 97, citing Jason Mazzone, ‘The Creation of a Constitutional Culture’ (2005) 40 *Tulsa Law Review* 671, 686.

rather than any grand legalistic institutional design. This chapter is important reading for any lawyer and indeed any person who values democracy. From a purely stylistic perspective, however, it may have been better suited as the first or last chapter of the book.

Evolutionary legal theory and German legal historicism are analysed in chapters four and five. Zimmermann explains how, '[u]nder the direct influence of Darwinism, a profound transformation of legal studies took place in the 19th century'.⁷ He cites the rejection of universal norms by leading proponents of evolutionary jurisprudence including Maine, Holmes and Hayek. Similarly, he describes how the influential German legal historicists Savigny and Hegel dismissed the idea of inalienable rights and 'asserted that law is invariably historical and so destined to be replaced by future laws'.⁸ To Savigny and Hegel, he explains, law and morality were to be found in the popular consciousness of the people and this manifested itself in the all-powerful *Volk* or state. Zimmermann then argues that this evolutionary, relativistic approach to law became a significant factor in the rise not only of legal positivism but also totalitarianism and moral relativism. He argues that it laid the foundation for National Socialist jurisprudence and Marxist legal theory. While evolutionary theory may be criticised, Zimmermann's analysis is perhaps overly critical. As Suri Ratnapala contends, '[b]y understanding the process of evolution and the limitations which it places upon us, we may be able to promote more successfully the survival of the things that matter to us, including our moral values'.⁹

⁷ Zimmermann, above n 1, 103.

⁸ Ibid 133.

⁹ Suri Ratnapala, 'Law as a Knowledge Process' in Suri Ratnapala and Gabriel Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011) 204.

In chapter six, Zimmermann provides a poignant reminder of the loss of ‘life, liberty and dignity’ in Nazi Germany.¹⁰ In doing so, he implicitly evokes the famous aphorism of Santayana that ‘[t]hose who cannot remember the past are condemned to repeat it’.¹¹ Zimmermann begins by analysing Nazism’s connection with socialism, Darwinism and religion. He then discusses the influence of German legal historicism and legal positivism on National Socialist jurisprudence. Zimmermann argues that the Savignian *Volk* evolved into ‘the totalitarian body of the Nazi state’ and the legal positivism of German jurists like Kelsen ‘promoted the expulsion of ethics and metaphysics from legal analysis, which ultimately offer[ed] no theoretical resource for the legal profession to resist the intrinsic arbitrariness of the Nazi regime’.¹² Notwithstanding these powerful impediments, Zimmermann is critical of Germany’s powerful juridical elite for failing ‘to resist the brutality and oppression of the Nazi regime’, and indeed providing the ‘philosophical cloak’ for its murderous actions.

Chapter seven on Marxist legal theory takes a similar approach to the preceding chapter. It commences with a discussion of Marxism’s relationship with religion and Darwinism. The influence of both Hegel and Savigny in the development of Marx’s ‘dialectical materialism’ is then considered. Using the Soviet Union’s experiment with communism as his example, Zimmermann contends that ‘the Marxist dream of classless (and lawless) society has led only to gross inequality and class-oriented genocide’.¹³ And yet, as he later reveals, Marxist ideology

¹⁰ Zimmermann, above n 1, 135.

¹¹ George Santayana, *The Life of Reason* (Dover Publications, 1905).

¹² Zimmermann, above n 1, 160.

¹³ Ibid 215.

remains observable in the writings of contemporary legal theorists such as feminist jurist Catharine MacKinnon.

In chapter eight, Zimmermann analyses the highly influential American Legal Realism movement. Oliver Wendell Holmes Jr, its leading proponent, wrote that law is nothing more than ‘prophecies of what the courts will do’.¹⁴ Zimmermann explains how, in Holmes’ opinion, legal standards are not objective but rather ‘the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which Judges share’.¹⁵ On this point, the Hon Michael Kirby AC CMG would certainly concur with Holmes. Although Zimmermann acknowledges the differing views of writers such as Brian Leiter, Zimmermann agrees with Raymond Wacks’ contention that Legal Realism was an important precursor to Critical Legal Studies and Postmodern jurisprudence.

Although the Critical Legal Studies (CLS) movement only existed for a brief period at the end of the 20th century, Zimmermann’s analysis in chapter nine vividly demonstrates its lasting influence. He explains that although CLS thinkers agreed with the Realists that law is indeterminate, they took a much more radical approach. CLS scholars argued that law is politics and the rule of law is a ‘myth that perpetuates the power of the economic elite’. Zimmermann argues that the CLS indeterminacy thesis has ‘been integrated into more moderate legal theories’ while its more radical use of Marxist ideology still exists in radical feminist jurisprudence.

¹⁴ Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457, 461.

¹⁵ Oliver Wendell Holmes, *The Common Law*, Mark DeWolfe Howe (ed) (1881) 1, quoted in Zimmermann, above n 1, 220.

Feminist jurisprudence is analysed in chapter 10 with Zimmermann distinguishing between ‘classical’, first-wave feminism and ‘radical’, second-wave feminism. He explains that in contrast to the classical feminists who fought for equal rights, radical feminists ‘combined traditional Marxist methods with a postmodern interpretation of society’ and regarded values such as ‘objectivity and neutrality of the law as the basis of inequality’.¹⁶ Zimmermann critiques influential feminists such as Betty Friedan and MacKinnon, before contending that the ‘gender struggle’ ideology of the radical feminists ‘should be treated with a great deal of suspicion’. He submits that ‘the holders of such views can easily find themselves in company with the likes of sexists, racial supremacists and religious bigots’.¹⁷

Chapter 11 discusses postmodern jurisprudence and what Zimmermann calls its ‘theoretical challenges to the objectivity of truth and knowledge in Western societies’.¹⁸ He contends that ‘mainstream postmodern theory emerged from a certain Marxist tradition of anti-Western philosophy’ with ‘conditional and socially determined’ individual rights.¹⁹ He then discusses Derrida’s view ‘that there is nothing outside of context’ and Estrich’s opinion that law is ultimately about politics. As a consequence of its rejection of objective values, Zimmermann contends that postmodern jurisprudence leads to law becoming subjective and merely representing the assertion of power by one group over another.

In chapter 12, Zimmermann discusses ‘Economic Analysis of Law’ or ‘Law and Economics’ (L&E) as it is also known. He illustrates how the utilitarian-inspired L&E scholars ‘apply microeconomic theory to the

¹⁶ Zimmermann, above n 1, 233.

¹⁷ Ibid 253.

¹⁸ Ibid 254.

¹⁹ Ibid 256.

analysis of legal rules and institutions'. Whilst he agrees that wealth maximisation alone may not be the sole basis for the creation of law, still he agrees with the premise that it may be the most direct route to a variety of moral ends including liberty.

In the final chapter, Zimmermann analyses libertarian jurisprudence and particularly the work of Friedrich A Hayek. Whilst discussing Hayek's support for the rule of law as a protector of liberty, he explains Hayek's preference for spontaneous order over centralised planning and judge-made law over legislation. However, Zimmermann cites criticism of Hayek's theory from those who fear that it's 'emphasis on the evolutionary nature of morals and law compromises the case for liberty'.

On the whole, I thoroughly enjoyed reading this book. Zimmermann is a highly engaging and persuasive writer who connects the many different theories of law in an almost seamless manner. He has most definitely achieved his objective of providing an accessible, interdisciplinary approach to legal analysis that encourages critical thought.