



# the sydney law review

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# *Address*

## Challenging Expert Rule: The Politics of Global Governance<sup>†</sup>

DAVID KENNEDY\*

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### *Abstract*

In my Julius Stone Memorial Address, I explored the hypothesis that everyday decisions made by the professionals who manage norms and institutions which seem to lie in the background of global politics may be more important to global wealth and poverty than what we customarily think of as the big political and economic decisions made by parliaments and presidents or brought about by war and peace. If you have the energy to protest, criticise and change the distribution of wealth and status in our newly globalised world, it can be hard to locate points at which allocative decisions can be politically contested. The urgent political disputes that become international front-page news can seem peripheral to the decisions responsible for the distribution of things in the world. Although meetings of the International Monetary Fund (IMF) or the G-7 (Group of Seven) provide useful backdrops for street protest and media attention, it is not clear that the decisions being taken inside those meeting rooms are either meaningfully responsible for global distributions of wealth and power or contestable in conventional political terms. Although it is easy to think of international affairs as a rolling sea of politics over which we have managed to throw but a thin net of legal rules, in truth the situation today is more the reverse. There is law at every turn — and only the most marginal opportunities for engaged political contestation. The footprint of national rules and national adjudication extends far beyond their nominal territorial jurisdiction. Private ordering, standards bodies, financial institutions and payment systems, tax systems, trade regimes — all are managed by legal expertise. Indeed, to say the world is covered in law is also to say we are increasingly governed by experts — legal experts. Even the story of the war in Iraq is overwhelmingly one of law, of military force mobilised, coordinated and legitimated by law. The difficulty is to understand more adequately what these experts do, the nature and limits of their vocabulary, and the possibilities for translating their work into politically contestable terms — or promoting the experience of responsible human freedom among the experts who govern our world.

<sup>†</sup> The Julius Stone Institute of Jurisprudence, University of Sydney. The Julius Stone Memorial Address 2004, Thursday, 17 June 2004.

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## 1. *Introduction*

Good afternoon. It is an honour to deliver a lecture that has had such a distinguished history and audience. Julius Stone was a lion of international jurisprudence, his influence as a theorist and innovator felt by generations of students and scholars. Reading Stone's many contributions to the *sociological* interpretation of international law has been an inspiration for the research agenda I would like to sketch this afternoon.

My plan is to explore the significance of legal expertise in global governance. I begin with a simple 'Julius Stonian' observation: the international world is governed. The domain outside and between nation states is neither an anarchic political space beyond the reach of law, nor a domain of market freedom immune from regulation. Our international world is the product and preoccupation of an intense and ongoing project of regulation and management.

Although it is easy to think of international affairs as a rolling sea of politics over which we have managed to throw but a thin net of legal rules, in truth the situation today is more the reverse. There is law at every turn — and only the most marginal opportunities for engaged political contestation.

Seen sociologically, the official — and unofficial — footprint of national rules and national courts exceeds their nominal territorial jurisdiction. Tax systems, national public and private laws, financial institutions and payment systems, the world of private ordering — through contracts and corporate forms, standards bodies — all affect the behaviour of public and private actors beyond their nominal jurisdictional reach.

And that's just the beginning of international regulation. Of course, there is public international law, the United Nations, the world's trading regimes — it's a long list.

Seen sociologically, the international legal order is far more diverse and extensive than we public international lawyers normally imagine. The United Nations Charter<sup>1</sup> does not provide its constitution — still less is the Security Council its legislator. The functionalist neologisms of the last century — 'transnational law', 'international economic law' — reached to describe it, but each stopped short with a catalogue of favourite regulatory initiatives.

Indeed, to say the world is covered in law is also to say we are increasingly governed by experts. Not by the American empire, not by 'global capital' — but by experts. These experts — quite often lawyers — make decisions that affect the wealth, status and power of other people. They do so by interpreting and enforcing the background norms and institutions which structure activity in the market, in the state, in the family. Their routine work establishes and refurbishes this complex transboundary legal and institutional milieu. Across the globe, experts communicate with one another in common vernaculars, their significance in every national system enhanced at the expense of conventional politicians by the processes we so often refer to as 'globalisation'.

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1 United Nations, *Charter of the United Nations*, 26 June 1945 (hereafter *UN Charter*).

Yet how, precisely, do experts rule? The nature, limits and contestability of expertise remain obscure. To explore the significance of experts and expertise for global governance, we need to develop three ideas.

First, the proposition that background norms and institutions *are* more important in global governance than we have thought. Second, the idea that the *vocabularies, expertise and sensibility* of the professionals who manage these background norms and institutions are central elements in global governance. Third, the proposition that expert work might be reinterpreted and contested in political terms, despite the ubiquity of the conviction among international legal experts that their expert work is not political.

## 2. *Background Norms*

When we think about ‘international politics’, we focus on the institutions we associate with public deliberation. In the United States, our television news rarely fails to let us know what the President was up to on a given day. My first proposition is a simple and familiar one — when we treat the *President’s* world as *the political world*, we miss a great deal.

But what, precisely, do we miss? What do we mean by ‘background norms and institutions’? We are all familiar with the suspicion that something that purported to be the result of foreground deliberation was actually the product of less visible background forces. We are accustomed to looking *behind* what the judge said, or what the legislation says, to understand the human intentions and social forces that shaped it. The sociological tradition is rooted in precisely this idea.

Any so-called ‘realism’ that attends only to the overt acts of national sovereigns is no longer realistic. In our world, power lies in the capillaries of social and economic life. Myriad networks of citizens, commercial interests, civil organisations and government officials are more significant than interstate diplomacy. Statesmen and stateswomen act against a background fabric of expectations — the legitimating or de-legitimizing gaze of world public opinion — and they act in the shadow of all manner of public and private norms.

As American trade law scholar John Jackson put it:

“Interdependence” may be overused, but it accurately describes our world today. Economic forces flow with great rapidity from one country to the next. Despite all the talk about sovereignty and independence, these concepts can mislead when applied to today’s world economy. How “sovereign” is a country with an economy so dependent on trade with other countries that its government cannot readily affect the real domestic interest rate, implement its preferred tax policy, or establish an effective program of incentives for business or talented individuals? Many governments face such constraints today including, increasingly and inevitably, the government of the United States.<sup>2</sup>

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2 John Jackson, William Davey & Alan Sykes (eds), *Legal Problems of International Economic Relations: Cases, Materials and Text* (4<sup>th</sup> ed, 2002) at 1.

Indeed, the international regime today is a dis-aggregated network of institutions, some public, some private, which are only loosely coordinated by national governments. This general argument blends two quite different observations. First, the idea that *other people* than those who seem to be in charge are making the real decisions, and second, the idea that *no one* is making the decisions — they are driven by facts on the ground, by natural forces, by unconscious motives or by invisible hands.

Although these two ideas often travel hand in hand, they are strikingly different. To distinguish them from one another, I *term* the operation of impersonal forces ‘context’. I use the word ‘background’ to refer to the work of *other people* than those who seem responsible for visible foreground decisions.<sup>3</sup>

### I: BACKGROUND NORMS & INSTITUTIONS

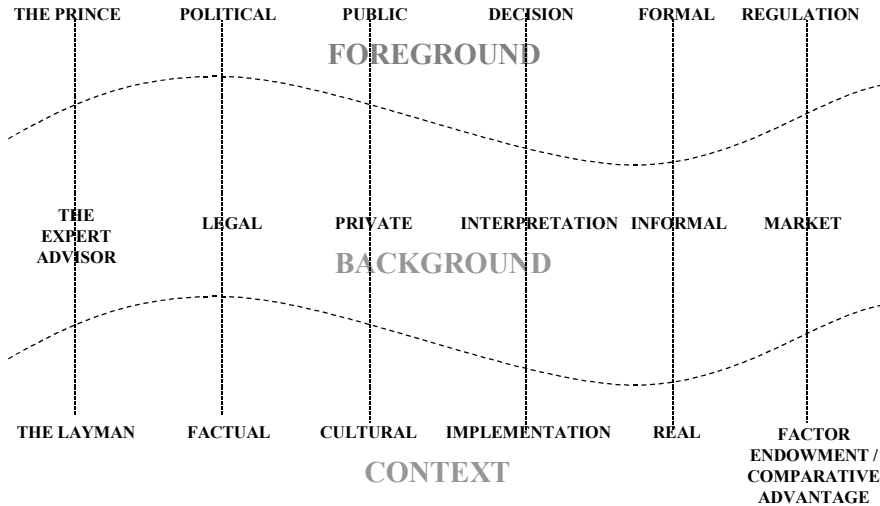


Figure 1.

We often feel foreground politics are merely an expression of deeper, impersonal forces — what I call ‘context’ — the means of production, say, or the interests of the ruling class. And context often seems to limit what we can do — the law in the books is never quite realised in action. Context can also provide the prod of inevitability — the hand of history or the market. We have context in mind whenever we extract an ought from an is.

<sup>3</sup> See Figure 1.

My own project focuses on background rather than context — and it is here that I begin to depart from the sociological tradition. Focus on context — on the impersonal forces — blunts the responsibility of actors in the foreground, while affirming their centrality. It creates a misconception that to the extent someone *can* do anything about anything, it will be the normal players in the political system. It's them, or it's necessity. Although sociological jurisprudence promises to 'contextualise' the decisions of sovereigns or legislators or judges, it also legitimates their authority — they are all we have and they did what was necessary, or all they could do, under the circumstances.

I propose that we focus rather on the background, on the decisions of other people than sovereigns and legislators. Indeed, it is striking how often we downplay the work of experts, attributing everything to foreground and context. And yet it is often experts who decide what is foreground and what is context — by distinguishing public regulation from private ordering, or the dynamic world of the market from the context of factor endowments and preferences actors bring to the table.

It is the expert who stands between the foreground *prince* and the lay *context*, advising and informing the prince, implementing and interpreting his decisions for lay people. It is the scientist, the pollster, who interprets *facts* for the *politician*, and it is the lawyer, the administrator, who translates political decisions back into facts on the ground. Both the assertion that something *is* the context, and the interpretation of its *consequences* are the acts of experts. Is the new global context one of fragmentation or integration? Does the new situation require multilateralism or unilateralism?

To bring the work of experts into focus, we will need to suspend the tendency to see everything that is not foreground as necessity. Doing so will be difficult: try to list, in your mind, the norms and institutions which affect, say, wage rates in the developing world. There are foreground political decisions — but not that many. Much seems like context — demand, supply, transport costs, competition. As an exercise, however, try to state these elements of context as the work — the decisions — of actual people.

It turns out that the distribution of resources, authority and contentment between a hypothetical worker and employer in a third world industrial setting is the product of an enormous web of human decisions. Suppose Mahrk, an Australian, pays Phred, an Indonesian, five dollars a day for his work in Jakarta.

What does that mean for Phred — what can he buy with it, how does he value it? What are his other costs and obligations? How did he compare this job to others?

Who influenced his thinking on these matters — his family, his church, the movies, his girlfriend, his nation, his government, his union? What decisions went into the prices of products he might want? What does five dollars mean to Mahrk — what else could he do with it? What *does* he want? Who influenced his thinking about *this*?

Let us suppose Phred and Mahrk came to the figure ‘five dollars’ by bargaining — in the shadow of what laws, institutions, social expectations did they do so? What strengthened or weakened their respective bargaining power?<sup>4</sup>

Perhaps Phred’s ‘skills’ seemed decisive — but who decided that he would end up having precisely these skills? How is their little bargain affected by the relative strength of larger social or political actors in other bargains? If the left just won the election, will that make Phred bolder? If his ethnic group, his religion, comes to power, what effect on wages — and who decided *what* to bring *that* about? It soon becomes clear that Phred’s wage may be affected by public and private administrative or regulatory decisions across the globe — or by the wings of an expert Chinese butterfly.

Indeed, it turns out there is very little ‘context’ which might not also be viewed as background — as the result of a decision taken by an expert — if we thought about it in that way. The power exercised in thousands of private decisions, business decisions, cultural choices and personal decisions about family, work and play also governs who will produce what, consume what, be mobile or stay put, have what status and what identity in the international world.

Sometimes these are small scale decisions — perhaps decisions within families distributing resources among members in terms developed by priests, therapists, the advice givers of the media or the sages within each family network, decisions which in turn affect the global division of labour, patterns of trade or relative wage rates. Sometimes these are the large-scale decisions of business people and investors allocating and conditioning the use of vast resources, made in the vocabularies of economists, accountants and policy analysts seeking to maximise return or corner markets. Far more than we normally think, these decisions are made, defended and criticised in the vocabularies and practices of expertise.

To understand the role of background decisions, we will need the tools of institutional economics, with its focus on local cultures, transaction costs, and path dependencies. To translate these forces into the decisions of real people, we will need the tools of constructivist political science, sociology and anthropology. To understand the people we encounter making decisions, we will need the varied tools of psychology, literature, or management science. The goal would be to develop a compelling account of the actual global governance regime.

#### ***A. Well, How Might this be Significant?***

First, of course, ignoring the background work of experts may distort our sense for what is actually going on in the world. We might miss the significance of the informal and customary world. Or the opportunity to contest decisions taken in the middle space between foreground and context.

A focus on experts may alter our overall image of the international legal regime. Take an issue like wage rates or safety standards. It might make sense to

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<sup>4</sup> Robert Mnookin & Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88 *Yale LR* 950.

speak of industry specific regimes — of ‘automotive law’ or ‘airline law’ or ‘pharmaceutical law’ — rather than ‘international’ or ‘national’ law.

Automotive worker safety may result from product and process standards — think of ISO 9000<sup>5</sup> — forced through the supply chain by the big manufacturers and consolidated by expert standards bodies. Airline safety might be more the function of the transnational effect of one nation’s administrative agency — the US Federal Aviation Administration — picked up by an intergovernmental agency or by government regulators elsewhere. In another industry, the decisions of local — or American — judges or juries adjudicating product safety suits might be more significant.

Moreover, industrial regimes might influence one another — the pharmaceutical regime might affect the entertainment regime by developing ideas about intellectual property that spread from drugs to DVDs. Taking the focus off the foreground might make the actual decision making procedure more visible. Some agencies may be captured, others not. Viewed clearly, the transnational regime may not be ad hoc at all, but reflect the decisions of quite well organised and stable constituencies.

Focusing on the background may also expand our sense of what is politically possible. We need not treat the impact of private law norms and economic institutions as natural consequences of market forces — or as politically contestable only through the foreground institutions of public regulation. They are also the contestable decisions of experts.

The best example I know of progressive efforts blown off course by disregard for background norms comes from the field of international labour standards. When we think about contesting Phred’s wage politically, we focus on the foreground of national, or sometimes international, public regulation. Where national regulatory capacity seems threatened by the opening of markets to foreign products, services, capital or labour, humanitarians have sought either to restrain these global flows, or to develop international regulatory replacements for national social welfare arrangements.

For years, those wishing to influence global labour conditions have focused attention on the World Trade Organization (WTO) and the International Labor Organization. If only labour standards — a social charter — could be adopted for the entire globe. At the same time, we know the weaknesses of global legislation — vague compromise standards, unenforced agreements, standards which legitimate more than they restrain. National actors have not been willing to adopt rules which would threaten their national economic strategies. But what else can we do?

It turns out the wage rate in Mexico or Bangladesh is meanwhile being set by the decisions of thousands of entrepreneurs, workers and investors, each made in the shadow of rules — formal and informal, public and private, national and

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5 ISO 9000 is an international reference for quality management requirements in business to business dealings, devised by the International Organization for Standardization.

international — about the uses of property, the conditions for labour organisation, the transport and trade of industrial inputs and outputs, patterns of credit and payment, immigration and so forth.

Social reformers have virtually ignored the world of background norms — private law, corporate standards, transnational administrative arrangements, rules of corporate governance and liability.

Take the WTO, for example. We have long known that in some sense, as the saying goes, ‘fair trade is free trade’s destiny’. As tariffs came down, industrial nations began to challenge all sorts of diverse pieces of one another’s regulatory environment as ‘non-tariff barriers to trade’. In doing so, they were contesting elements of one another’s background regime. I remember the Reagan administration’s ‘Structural Impediments Initiative’ accusing Japan of blocking access to its markets through everything from informal distribution practices to inadequate English language instruction in their schools. Once begun, there seems no natural limit to this practice — as the European Union’s legal order has amply demonstrated.

It is an old legal realist insight that the reciprocal nature of a comparison between two legal rules — or legal regimes — makes it impossible to say which *causes* the harm or which is ‘discriminatory’. Is it the railroad’s right of way that damages the farmer’s wheat or the farmer’s property right which imposes cost on rail transport?

In the trade context, we might ask whether Mexico’s low minimum wage, or failure to implement its own minimum wage scheme, is an unfair ‘subsidy’. Or whether Mexican or Chinese manufacturers who benefit from non-enforcement of local law are ‘dumping’ when they export to American — or Australian — markets.

But we might equally well ask whether it is a ‘non-tariff barrier’, an unfair or unreasonable extraterritorial reach of US law, for the United States to demand higher labour standards for production of goods to be imported to its market.

To decide, conventional legal analysis relies on an assumption about which legal scheme is ‘normal’, and which not. If farmers *normally* grow wheat, a new railroad may appear to impose the cost — if the difference between American and Mexican wages is ‘normal’, American efforts to raise Mexican standards will seem an abnormal non-tariff barrier. Deciding what is ‘normal’ and what is not is rulership, an unavoidable political decision about allocation of costs.

The WTO provides a mechanism for settling disputes between nations each asserting that *their* background rule is normal and that their trading partner is imposing unfair costs or offering unfair advantages. As it processes routine trade disputes, the WTO system generates a string of decisions about globally tolerated levels of differentiation among labour and other regulatory standards — about the range of ‘normal’ background regulation.

Meanwhile, humanitarians struggle for adoption of a ‘social charter’ within the WTO, for new international soft law social norms, for implementation of

international economic and social rights. If only the international legal order were powerful enough, we bemoan, to take on the question of labour rights. But the international legal order *is doing that every day* as it provides an interface between national regulatory schemes. The difficulty is finding opportunities for politically contesting the results it generates, results which permit a wide range of low wage industrial strategies.

The political Right has had no trouble focusing on the world of background norms: developing a complex network of financial and payment systems to facilitate the free movement of capital, extraterritorial uses of national regulation to combat terrorism or money laundering, and more. Unfortunately, the humanitarian vocabulary has impeded similar work on the left by focusing our attention on the foreground of public regulation.

Something similar goes on in thinking about war and peace. We focus on summit meetings and late night telephone calls between heads of state, or speeches in the Security Council. Doing so, we underestimate the discretion — and the significance — of people in the background of these public deliberations.

We underestimate the power of *expert consensus* — consensus that Iraq had weapons of mass destruction, that American credibility was on the line, that something must be done, that dominoes would surely fall. We now know that although 9/11 opened a window of plausibility for the invasion of Iraq, the campaign had already long been underway — and not simply because the leadership, the Bush family, say, was ‘obsessed’ with Iraq, but also, and more importantly, because an entire administrative machine had been set in motion, with its own timetables and credibility requirements.

The invasion incubated there, in the background, built momentum through hundreds of small decisions, budgetary, administrative, political, rhetorical, public and private. In some sense, of course, Bush could have called the whole thing off, and without his enthusiasm all that momentum may never have built.

The interesting point, however, is that by the time we focused on ‘the President deciding’, it is not at all clear how much room to manoeuvre he still had. ‘The United States’ had made a commitment to overthrow Saddam Hussein, a commitment whose political and bureaucratic momentum could not easily have been stopped without incurring all manner of further costs, long before the decision came to the President — let alone the Security Council — for explicit decision.

Moreover, even when broad ideological battles have not been crisply won in public fora, they can nevertheless affect the status of forces in all manner of interstitial bargains by affecting the perceived strength, legitimacy or plausibility of actors, programs or positions.

It has become routine to say that international law had little effect on the Iraq war. Arguments by a few international lawyers that the war was illegal failed to stop the Bush administration and its allies, who were determined to go ahead regardless, and who had, after all, their own international lawyers to rely upon.

But this lets international law off the hook too easily. The laws of force are not the only rules that affect the legitimacy, violence and incidence of war. The military conducts its campaigns in the shadow of endless background rules and institutions of public and private law — national and international. If we expand the aperture from the decision to invade — war looks ever more to be a product of law. The laws *in* war which legitimated targeting. The laws *of* war which provided the vocabulary for assessing its legitimacy. The laws of sovereignty which defined and limited Saddam's prerogatives, and which have structured the occupation. Not to mention commercial rules, financial rules, private law regimes, through which Iraq gamed the sanctions system — and through which the coalition built its response. The United Nations law of force makes these background rules seem matters of fact rather than points of choice.

Making war has become an extremely technical practice, involving the details of economic and social life, patterns of traffic and sewerage and investment. When we think about restraining war, it is easy to overlook the background rules and institutions for buying and selling weaponry, recruiting soldiers, managing armed forces, encouraging technological innovation, making the spoils of war profitable, channelling funds to and from belligerents or organising public support.

Global efforts to promote peace — through the laws of war, deterrence, arms control, collective security, or peacekeeping — have themselves become institutional and bureaucratic practices. As this happens, they sink into the background. We no longer notice that they have become vocabularies through which war is promoted, fought and legitimated, rather than restrained.

Occasionally, of course, we do get a glimpse of these background vocabularies, rules and conditions — as in trade struggles over 'normal' levels of background regulation. It is difficult to think about the ebb and flow of military violence in a place like the Congo without thinking about the norms and institutional practices responsible for trade in diamonds and other minerals. Just as it is difficult to think about a global health crisis like HIV/AIDS by focusing only on the United Nations, the World Bank or World Health Organization, while ignoring intellectual property law and big pharmaceutical companies.

Yet, when we want to *do* something, it is tempting to return to the centres of political action in the foreground of our consciousness, demanding resolutions, regulations and funds. We should expand our ability to act through the capillaries of private quality standards or investment guidelines, through consumer boycotts, property regulations and all the other norms and institutions which affect the use of force or the incidence of disease. We should expand our capacity to do so. Nevertheless, it remains all too easy, even comforting, to overlook opportunities to contest and reshape the background because we do not readily comprehend its power to distribute resources in society, nor do we have a clear view of how its terms might be contested.

**B. *Still, How Different is Decision Making in this Background World?***

Common sense tells us the difference is large. We associate the foreground world with clashing ideologies and social interests. Left-Centre-Right. Labour vs capital, south vs north, industry vs agriculture. We attribute *discretion* to foreground political actors who speak in these terms.

Our image of the background is different. Experts do not speak in the language of interests or ideologies — they speak professional vocabularies of best practices, empirical necessity, good sense, or consensus values. They do not have discretion — they are compelled by their expertise. For them to exercise discretion — ‘deciding in the exception’, to coin a phrase — is to overstep the proper bounds of background work.

The experts I have known are generally loathe to think of their work in political terms. They advise, they interpret, but they do not rule. Theirs are vocabularies of advice, implementation, technique, know-how — useful for limiting and channelling the power of *others*. More research is needed about the nature of expert decision-making and expert vocabularies. But we can already see some important limits of this commonsense attitude. For one thing, the difference between foreground and background is, as I have mentioned, itself a product of expert analysis and is extremely fluid.

People in the governing professions routinely use the foreground/background distinction to locate responsibility for decisions with which they agree or disagree. Experts sustain their self-image as ‘background’ by locating the ‘political’ elsewhere. They deny responsibility — their own or others’ — by claiming that what was *really* going on was happening at another level. The *real* decision was made ... yesterday, in the Council, by the President, by the Member States, or in implementation, by experts in the background. *Actually*, they might say, the agency was captured by its context. He did his best, but the bean counters just wouldn’t go for it.

As a result, we need to relativise our idea of ‘international governance’ more radically. Governance is what we contest as political but there is very little we are not *also* able to see as a ‘mere’ problem of technical management, and vice versa.

But whether making war or pursuing economic development, politicians now speak the language of background experts. The terms of professional expertise increasingly provide the frame for political debates and decisions. The media has become adept at educating its audience into the nuances of what had been technical disputes.

Indeed, there is very little in the foreground of political life which is not *also*, or even better, understood as the work of experts and the product of expertise.

Perhaps the most significant recent example was the ability of the strategic studies profession to transform their computer models of prisoners in reiterated dilemmas into massive defence funding — in Moscow no less than Washington.

The internal debates of technical experts have been transformed into positions which can be more readily assimilated to the familiar left-Centre-Right structures of public political discussion. Technical disputes are often framed in terms that

parallel positions in broader political debate, so that success or failure in one domain can have an impact on what it is possible to articulate convincingly in the other.

Indeed, public programs and regulatory initiatives do not spring whole from the political commitments of politicians any more than they are the product of disembodied entities we refer to as the 'legislature' or the 'executive'. They are imagined, designed, debated, defended and adopted by people, in the vocabularies of one or another policy profession.

In international affairs, state power is everywhere spoken and exercised in the vocabulary of international relations, political science, international law and military science. Wars and the machinery of war are ordered, purchased, launched, pursued in professional vocabularies, whether the computer modelled rationality of nuclear deterrence, the justificatory language of humanitarian intervention, self-defence and rights enforcement, or the gaming vernacular of dispute resolution and grand strategy. International economic life is organised in the vocabulary of professions committed to growth and development. Markets are structured to reflect professional notions of 'best practice', and defended in the professional language of efficiency. Likewise, when state power takes the form of public or private law, it is conceived and exercised in the vocabulary of law and lawyers.

In fact, although we have conventionally overlooked the work of the background, the reverse may be more accurate — the work of the background has colonised the foreground *and* the context. The foreground increasingly seems a mere *spectacle* — a performance to which we attribute agency, interest and ideology. At the same time, it is difficult to locate elements of *context* which are not constructed by people managing background norms and institutions. Indeed, the foreground and the context may well turn out to be effects of background practices.

The foreground sites and axes of international political contestation are also institutions driven, debates conducted, options framed and programs designed in the technical vocabularies of one or another group of experts. As a result, it is often difficult to distinguish the terms of 'political' contestation from the vocabularies we associate with the background tasks of advising, interpreting, implementing the decisions of those in the foreground.

Well, enough said about my first proposition — that background norms are more significant than we may think. The fluidity of the line between background and foreground suggests further lines of inquiry. First, it is crucial to articulate more clearly what it is that *technical experts and professionals* actually do. What is the nature of their expertise, their experience of discretion? How do they maintain their relations with the foreground and the context?

### 3. *What, Precisely, is Expertise?*

Although much has been written about the sociology of the professions, we know far less about the nature of expertise itself — about the forms of knowledge and practices of argument and persuasion used by experts managing background

norms and institutions. Still, understanding the terms of professional expertise turns out to be less complicated than it sounds, for the expert vocabularies of the governing professionals follow well trodden routines. Patterns of debate recur; characteristic professional styles — the uptight rule follower, the agonised exception-monger, the interdisciplinary enthusiast — are readily recognisable across the professions.

The key issue to be understood is the role of expertise in limiting expert *discretion*. Once we focus on experts, it is easy to *overestimate* their political freedom. As we come to think of the global HIV/AIDS crisis as a matter of drug prices and delivery systems, of intellectual property and health care finance, it is tempting to imagine that one enlightened industrialist could simply make the drugs available, one enlightened judge could carve out an exception to the rules of intellectual property, one enlightened bishop could remove the impediments to education about the causes and consequences of HIV infection.

Yet we also know these people in some very real sense cannot make these choices. They cannot respond to political programs any more than they can respond directly to pressure from patrons, funders, voters, or their own conscience. These people *are experts* who come upon their roles as investors, managers, patent holders or bishops precisely by routinising themselves into a professional vocabulary and practice which makes it difficult for them to experience human freedom and the direct responsibility which goes with it. The difficulty is to understand just how expertise limits expert freedom, and dulls the experience of responsibility.

For some years, I have been conducting research into the structure of legal professional vocabularies in various international fields — among public international lawyers, international trade specialists, refugee lawyers and humanitarians. Beyond understanding these fields of expert knowledge, my goal has been to contribute to a more general understanding of expert knowledge itself.

Expert knowledge is not only important when it channels the advice experts give the prince. Experts also influence the world when they *imagine* the prince as a prince, imagine the economy as an economy, or imagine the law as law, and when they convince us to imagine things the same way. Expertise can shape how problems are defined and narrow the range of solutions considered — along the lines of the old adage, to a man with a hammer, everything looks like a nail.

To trace these effects we need better *maps* of expertise. One might map expert knowledge in a variety of ways. Mapping the knowledge of experts is complex and technical work raising all sorts of methodological issues — who are the experts, what is their vocabulary, what is the relationship between *disputes* among experts, and agreement on the *terms for disagreeing*, or between different *schools of thought* within a profession and broadly shared assumptions? My own work on these questions is just beginning — let me present a series of hunches about how to proceed, and hypotheses about the nature of expertise which emerged from my preliminary studies.

I have typically begun with a specific professional discipline, say, public international lawyers in the United States after the Second World War. The

discipline was composed of particular, identifiable people, pursuing projects of various kinds by making arguments in a common vocabulary. At a very general level, I try to identify their shared 'disciplinary sensibility' — what do they see, what do they worry about, how do they see the world?

For example, public international lawyers have generally seen a world of nation states and are worried about war. Trade lawyers, by contrast, tend to see a world of commerce and remember the trauma of the Depression. For public international lawyers, trauma about the Holocaust, fear of totalitarianism and aversion to ideology, were more common than worry about tariffs or exchange controls.

Both groups share the assumption that the political world of international relations is real — their context — and that international legal arrangements are fragile human constructions seeking to tame a sea of political conflict. All these ideas affect what they feel able, or willing, to do.

Moreover, experts in a given discipline often share an *intellectual history*. Ideas come in and out of fashion. Economics can seem more important than political science for a time, and then the reverse. Some economic ideas can seem more significant than others. Among international lawyers, for example, interest in macroeconomics has largely been displaced by microeconomics. When international lawyers think about the economy, they no longer imagine an input-output cycle responsive to government stimulation, but a market of private actors responsive to price signals.

On the basis of these very general shared assumptions, professionals typically share a set of issues about which they *disagree*. Typically, these are the questions to which their expertise is addressed. What is sovereignty? How do norms bind sovereigns? How should a decentralised sovereign order legislate? How should international institutions be designed for a world of sovereigns? What role for an international judiciary? Should international law strive for uniformity or pluralism? For rules or principles and informal practices? And so on. These are the issues about which experts within a field typically *disagree*. International lawyers make *arguments* about these things, seeking to persuade that one or another approach will be better.

Arguing about these things, they develop what might be thought of as a *vocabulary of arguments*, which can also be mapped, in search of the grammar through which they are held together in persuasive professional arrangements. Patterns of professional argument can be traced over time, as schools of thought emerge within a field, or modes of persuasion themselves come in and out of fashion. Finally, it is possible to trace the projects pursued by individuals and groups within the discipline. A good map may change your view of the discipline. We might no longer see 'international law', say, as 'the rules which bind sovereign states in their relations with one another' — but as a group of people pursuing projects in a common language. One of their projects is to promote the idea that there is 'international law' outside their efforts, and that *it* 'governs' sovereign states — and that it is, by and large, a good thing — there should be more of it.

Having mapped various international legal professions, I find the material crying out for a more general map, for a common vocabulary of expertise. I'd like to share one proposal for such a map with you here.<sup>6</sup>

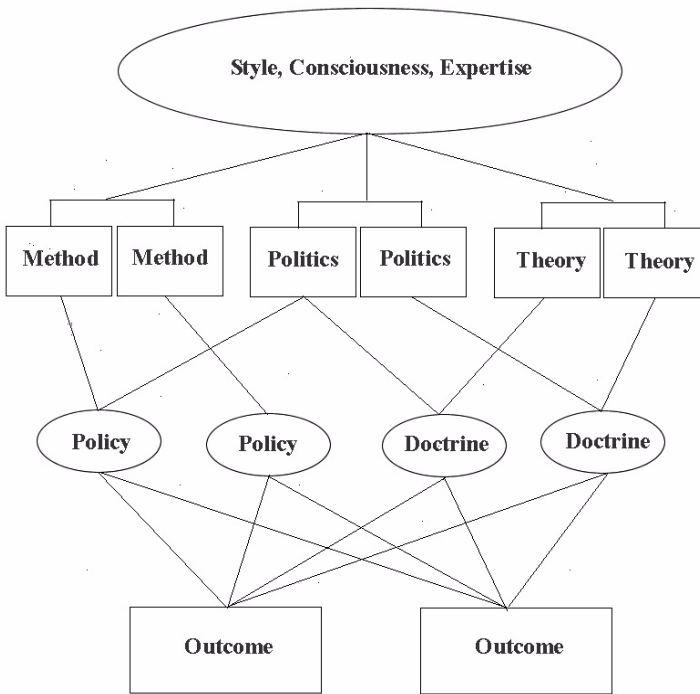


Figure 2.

The central idea is that professionals make arguments about choices which produce *outcomes*. The outcomes might be material and distributional (favour plaintiff vs defendant, agriculture vs industry, slow the economy vs speed up the economy) or normative (strengthen respect for equality or justice, community solidarity or individualism, and so forth).

Experts dispute alternate *policies* and *doctrines* which they think will lead to different outcomes. They select rules and interpret their exceptions. They select among policies — cooperation or coexistence, import substitution or export led growth — and interpret what these policies require in the way of rules and outcomes.

Experts argue for their preferred policy or doctrinal choice by reference to broader *theories, methods* and *political commitments* which they associate with the doctrine or policy they prefer. For lawyers, these can be theories of law — positivism, naturalism, sociology, whatever — or theories about society —

<sup>6</sup> See Figure 2.

realism, idealism and so forth. They can be broad approaches or policy orientations — like ‘humanitarianism’ or ‘cosmopolitanism’.

Although they differ in the choices they promote, they also share a *style or consciousness*. These common assumptions tend to be less fully conscious. They seem compatible with the full range of alternative theories, methods or political commitments about which those in the field disagree.

The work of expertise, in a nutshell, is to build vertical associations and make horizontal distinctions on this general map. We might think, most conventionally, about judges selecting and applying doctrines to generate outcomes, selecting and interpreting doctrines on the basis of underlying methodological or interpretive commitments.

The semiotic analysis of legal expertise is a new field and much remains to be done. Let me indicate some general hypotheses which emerge from preliminary work of this type. First, experts characteristically overstate the solidity of vertical associations on this map. *This theory requires this doctrine*. Experts defend links *between* levels, between doctrines and outcomes, between methods and doctrines, with full knowledge that *other* experts will argue for alternative associations in terms equally consistent with their common expertise.

As a result, it is a very common experience, sociologically speaking, to find that an association between a general theory and a specific policy — a commitment, say, that import substitution requires nationalisation — which seemed stable, on further reflection, and under the pressure of criticism, seems far less compelling.

Second, horizontal distinctions — between two doctrines or theories or methods — can loom far larger in the minds of experts than one would suppose, given the quite common experience of instability along the vertical axis. Indeed, we might say that it is the work of experts to define *choices* along the horizontal axis which seem significant — seem to require decision — because they are associated with different outcomes.

With the common experience of vertical instability comes the equally common experience that experts are making mountains out of molehills — that the horizontal choices they are debating lie closer together than their arguments suggest. The phrase ‘narcissism of small differences’ and the image of professional sectarianism come to mind here.

Putting these two observations together, it also appears that the choices experts debate, defined in the terms of their expertise, may well be both narrower and less significant than experts would have us believe. To the extent these expert choices become the options considered by the prince, the expert vocabulary will have narrowed the terrain of political decision.

Let me leave this evolving model here and ask how we might understand and contest the work of experts in political terms. We already have a set of intriguing hypotheses about the ways individual experts come to have a narrower appreciation for their *own* discretion or manoeuvre room, while vigorously asserting that *other* experts have more discretion than they think.

#### **4. *Identifying the Political — Three Traditions***

Many critics of ‘globalisation’ have sought a more robust politics for contesting the decisions of our global governance regime. Why do we have so much law, and so little opportunity to contest its terms?

By ‘politics’, critics usually mean more participation and transparency in intergovernmental institutions like the WTO or the World Bank. They decry the ‘democracy deficits’ of our transnational regulatory agencies. In Europe this has brought calls for an expansion of parliamentary control in the European Union.

Or they urge national and local institutions to stem the effects of globalisation. This often drives calls for the return of sovereignty, of unilateralism — of individual and local rights against the transnational regime.

These are all important ideas, but they are not my central focus. These suggestions remain focused on the relative power of foreground institutions, and on the opportunity to participate in them.

There is also a long tradition of identifying the politics of expertise itself. Given the apolitical self-presentation of much expert work, these traditions work by translation — from the vocabulary of expertise, to that of politics.

We might begin by focusing on the decisions experts make, translating the outputs of expertise, if you like, into left-centre-right terms, or linking them with social groups or interests we think of as contenders on the political stage — labour and capital, men and women, the developed North and the underdeveloped South. We might search for biases or blind spots in their expert knowledge that favour these social groups or ideological positions. Or we might look for signs of political possibility in an expert’s own experience of being a free agent — exercising discretion and taking responsibility.

In the remainder of my time with you, I’d like to develop three broad approaches to contesting the work of experts and their expertise in political terms.

##### **A. *First, Translation to the Politics of Ideology and Interest***

This first tradition requires an assessment, however crude or incomplete, of consequences — who wins and who loses? Who decides and who submits to the decisions of others? Only by identifying the *stakes* of expert action can we understand its politics.

An expert decision is political, for this tradition; to the extent its consequences can be associated with left-centre-right ideological positions or with social groups — ‘labour’ and ‘capital’ — which we think of as contestants in our political world.

We routinely interpret expert action in this way, and I need not say too much about it. We associate expert decisions with the *interests* of politically significant groups — claiming they favour agriculture or industry, church or secular society. We might think these interests lay behind the decision, motivating it, or we might think the decision will unwittingly favour them. Or we might simply be struck that the vocabulary used to defend the decision is familiar from other contexts as a defence of one or another social interest.

Much of the expertise of the governing professions consists precisely in criticising the decisions of *other* experts by associating them with ideological positions or social interests. We often assert that a decision-maker has been *captured* by political interests or ideologies. Doing so is a routine professional practice — but it can also be an important political strategy.

Still, capture claims can be difficult to sustain — what *is* in the interests of capital or labour, of the first world or the third? To formulate an answer is to enter the realm of international policymaking itself, attuned to perverse effects, unexpected costs and benefits. To make policy is precisely to distribute among groups — and claims of ‘capture’ are often simply ways of disagreeing with the policies which have been made.

Moreover, the consequences of expert choices are extremely difficult to pin down. Alternatives that seem stark turn out to be more nuanced — to have room for more than one political interpretation. It is easy, in this tradition, to conclude that the only real antidote to rule by experts is more expertise.

Challenging expertise in this way can make you sound shrill, lacking in nuance. When protesters in Davos, or Seattle, or Geneva denounce the WTO as a tool of global capital, it is hard not to think they should probably break things down a bit more, get more precise, maybe go to law school. But somehow we also know that if they did, they would likely lose their edge, dampen their sense for the politics of global governance, precisely as they refined their skills to participate in it. Searching for the politics of expertise has taken us right back to expertise.

### **B. *The Politics of Consciousness***

A second tradition is designed to compensate for these difficulties by focusing less on the specific choices experts make than on their underlying shared assumptions — the blind spots and biases which skew their choices, or place some alternatives altogether out of discussion.

Assumptions common to both sides of expert debates — professional preoccupations, *deformations* if you like — can often be associated with a social interest or an ideological position. Expertises differ, and those differences can have a politics. The key in this second tradition is to link this sort of blind spot or preoccupation to political interests or positions.

Take labour policy. For a public international lawyer, the problem will be a lack of governance capacity, a need for norms and institutions to ensure compliance with them. International labour policy will mean a network of international legal rules and standards and enforcement machinery.

For an international *economic* lawyer, the problem will be to interface between different national labour practices without unduly restricting trade. The policies — and the outcomes — which result from thinking about labour in these different ways may well differ dramatically.

In this tradition, we might identify blind spots and biases in the professional thinking of, say, ‘foreign policy professionals’ in the industrialised democracies of the West. These experts have come to share a common vocabulary — ideology, if

you like — which we might call ‘humanitarianism’. Wars are fought, defended, and denounced, in humanitarian terms. Immigration schemes, economic development programs, trade rules, are designed, justified, and denounced, in the vocabulary of human rights and humanitarianism.

Even in the absence of a global government, this kind of common vision among experts can operate as a kind of *as if* world government — wherever two are gathered in the name of humanitarianism, there is global governance. Many have claimed that shared ideas about colonialism or free trade may have operated similarly in the 19<sup>th</sup> century, widely shared elite assumptions about the separation of economics and politics or the West’s civilising mission substituting for strong global institutional networks. From the other side, we might think of Osama bin Laden’s call for the restoration of a global ‘caliphate’ as the call for a similar *as if* government of the like minded.

This shared vision produces a series of professional deformations. International policy makers operate with a *map* of the world in their heads. On this map, perspective is the foreshortened view from high in the United Nations headquarters building, or flying among conferences and summits, commissions and expert working groups. The sites of prior international engagement loom large — Passchendaele, Somme, Munich, Bretton Woods, or, closer to our day, Vietnam, Cambodia, Bosnia, Rwanda or Iraq. Each stands for a ‘lesson’, which shapes reactions to new problems. Navigating on such a map can substitute for navigating in the world, for assessing the actual consequences of actual policies in contexts to come.

High up there, it is easy to expect the Potemkin village of intergovernmental institutions to operate like the domestic institutions — courts, administrations, parliaments — on which they were loosely modelled. The expert’s mental map discourages engagement with things *below the line of sovereignty*. We focus on what happens *outside and between* national jurisdictions. In Antarctica. In outer space. On the seabed.

International policy makers imagine themselves in a space *above* sovereignty, a space in which sovereigns mingle, communicate, have ‘disputes’. For something to get into this space — to be ‘taken up on the international plane’ — it must be a *grave* matter, a *serious* breach, cause *material* damage, result in *irrevocable* harm, *shock* the conscience or meet any of numerous other substantive tests for reversing the presumption that things below the line of sovereignty are immune from international policy making. Sovereigns can do as they like at home: for their actions to be respected *on the international plane* they must meet certain standards.

This gives international policy an odd shape. The international policy maker sees things like smoke or fish when they cross boundaries more clearly than when they stay close to home. The law of the sea classifies the world’s fish species according to their migratory habits, measured by their propensity to swim across international boundaries. International environmental policy covers the oceans, but with decreasing intensity as one moves closer to shore or on board a ship; it covers outer space; and it covers those pollution flows which cross boundaries so

long as it causes substantial harm. Of course, with clever and expansive interpretation, international policy makers *could* stretch until very little escaped their purview. Experts know *how* to blur the boundaries which restrict their ambit, but their default conception is unnecessarily self-limiting.

The global expert's mental map makes economic 'forces' seem naturally global, while the regulation of economic 'actors' seems naturally to be the function of national government. International governance seems separate from both the global market and from local culture. It seems a matter of public, rather than of private law.

In this vision, international policy making seems to be an exceptional matter of intervention from 'above,' oscillating among respecting, bundling and unbundling sovereign rights. Preoccupied with sovereignty, it is easy to underestimate the worlds of private and economic law or overestimate the military's power to intervene successfully while remaining neutral or disengaged from local political and culture struggles. When foreign policy experts overestimate the technocratic nature of economic concerns — or the autonomy of economics from culture and institutional context — they underestimate their ability to contest the distributional consequences of transnational economic forces.

Thinking of their work as 'intervention', down from a great height, experts are prone to think there was no international policy *before* intervention — and they easily become preoccupied with debate about *whether or not* to intervene. This obscures our ongoing engagement with local conditions, and the extent to which all regimes are today the product of transnational meddling and influence.

Indeed, it is quite common to imagine the international community as a place beyond culture and politics, a neutral world of expertise. Policy makers are prone to think one might intervene in Kosovo or East Timor simply to 'keep the peace' or 'rebuild the society' *without* affecting the background distribution of power and wealth, that we might have an international governance which does not govern.

Moreover, the idea that one should not intervene without good reason and good authority erects a conceptual hurdle in front of every humanitarian initiative. What standing do we have? Innumerable worthy international policy initiatives have crashed on the rocks of hesitation to engage in what we are all too prone to call 'cultural imperialism'.

International humanitarians all too often focus on who makes policy rather than the policy they will make, and on the appropriate form for policy rather than the resulting outcomes of policy making. They worry more about the defensibility of international action than about the potential for good results.

A striking illustration of this was the limitations of using human rights and humanitarianism to oppose the war in Iraq. There is no question the humanitarian vocabulary of proportionality, necessity and self-defence, was very useful for legitimating the war. But opponents of the Iraq war were themselves blown off track by their humanitarian expertise. The war would not have made any more sense, after all, had it been approved by the United Nations apparatus. More importantly, the Charter scheme had the unfortunate effect of changing the subject.

Let us say, for a moment, that after 9/11 we did need a completely new political and military strategy for dealing with the Middle East. Let us say it was necessary to ‘change regimes’ from eastern Turkey to western Pakistan.

Notice how difficult it is to discuss these ideas. Notions of sovereignty, the limits of the UN Charter, core humanitarian commitments all render the desire to change regimes undiscussable. This frame makes it difficult to talk about the ongoing and legitimate ways in which supposedly sovereign regimes are always already entangled with one another. Our humanitarian expertise makes it difficult to acknowledge that we — our economy, our government, our international financial institutions, our media, our humanitarian agencies — influence regimes across the globe every day. We force their governments to accept structural adjustment policies, open their markets, exploit their resources, change their cultures.

In political terms, humanitarian expertise gave progressives an easy and irresponsible way out. We never needed to ask: *how should* the regimes of the Middle East — our regimes — be changed? Is Iraq the place to start? Is military intervention the way to do it?

Why not consider changing regimes the European way — through the promise of accession to the EU? This strategy would have been equally expensive and risky — but would it have been more or less likely to work? We will never know because it was never seriously mooted as an option.

It now seems clear that Iraq was not the right place to start, and war was not the right instrument. But it was surely right that we could no longer afford to rely on the stability of shaky dictatorships across the Arab and Islamic worlds, unable to provide for the basic welfare of their citizens.

The options most salient to the humanitarian imagination — restraining the hegemon, and offering humanitarian assistance — are no longer sufficient basis for a responsible foreign policy. Yet our humanism and the expert vocabularies we have developed to give it expression gets in the way of developing workable alternatives.

Experts share maps of time as well as space. International policy makers situate themselves in a grand story of the slow and unsteady progress of law against power, policy against politics, reason against ideology, international against national, order against chaos in international affairs over 350 years. In this story, international governance is itself a mark of civilisation’s progress. Progress narratives of this sort can become policy programs, both by solidifying a professional consensus about what has worked and by defining what counts as progress for the international governance system as a whole. This can redirect policy makers from solving problems to completing the work of a mythological history, orienting or shaping their efforts to build the international system.

The historical conviction that international policy making is already and automatically part of the solution rather than the problem can blind internationalists to the dark sides of their activities. We speak of international environmental law as synonymous with the effort to generate environmentally protective norms. And yet, a catalogue of international norms affecting the

incidence of environmental damage would include many norms encouraging or enabling despoilation — perhaps more than the number encouraging protection. International law and policy offer the environmental despoiler, like the war criminal or the human rights abuser, a great deal of comfort and protection.

A strong myth of professional progress hinders the pragmatic assessment of specific initiatives. All too often, the failures of particular initiatives are interpreted as warnings to do more, to intensify our effort, along precisely the same lines. Internationalists can come to see themselves as continuously *becoming*, polishing their tools, embroidering their technique, strengthening themselves, that they might one day tackle global problems. In the meantime, failures reflect the primitive state of the work, the strength of their enemies, the long road still to travel.

This gives you a sense for the types of difficulty this second tradition makes salient. An expert's mental map may limit his or her imagination — but we would need to know much more about the context within which he or she acts to predict who will win or lose as a result. Among other things, we would need to know whether his or her professional deformation was compensated or deepened by the deformations of experts in other disciplines working on the same problem.

Moreover, in looking for blindspots and biases, it is easy to underestimate the flexibility of expertise. Professional deformations are not, after all, straitjackets. Are military professionals too prone, or not prone enough, to use force? Economists *do* turn out to have a vocabulary for things that non-economists think of as matters of 'value' rather than matters of 'efficiency'.

Lawyers *do* have a vocabulary for criticising reliance on rules or litigation, for broadening exceptions, for promoting alternative dispute resolution, structuring administrative discretion and appreciating the role of political life in constituting the rule of law. Political scientists do have a way of speaking about the influence of rules in international affairs — even if they like to preface their accounts of multilevel games and predictive stability with denunciations of 'idealistic' lawyers.

Although international economic lawyers focus on strengthening trade flows, this may — or may not — be inhospitable to an international minimum wage, to strengthening health and safety standards or promoting conditions more conducive to labour organisation. Nor is it clear that efforts to develop an interface among national labour regimes is biased towards homogenisation.

The policy choices against which a discipline is said to have closed its eyes often turn out to be present in mainstream thinking. Within 'free market' ideas there lurks an exception for 'market failures' which can be interpreted broadly or narrowly. Making out a case for bias requires saying quite a bit more about how experts resolve the various choices *internal* to such a general policy commitment — how broadly they interpret 'market failure'. A 'free market' policy could turn out, if properly structured, to be more friendly to 'workers' than its 'socialist' alternative. As a result, in looking for bias in the background assumptions of experts, one can also become captured by them. Again, the call for more politics has us back asking for more expertise.

### C. *The Politics of Experience and Decision*

A third tradition for identifying the politics of expertise shifts our attention from ideological positions or social interests to the *experience* of the expert him or herself.

In this tradition, the key to politics is the experience of *responsible discretion*. An expert governs when he or she *decides* — in the sense that they experience a freedom of manoeuvre to go one way or the other — and when their decision has consequences for other people for which they are then responsible.

In this tradition, *politicising* a decision does not mean translating its terms from an apparently neutral expert vocabulary into a vocabulary of interests and ideologies. It means rendering implausible the expert's presentation of the decision, to himself or herself and to others, as *determined* rather than 'free'.

There are all sorts of techniques for doing this — many of them routine forms of criticism used by experts to criticise one another. When an expert presents a choice at one level of my expertise map, a doctrine, say (as determined by another) a method or theory, other interested experts will often argue that the theory requires no such thing. Often the second expert will convince someone — perhaps even the first expert — that he or she is right, the decision was, in fact, not necessary. When this happens, the person who has been convinced comes to experience the original decision as discretionary.

In this tradition, it is crucial that experts often decide under conditions of ambivalent, contradictory or vague guidance from their expert vocabularies. Decisions they present as compelled often turn out, on closer inspection, to have been more open.

Of course, one *could* then try to say something about what '*really*' filled this open space. 'Although you say your decision was compelled by the constitution, the text is rather vague. I think it was your ... fill in the blank ... social democratic sympathies, your loyalty to the administration, or whatever which did the work'. The process of filling in the blank takes us back to the earlier traditions, associating expert decisions with ideological positions or interests. Here, the focus is on motivation, rather than outcome — although it is common simply to reverse engineer the motivation from predictions about the outcome.

This last tradition is more sceptical about interpreting motives or consequences and focuses rather on the person who decides, urging him or her to experience the freedom to *select* a motive or *choose* among consequences. It urges us to see the expert as free, rather than as determined by interest or ideology. In this tradition, politics is the experience of deciding in the exception — in the freedom of not knowing, released from expertise, but not from responsibility.

Expanding the possibility for politics in global governance means expanding our experience of this kind of decisional freedom — in ourselves, and in the experts who govern our world.

Most experts flee from this experience. Their flight; their denial of both freedom and responsibility accounts for their self-presentation as an expert, as part

of the background, rather than the foreground. This last tradition suggests that we develop professional habits of mind which resist this flight from political awareness, and from the experience of freedom and responsibility. The goal would be to encourage a form of expertise, which could experience politics as its vocation.

## 5. *Conclusion*

I offer this broad research agenda in the spirit of Julius Stone's own sociological admonition that we strengthen our understanding of how our world is actually governed.<sup>7</sup> We focus too much on the foreground. We overlook the work of experts, and understand only dimly the workings of expertise itself. But a better description is only a first step. Although our world is densely governed, we have only the thinnest experience of participating in global politics. We remain subjects of an invisible hand — not that of the market, but of expertise which denies its politics.

The more difficult job lies ahead — remaking the possibilities for global political life. Thank you.

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<sup>7</sup> See for example Julius Stone, *Visions of World Order: Between State Power and Human Justice* (1984); Julius Stone, *Of Law and Nations: Between Power Politics and Human Hopes* (1974).

# *Australia's Constitutional Rights and the Problem of Interpretive Disagreement*

ADRIENNE STONE\*

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## *Abstract*

This article critically reviews Australia's express and implied constitutional rights. It is suggested that the rights conferred by the Australian Constitution are undermined by continuing disagreement as to their foundations. This disagreement makes the protection of rights under the Australian Constitution especially weak. Although all constitutional rights are subject to disagreement as to their extent, many, if not all, of Australia's constitutional rights are subject to disagreement as to their existence. The article concludes with some observations on the debate over an Australian bill of rights.

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## 1. *Introduction*

The rights found in the Australian Constitution are regarded as patchy, inconsistently interpreted and, in the case of ‘implied’ rights, obscure.<sup>1</sup> The inadequacy of Australia’s constitutional rights is frequently one plank in an argument for an Australian bill of rights.<sup>2</sup> In this article, I subject Australia’s constitutional rights to closer scrutiny. My point is three-fold. First, I seek to broaden the understanding of how rights pervade, or could pervade, Australian constitutional law. Secondly, I re-examine the critique of Australia’s constitutional rights. I agree with the view that Australia’s constitutional rights are especially weak, but I provide a more precise articulation of the source of that weakness. Finally, I briefly consider the implications of this analysis in deciding whether Australia should adopt a constitutional bill of rights.

I begin, in Part Two, with a brief review of Australia’s existing constitutional rights. The analysis extends beyond the express and implied rights that form the backbone of Australia’s constitutional rights, to less obvious means of rights protection found in apparently rights-neutral contexts. In this latter section, I show how the High Court can pursue rights protection through the use of rights-sensitive interpretive devices and judicially created rules for the application of constitutional provisions.

In Part Three, I assess the claim that Australia’s constitutional rights are an especially weak form of protecting rights. I will argue that a system of rights protection that depends so heavily on the implication of rights, and on the incorporation of rights from extra-constitutional sources and other judicially created rules of constitutional law, is inevitably weak. The source of this weakness lies in the contested nature of constitutional interpretation itself. Because the methods of constitutional interpretation on which Australia’s constitutional rights rely are themselves contested, many of these rights are subject to an ongoing disagreement as to their very existence. The doubt that attends the use of these methods is exacerbated when they are used in the context of a written constitution that deals primarily with non-rights concerns and was drafted without much consideration of rights. Arguments based on constitutional text and constitutional history will, therefore, tend to run counter to rights-protective readings of the Constitution.

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1 For critiques of the express rights, see Leslie Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) at 410; Hilary Charlesworth, *Writing in Rights* (2002) at 30–31; George Williams, *Human Rights Under the Australian Constitution* (1999) at 245; Peter Bailey, *Human Rights: Australia in an International Context* (1990). With respect to the ‘implied rights’ see Williams, id at 259 and for a detailed critique of the freedom of political communication see Adrienne Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25 *MULR* 374; ‘Freedom of Political Communication, the Constitution and the Common Law’ (1998) 26 *Fed LR* 219; ‘The Limits of Constitutional Text and Structure’ (1999) 23 *MULR* 668.

2 See, for example, Williams, id at 245, 257, 259; Murray Wilcox, *An Australian Charter of Rights?* (1993) at 194–209, 230–231.

In many cases, then, Australia's constitutional rights are likely to be accompanied by disagreement about the methods of constitutional interpretation on which they rely. Such rights are peculiarly vulnerable to judicial revision in the short-term. Further, even when a right obtains a degree of acceptance over time, doubts surrounding its recognition will adversely affect its development.

I conclude with some brief reflections on the implications of these conclusions for the Australian bill of rights debate. It follows from my analysis in Part Three that an express bill of rights in the Australian Constitution would put to rest one important area of dispute by providing an unarguable basis for the recognition of constitutional rights. However, I suggest that the settling of that interpretive controversy is not, itself, a reason to adopt a bill of rights because such a reform would, overall, make constitutional adjudication considerably more complex and uncertain.

## 2. *Rights Under the Australian Constitution*

### A. *Express and Implied Rights*

The Australian Constitution is usually understood to contain express rights and rights implied from constitutional text and structure. Far more controversially, it has also been suggested that the Constitution contains rights implied from fundamental underlying doctrines.<sup>3</sup> Since these rights have received extensive treatment elsewhere,<sup>4</sup> I will deal with them only briefly before turning to another constitutional method of protecting rights.

#### (i) *'Express Rights'*

Despite the absence of a comprehensive bill of rights, a number of provisions in the Australian Constitution are often categorised as 'express rights'.<sup>5</sup> The provisions most often placed in this category are s116, which in part prevents the Commonwealth acting to 'establish' a religion or to prohibit its 'free exercise';<sup>6</sup> s80, which provides for a jury trial when a Commonwealth offence is tried on indictment; s51(xxxi), which qualifies the Commonwealth power to acquire property with a requirement to provide 'just terms'; and s117, which prevents discrimination based on state residence.<sup>7</sup>

3 For a different, but very helpful, account of the 'schema' of constitutional rights see George Winterton, 'Constitutionally Entrenched Common Law Rights' in Charles Sampford & Kim Preston, *Interpreting Constitutions* (1996) at 121.

4 See Zines, above n1 at 373–399, 400–423; Winterton, above n3.

5 Zines, above n1 at 402–415; Williams, above n1 at 96–128, 129–154.

6 In these two respects, s116 resembles the non-establishment and free exercise clauses of the First Amendment to the United States Constitution. Section 116 also prevents the Commonwealth from 'imposing any religious observance' and provides that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'.

7 The list of express rights sometimes also includes s41, which gives those who qualify as state electors the right to vote in federal elections; s92, which requires that interstate trade and commerce be 'absolutely free'; and s51(xiiiA), which precludes the 'civil conscription' of medical practitioners.

From a rights perspective, the High Court's interpretation of these provisions has (with the exception of s117) been disappointing. The rights that resemble traditional civil and political rights — such as sections 80 and 116 — have been given very narrow fields of operation,<sup>8</sup> and criticism of their evisceration is heightened by charges of inconsistency. Commentators have complained of the court's inconsistent preference for plain or literal meaning of constitutional text in some cases and for the framers' intent in others.<sup>9</sup> The narrowness of the court's approach to these civil and political rights also contrasts unfavorably with those sections that seem to confer 'economic rights' (such as s51(xxxi) and s92), which have been given a relatively wide field of operation.<sup>10</sup> Though a thoroughgoing reinterpretation of the 'express rights' provisions is often advocated,<sup>11</sup> that argument has, with one notable exception (the interpretation of s117)<sup>12</sup> met with little success.

(ii) *Implied Rights — Text and Structure*

A second form of constitutional right in the Australian Constitution arises from a method of interpretation known as 'implication from text and structure'. Two well-known kinds of implied rights in the Australian Constitution provide illustrations — the rights implied from representative and responsible government, and the rights implied from the separation of judicial power.

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8 As interpreted by the High Court, s80 does not apply if Parliament provides that an offence is not to be tried on indictment: *R v Archdall & Roskrige* (1928) 41 CLR 128. The protection of religion by s116 is readily outweighed by other values: see for example, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 (holding that s116 did not prohibit laws prohibiting advocacy detrimental to the prosecution of war by the Commonwealth, even if that advocacy is undertaken in pursuit of religious conviction); *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 (allowing government funding of the educational activities of religious schools). The 'right to vote' in s41 guarantees a right to vote only to those who qualified to vote in state elections at the time of federation: *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254. See generally Zines, above n1 at 402–405.

9 George Williams contrasts the interpretation of s80 (in which the 'plain meaning' of the text has been said to preclude a substantive interpretation of 'trial on indictment') with the interpretation of s41 (where historical material was used to limit the apparent plain meaning). He concludes '[i]t is hard to avoid the conclusion that until [the High Court's judgment in *Street v Queensland Bar Association* in] 1989 judges of the High Court have selectively used whatever tool was available ... to construe sections 41, 80, 116 and 117 as empty guarantees'. Williams, above n1 at 128.

10 See generally Bailey, above n1 at 84–86; Williams, above n1 at 129–154. Though it should be noted that *Cole v Whitfield* (1988) 165 CLR 360 narrowed previous interpretations of s92.

11 See Bailey, above n1 at 105; Williams, above n1 at 128, 249–250.

12 See *Street v Queensland Bar Association* (1989) 168 CLR 461 (hereafter *Street*), which transformed s117 into a real limitation on government that protects the individual from discrimination based on state residence.

The first implication, drawn from representative and responsible government,<sup>13</sup> gives rise to a right of freedom of political communication (a limited kind of free speech right)<sup>14</sup> and, perhaps, to rights of freedom of movement and association.<sup>15</sup> Although the court has occasionally been reticent about using the language of rights to describe the freedom of political communication,<sup>16</sup> the protection conferred by the freedom of political communication fits easily within the concept of a constitutional right.<sup>17</sup> Indeed the scope of the implied freedom overlaps with (though may be narrower than) the protection conferred by express free speech rights contained in other constitutions.<sup>18</sup>

A second set of constitutional rights is implied from the separation of judicial power.<sup>19</sup> In general terms, the separation of judicial power requires, first, that the judicial power of the Commonwealth be exercised only by the courts identified in s71 of the Constitution,<sup>20</sup> and secondly, that courts established by or under the Constitution only exercise the judicial power referred to in Chapter III of the Constitution (together with incidental non-judicial powers).<sup>21</sup>

Those general principles give rise to a wide range of more specific rules, too complex to be summarised here.<sup>22</sup> These rules can all, in some sense, be

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13 In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (hereafter *Lange*), the court emphasised that the freedom of political communication is derived from specific textual provisions implementing certain institutions of representative and responsible government rather than general principles. For a critique of that line of reasoning, see Stone, 'The Limits of Constitutional Text and Structure', above n1.

14 *Lange*, *ibid*.

15 The freedoms of movement and association are yet to be determined in any case but have received some judicial recognition. *Kruger v Commonwealth of Australia* (1997) 190 CLR 1 at 91 (Toohey J), 116 (Gaudron J), 142 (McHugh J), compare 156 (Gummow J holding that there is no freedom of association for 'political cultural and familial purposes'). See also *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 109–110; *Higgins v Commonwealth of Australia* (1998) 79 FCR 528 at 535. On the constitutional right of freedom of association, see *Australian Capital Television v Commonwealth (No 2)* (1992) 177 CLR 106 (hereafter *Australian Capital Television*) at 232 (McHugh J); *Kruger*, *id* at 91 (Toohey J), 142 (Gaudron J) and *Mulholland v Australian Electoral Commission* [2004] HCA 41 (hereafter *Mulholland*) at [113]–[116] (McHugh J), [148] (Gummow & Hayne JJ with whom Heydon J agreed), [284]–[286] (Kirby J) compare [334]–[335] (Callinan J).

16 *Mulholland*, *id* at [104], [182].

17 Albeit that the freedom is a 'negative' rather than a 'positive' right and therefore operates to prevent interference with political communication rather than facilitate its exercise. In addition the freedom applies 'vertically' against government action (including the judicial enforcement of the common law) rather than 'horizontally' against private action. See Stone, 'Rights, Personal Rights and Freedoms', above n1.

18 On the kinds of communication covered by the freedom of political communication, see Stone, 'Rights, Personal Rights and Freedoms', above n1 at 378–390; on the level of protection accorded to that communication, see Stone, 'The Limits of Constitutional Text and Structure', above n1.

19 For an authoritative account see Zines, above n1 at 161–170, 202–212.

20 *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54; *Waterside Workers Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

21 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 affirmed on appeal to the Privy Council in *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529.

22 See Zines, above n1 at 202–212.

understood as protecting individual rights because diffusing government power guards against the possibility of abuse of that power. More specifically, the separation of judicial power promotes the independence and impartiality of the judiciary and thus the observance of important aspects of the rule of law.<sup>23</sup> The implied separation of judicial power also gives rise to some rules that resemble rights commonly found in bills of rights. For example, because the judgment of criminal guilt is regarded an exclusively judicial task,<sup>24</sup> the High Court has recognised that the Federal Parliament cannot enact a bill of attainder.<sup>25</sup> In addition, Parliament cannot order detention (at least of a punitive nature) without the intervention of a court.<sup>26</sup> Finally, there is also a requirement that courts act consistently with judicial process which, though it has not lived up to the hopes of its most vigorous interpreters, has led some commentators to speak of a general right to curial due process.<sup>27</sup>

### **B. ‘Fundamental’ Implied Rights**

The Australian Constitution is sometimes understood to contain a third set of rights derived from fundamental doctrines that are said to be assumptions or foundations on which the Constitution is based. One form of this argument has it that the common law contains principles that are so fundamental that they limit parliamentary sovereignty.<sup>28</sup>

These rights are much more controversial than the rights implied from text and structure. Rights derived from fundamental doctrines or constitutional

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- 23 Fiona Wheeler, ‘Due Process, Chapter III and the New High Court’ (2004) 32 *Fed LR* 205. Blackstone stated that public liberty ‘cannot subsist long in any State, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power’: see *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 381 (Isaacs J).
- 24 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (hereafter *Lim*) at 27; *Nicholas v The Queen* (1998) 193 CLR 173 at 186, 208–209, 220. See also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11–13.
- 25 *Polyukhovich v Commonwealth of Australia* (1991) 172 CLR 501 at 536. For comparable express provisions, see Art I ss9 and 10 of the *Constitution of the United States* (prohibiting Bills of Attainder); *Canadian Charter of Rights and Freedoms* s11 (requiring a trial according to law in a fair and public hearing by an independent and impartial tribunal); see also s25 of the *New Zealand Bill of Rights Act* (1990) and Art 6 of the *European Convention on Human Rights*.
- 26 *Lim*, above n24 at 27–28. Those limitations do not, however, preclude the Parliament authorising indefinite administrative detention: *Al Kateb v Godwin* (2004) 208 ALR 124 (hereafter *Al Kateb*). Moreover, conditions of immigration detention are not relevant to the validity of that detention: *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 208 ALR 271 (hereafter *Behrooz*).
- 27 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580: the separation of powers gives rise to ‘the Constitution’s only general guarantee of due process’ (Deane J). See generally, Zines, above n1 at 202–212; Fiona Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’ (1997) 23 *Mon LR* 248.
- 28 A view defended by TRS Allan, *Constitutional Justice* (2001). For a critical appraisal see Jeffrey Goldsworthy, ‘Homogenizing Constitutions’ (2003) 23 *Oxford J Legal Studies* 483.

assumptions have only ever been recognised by a minority of the court<sup>29</sup> and, in some contexts, they have met with explicit rejection.<sup>30</sup> Moreover, there are clear indications that the present High Court disapproves of this form of reasoning. Recent cases concerning immigration detention, which might have lent themselves to arguments based on fundamental common law rights,<sup>31</sup> were decided without any reference to the idea. Further, because these rights are derived with little direct appeal to constitutional text, their recognition seems to be precluded by the High Court's recent insistence that constitutional implications must have a firm textual base.<sup>32</sup>

However, these arguments cannot be entirely neglected in a study of Australian constitutional rights. The idea that common law notions might limit parliamentary sovereignty seems to underlie another argument that still influences the High Court. This idea is prominent in the constitutional understandings of Sir Owen Dixon<sup>33</sup> and finds its most famous expression in his judgment in the *Communist Party Case*:<sup>34</sup>

[The Australian Constitution] is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect... others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.

No doubt at least partly due to the personal prestige of Sir Owen Dixon, the idea that the 'Rule of Law' is a limiting principle in the Australian Constitution has retained some force, even despite doubts about the more general limiting power of the common law. It reappeared in the joint judgment of Gummow and Hayne JJ in *Kartinyeri v Commonwealth*,<sup>35</sup> which suggested that the power in s51(xxvi) of the Constitution (which confers legislative power with respect to 'the people of any race for whom it is deemed necessary to make special laws') might be limited by Dixon's idea.<sup>36</sup>

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29 By Murphy J (see Winterton, above n3 at 131) and Deane and Toohey JJ (who relied partly on the common law in advancing their argument that the Constitution contained 'a general doctrine of legal equality'): *Leeth v Commonwealth* (1991) 174 CLR 455 (hereafter *Leeth*) at 486.

30 *Durham Holdings Pty Ltd v State of New South Wales* (2001) 205 CLR 399 (rejecting the argument that a common law principle limited the power of a state parliament so that a statute of expropriation must provide for just compensation).

31 In *Behrooz*, above n26, a detainee charged with 'escaping' from detention asserted that the conditions in which he had been kept were inhuman and degrading. In *Al Kateb*, above n26, a stateless Palestinian who wished to leave Australia but would not be accepted by any other nation challenged the indefinite nature of his detention. Neither claim succeeded. See above n26 and accompanying text. For an account of these cases noting the absence of any consideration of fundamental common law rights, see Michael Kirby, 'The Robin Cooke Lecture 2004: Deep Lying Rights — A Constitutional Conversation Continues': <[http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_25nov04.html#f107](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_25nov04.html#f107)>.

32 *Lange*, above n13.

33 See generally Michael Wait, 'The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited' (2001) 29 *Fed LR* 57 at 67–68.

34 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.

35 (1998) 195 CLR 337 (hereafter *Kartinyeri*).

The precise content of this ‘assumption’ is unclear. The ‘Rule of Law’ is as complex and contested an ideal as there is<sup>37</sup> and its invocation in Australian constitutional law has been infrequent and sometimes tentative.<sup>38</sup> However, it is very likely that interpreting the Constitution to contain such an assumption would confer protection like that conferred by constitutional rights in other systems. A procedural conception of the ideal might impose limitations like those imposed by ‘due process’ guarantees<sup>39</sup> (thus overlapping with, or perhaps incorporating, implications drawn from the separation of judicial power) and by provisions requiring that limitations on rights be ‘prescribed by law’.<sup>40</sup> A ‘substantive’ conception of the rule of law – which is unlikely though not entirely ruled out on current authority<sup>41</sup> — could be even more significant. Requiring law to conform to some set of substantive moral criteria may entail protection resembling rights of equality or freedom of speech.<sup>42</sup>

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36 *Id* at 381. Recently, the Court has sought to give some textual basis for this doctrine. See *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 (Gaudron, McHugh, Gummow, Kirby & Hayne JJ): ‘The provision of the constitutional writs and the conferral upon this Court of an irremovable jurisdiction to issue them to an officer of the Commonwealth [in s75(v)] constitutes a textual reinforcement for what Dixon J said about the significance of the rule of law for the Constitution in *Australian Communist Party v The Commonwealth*.’

37 Richard Fallon, ‘The Rule of Law as a Concept in Constitutional Discourse’ (1997) 97 *Colum L Rev* 1.

38 In *Kartinyeri*, above n35 at 381 Gummow and Hayne JJ say only ‘the occasion has yet to arise for consideration of all that may follow from Dixon J’s statement’.

39 The rule of law is commonly associated with the idea that the law meets certain procedural requirements that ensure an individual is able to obey it, and that it effectively guides the conduct of citizens, that it is reasonably stable, that legal authority governs the exercise of political power and that it is impartially administered by independent courts: Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1979) at 212–214. A ‘procedural’ interpretation of the rule of law would overlap with the guarantee of curial due process derived from the separation of judicial power.

40 Section 1 of the *Canadian Charter of Rights and Freedoms* provides that ‘The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits *prescribed by law* as can be demonstrably justified in a free and democratic society’. [Emphasis added.] See also *European Convention on Human Rights*, Arts 10(2) and 11(2).

41 The judgment of Gummow and Hayne JJ in *Kartinyeri*, above n35 may even contemplate such an understanding, because they seem to suggest that a law could possibly infringe the rule of law requirement because of its content (the conferral of a racially discriminatory burden). However, there are also indications that point in the other direction. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR at 23, McHugh and Gummow JJ stated: ‘In Australia, the observance by decision-makers of the limits within which they are constrained by the Constitution and by statutes and subsidiary laws validly made is an aspect of the rule of law under the Constitution. It may be said that the rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying the Constitution.’ See also *Plaintiff S 157/2002 v The Commonwealth*, above n36 at [102]–[104]. I am grateful to Graeme Hill for this point.

42 Allan, above n28.

### C. *Rights Protection in Rights-Neutral Contexts*

So far, I have advanced only the well-understood point that rights are protected under the Australian Constitution when there is constitutional language that refers (or is understood to refer)<sup>43</sup> to a right, and secondly, when some general rights-protecting principle is given constitutional status (either because it is inferred from the text or, more tentatively, because it is considered to be assumed by the Constitution). But the recognition of express and implied rights does not exhaust the ways in which rights might enter Australian constitutional law. First, these methods might also be combined in quite complex ways. The dissenting justices in *Leeth v The Commonwealth*, Deane and Toohey JJ, demonstrate the point.<sup>44</sup> In that case, their Honours derived a right of 'equality before the law' relying both on fundamental principles of common law<sup>45</sup> and implications from other features of the Constitution.<sup>46</sup>

In addition, the High Court has incorporated rights into more discrete aspects of its interpretation of the Constitution. The court has sometimes identified limitations that reflect a concern for rights in the course of deciding the extent of a particular power. In this way, considerations of rights may become relevant in what appear to be 'rights-neutral' contexts.

To make this point, I need to make a few preliminary points about constitutional adjudication. Grants of legislative power (like many constitutional provisions) are usually expressed in general terms. Take, by way of illustration, the Commonwealth's power with respect to 'trade and commerce with other countries and among the states'<sup>47</sup> and its power with respect to 'external affairs'.<sup>48</sup> In the context of individual cases, the courts are faced with very specific questions: can the Commonwealth Parliament use its power over 'trade and commerce with other countries and among the states' to enact a law requiring that interstate traders obtain ministerial approval before exporting a certain good?<sup>49</sup> and can the Commonwealth Parliament use its power over 'external affairs' to enact a law that implements obligations assumed under a treaty (the subject of which does not come within any other grant of legislative power)?<sup>50</sup>

One task for a court, therefore, is to transform the Constitution's general commands into rules that are capable of resolving specific disputes. To do this, the courts develop a body of rules or doctrines best known, at least in the Australian

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43 The classification of a constitutional provision as a 'right' is sometimes controversial. See below notes 99–101 and accompanying text.

44 *Leeth*, above n29. I am seeking here to demonstrate possibilities in constitutional interpretation rather than accepted propositions of law.

45 *Id* at 487.

46 *Id* at 486.

47 Section 51(i).

48 Section 51(xxix).

49 *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 (holding that such a law was within the Commonwealth's power with respect to 'trade and commerce with other countries or among the States').

50 See *Commonwealth v Tasmania* (1983) 158 CLR 1.

constitutional law, as ‘tests’.<sup>51</sup> Because judges have considerable latitude in the way they formulate these tests, they may develop tests that allow them to take a rights-protective stance.

The rights-protecting potential of these tests is demonstrated by *Davis v Commonwealth*<sup>52</sup> and by the judgments of Mason CJ and McHugh J in *Nationwide News v Wills*.<sup>53</sup> In these cases, Commonwealth legislative powers<sup>54</sup> were held to be subject to limitations that prevented the Commonwealth from circumscribing freedom of expression. In *Davis*, the court invalidated restrictions on the use of certain expressions (including the use of ‘200 years’ in conjunction with ‘1988’ or ‘88’) that were imposed as part of the national commemoration of 200 years of white settlement in Australia.<sup>55</sup> In *Nationwide News*, some judges used a similar technique to invalidate a law<sup>56</sup> that prohibited criticism ‘calculated... to bring a member of the [Industrial Relations] Commission into disrepute’.<sup>57</sup>

These cases are usually taken to demonstrate that common law rights ‘enjoy a weak form of constitutional entrenchment’.<sup>58</sup> However, these cases also illustrate the importance, and the rights-protecting potential, of a particular kind of ‘test of application’ (proportionality) that drew attention to the effect of the law on rights.

For much of its history, the High Court has employed rather deferential tests of application in the interpretation of grants of legislative power. For example, when interpreting incidental powers,<sup>59</sup> the court showed a high level of deference to the means employed by the Parliament to pursue ends within its power.<sup>60</sup> But for a

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51 For extensive scholarly analysis of these and related kinds of rules as they arise in American constitutional law, see Richard Fallon Jr, ‘Supreme Court Foreword: Implementing the Constitution’ (1997) 111 *Harv LR* 54; Lawrence Sager, ‘The Strategic Space Between Norms and Rules of Constitutional Law’ (1985) 63 *Tex LR* 959; Mitchell Berman, ‘Constitutional Decision Rules’ (2004) 90 *Va LR* 2; David Strauss, ‘The Ubiquity of Prophylactic Rules’ (1998) 55 *UChi LR* 190.

52 (1988) 166 CLR 79 (hereafter *Davis*).

53 (1992) 177 CLR 1 (hereafter *Nationwide News*).

54 In *Davis*, above n52, the so-called ‘implied nationhood’ power; in *Nationwide News v Wills*, *ibid*, the conciliation and arbitration power (s51(xxxv)).

55 *Davis*, above n52 at 100 (Mason CJ, Deane & Gaudron JJ, with whom Wilson, Dawson & Toohey JJ agreed on this point).

56 Section 299(1)(d)(ii) of the *Industrial Relations Act* 1988 (Cth).

57 *Nationwide News*, above n53 at 34 (Mason CJ); see also 102 (McHugh J). Other justices held that the law was contrary to the implied freedom of political communication.

58 Jeffrey Goldsworthy, ‘The Constitutional Protection of Rights in Australia’ in Greg Craven (ed), *Australian Federation, Towards the Second Century* (1992) at 151, 157; See also Winterton, above n3.

59 The Commonwealth Parliament has an express grant of incidental power conferred by s51(xxxix) of the Australian Constitution, which refers to ‘matters incidental to the execution of any power vested by this Constitution in the Parliament’. In addition, each grant of enumerated power is taken, by virtue of the ordinary rules of construction, to authorise measures that are necessary to effectuate the main purpose of the power: *D’Emden v Pedder* (1904) 1 CLR 91 at 109; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

60 See *Herald & Weekly Times v Commonwealth* (1966) 115 CLR 418 at 437 (Kitto J) for a famous statement of this approach. See generally Zines, above n1 at 47.

period in the 1990s, the court sometimes used a test of 'proportionality'<sup>61</sup> to apply closer scrutiny to Commonwealth legislation. Under this test, the court considered whether alternative, less restrictive means could have been used and whether the end pursued by that law was worth the restriction imposed.<sup>62</sup>

In *Nationwide News* and *Davis*, the proportionality test drew attention to the adverse consequences of the law — the effect on freedom of expression.<sup>63</sup> In *Davis*, Mason CJ and Deane and Gaudron JJ described the law in question as 'grossly disproportionate to the need to protect the commemoration [of the Bicentenary of European Settlement]'.<sup>64</sup> The language of 'proportionality' was also employed in *Nationwide News* to similar effect.<sup>65</sup>

Thus, these cases demonstrate that rights-promotion need not be pursued only through doctrines understood as 'constitutional rights'. Even when considering the apparently technical question of whether a law was 'with respect to' a nominated head of power, the court had latitude to incorporate rights concerns through closer scrutiny of the means chosen by Parliament to pursue a nominated end. Similar choices arise when framing the test for determining whether a Commonwealth law is contrary to a limitation on power (express or implied), such as the implied freedom of political communication. There is a continuing discussion of the proper test for the application of the freedom of political communication,<sup>66</sup> including discussion of the appropriate level of deference (if any) that courts should give to legislative judgments.<sup>67</sup> A test that is less deferential to legislative judgment will tend to give more protection to rights.<sup>68</sup>

### 3. *Existing Constitutional Rights and an Australian Bill of Rights*

I have so far sought to illustrate how the Australian Constitution has been interpreted to protect rights. In the next part of this article, I will identify why the Australian Constitution has proved to be an especially weak mechanism for the protection of rights.

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61 Zines, above n1 at 44–48.

62 The proportionality test as used by the Supreme Court of Canada and the European Court of Human Rights is usually understood to consist of three inquiries: (1) whether a law exhibits a 'rational connection' to its purported end; (2) the availability of alternative, less drastic means by which that same end could be achieved; and (3) whether the end pursued by that law is worth the restriction or costs imposed. Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *MULR* 1 at 4–7. But see *Leask v Commonwealth of Australia* (1996) 187 CLR 579 (hereafter *Leask*).

63 *Davis*, above n52 at 99–100.

64 Id at 100 (Mason CJ, Deane & Gaudron JJ), 116 (Brennan J). For Brennan J it was also relevant that the power was, on his analysis, an incident of the Executive power to 'advance the nation — an essentially facultative function' which made him especially reluctant to allow the creation of offences: at 112–113.

65 *Nationwide News*, above n53 at 33 (Mason CJ), 101 (McHugh J).

66 See Stone, 'The Limits of Constitutional Text and Structure', above n1; *Coleman v Power* (2004) 209 ALR at 182, 208, 229 and 233 (hereafter *Coleman*).

67 For a discussion of this in explicit terms, see *Mulholland*, above n15 at [237] (Kirby J).

68 As argued in Stone, 'Rights, Personal Rights and Freedoms', above n1.

### A. *The Potential Power of Non-Express Rights*

To make that argument, I will first address a possible suggestion to the contrary. It might be argued that Australia's current system of constitutional rights is an especially *powerful* method for the protection of rights. Certainly some commentators have considered the existing express and implied rights to be at least functionally equivalent to a bill of rights. Following the early decisions recognising the freedom of political communication, Michael Detmold optimistically heralded the arrival of 'The New Constitutional Law', stating 'we now have everything a written bill of rights could give us'.<sup>69</sup>

The argument could perhaps be taken even further. Those who fear that articulating rights in textual form would undesirably limit rights,<sup>70</sup> or encourage technical legal argument about the meaning of text over substantive consideration of values,<sup>71</sup> might prefer a system in which rights are implied from constitutional structures or fundamental assumptions. After all, the point of these structural methods of interpretation is that they focus our attention on the nature of the Constitution and the institutions it creates.<sup>72</sup>

Viewed in that light, the interpretive methods just discussed can be viewed as instances of a potentially broader phenomenon.<sup>73</sup> The method of implication might give rise to a broad range of rights implied from various constitutional structures or perhaps even the nature and existence of the Constitution itself.<sup>74</sup> The reference to common law rights in *Nationwide News* and *Davis* might find analogous applications in the use of international law<sup>75</sup> or perhaps even by reference to developments in statute law.<sup>76</sup> Judges may also respond to uncertainty in constitutional meaning by incorporating their own conception of the appropriate protection of rights or by their assessment of community values.<sup>77</sup>

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69 Michael Detmold, 'The New Constitutional Law' (1994) 16 *Syd LR* 228 at 248.

70 George Williams lists this as an argument put against an Australian bill of rights in George Williams, *A Bill of Rights For Australia?* (2004).

71 A possibility raised by Jeremy Waldron, *Law and Disagreement* (1999) at 106.

72 Charles Black, *Structure and Relationship in Constitutional Law* (1969). For Black, the great virtue of the structural method is that 'it frees us to talk sense' when compared with '[t]he textual method [which], in some cases, forces us to blur the focus and talk evasively'. *Id.* at 13.

73 In a recent speech Kirby J, above n31, issued a reminder of the continuing significance of implied rights: 'At least in a country such as Australia, without a comprehensive and entrenched Bill of Rights, it is natural that courts should scrutinise cases of apparent or arguable injustice against the criterion of whether the written Constitution permits it — either in its text or in the implications derived from that text or the assumptions upon which it is drawn.'

74 See Detmold, above n69.

75 Prominently (and controversially) Kirby J interprets the Constitution by reference to international law. Kirby J adopted this approach in his interpretation of the constitutional guarantee of 'just terms' in s51(xxxi) (*Newcrest Mining (WA) Ltd v BHP Minerals Ltd & the Commonwealth* (1990) 190 CLR 513 at 657–658), in his interpretation of the Commonwealth's power to make laws with respect to 'the people of any race' (*Kartinyeri*, above n35 at 417–418) and, most recently, in his interpretation of the Commonwealth's power over aliens and limitations on that power implied from the separation of judicial power (*Al Kateb*, above n26 at [150]).

Detmold's declaration was, to be fair, intended as a statement of constitutional theory rather than a prediction of the direction that the High Court would take.<sup>78</sup> However, its failure as a matter of prediction points to a deeper problem — the problem of interpretive disagreement. Most of the methods of constitutional interpretation on which Australian constitutional rights rely are contested, either generally or in their specific applications. Disagreement about constitutional rights thus stems from the highly contested nature of constitutional interpretation itself.

Interpretations of the Constitution will be most secure when an interpretation is clearly supported by one or more established methods and is not inconsistent with any of them. Established methods are textual argument, historical (or originalist) argument, argument based on precedent, and implications from the constitutional text and structure. Although there are disagreements about the proper emphasis to be given to these arguments in any given case, it is generally agreed that there is *some* place in constitutional interpretation for their use. By the same token, however, readings of the Constitution which rely on controversial modes of constitutional interpretation or which seem to run contrary to one of the established modes will be much less secure. The problem for many of the Australian constitutional rights is that there is at least one established form of constitutional argument (usually one based on constitutional text or constitutional history) that undermines them.

## **B. The Problem of Interpretive Disagreement**

### *(i) Reliance on a Contested Method of Constitutional Interpretation*

The phenomenon of interpretive disagreement is most obvious in relation to the implication of rights based on fundamental doctrines of the common law or other unexpressed concepts. For this reason perhaps, the implication of such rights has never been fully accepted by the courts,<sup>79</sup> and the recognition of rights implied in this manner has only ever been sporadic and, except where supported by long-standing precedent, remains tentative.<sup>80</sup>

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76 This method is not widely advocated or even discussed. However, in an intriguing passage in *Street*, above n12, Gaudron J appears to interpret the Constitution by reference to developments in legislation when, along with other members of the court, she adopted a substantive and more rights-protective interpretation of the concept of discrimination (found in the s117 prohibition on discrimination based on state residence). In reference to the earlier cases on s117, she held at 566 that those cases 'do not reflect recent developments within the field of anti-discrimination law which have led to an understanding that discrimination may be constituted by acts or decisions having a discriminatory effect or disparate impact (indirect discrimination) as well as by acts or decisions based on discriminatory considerations (direct discrimination)'. Her Honour referred to the *Sex Discrimination Act* 1984 (Cth) s5, the *Anti-Discrimination Act* 1977 (NSW) s7; and the *Equal Opportunity Act* 1984 (Vic) s17.

77 See John Braithwaite, 'Community Values and Australian Jurisprudence' (1995) 17 *Syd LR* 351; Wojciech Sadurski, 'Conventional Morality and Judicial Standards' (1987) 73 *Va LR* 339.

78 Detmold's argument is that the very idea of a constitution brings with it rights at least as extensive as those seen in a typical bill of rights: Detmold, above n69.

79 The method is regarded as relying on weak historical premises and is too imprecise to provide a meaningful limit on government. Winterton, above n3 at 142–143.

80 As is the case with the 'rule of law' assumption recognised in the *Communist Party Case*, above n34.

Reservations about this kind of interpretive method have thus prevented the realisation of Michael Detmold's vision of 'The New Constitutional Law' which would recognise extensive implied rights, and in which the interpretation of the Constitution more generally would be infused by a commitment to equality and the rule of law. These reservations have also prevented the general acceptance of Kirby J's anti-originalist<sup>81</sup> and internationalist<sup>82</sup> approach to constitutional interpretation.<sup>83</sup> That approach would allow for much greater protection of rights in the Constitution because it renders irrelevant the framers' decision not to include rights in the Australian Constitution<sup>84</sup> and provides a mechanism for the incorporation of the growing international law of human rights.

(ii) *Accepted Method; Contested Application*

Constitutional interpretation is further complicated by disagreements that arise as to the applications of a given method of interpretation. Thus, even when a method of constitutional interpretation is accepted, particular doctrinal developments are likely to remain disputed. That phenomenon is best illustrated by reference to the implication of the freedom of political communication. The judgments first recognising the freedom of political communication stressed the legitimacy (and prior use) of the method of constitutional implication.<sup>85</sup> Nonetheless, the implication of a freedom of political communication was controversial, largely because it appeared to run contrary to originalist arguments as to the intention of the framers and because of doubts as to its textual foundation.<sup>86</sup> Even among those

81 Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *MULR* 1.

82 See above n75.

83 Despite Kirby J's opposition to the originalist method, other members of the court continue to have regard to constitutional history, including the framers' intention, to determine the meaning of the Constitution. Among many examples, see *Grain Pool of Western Australia v Commonwealth of Australia* (2000) 202 CLR 479 at 492–496, 515, in which a joint judgment of six judges interpreted the Commonwealth's power with respect to 'patents of invention' partly by reference to essential characteristics in 1900 and in which Kirby J declined to consider the historical meaning of the phrase. On these cases see Graeme Hill, '“Originalist” v “Progressive” Interpretations of the Constitution – Does it Matter?' (2000) 11 *PLR* 159. See also, *Singh v The Commonwealth* (2004) 209 ALR 355 in which all members of the High Court (including Kirby J) interpret the Commonwealth's power with respect to 'aliens' by reference to the historical understanding of that concept and Leslie Zines, 'Dead Hands or Living Tree? Stability and Change in Constitutional Law' (2004) 25 *Adel LR* 3. For a critical assessment of Kirby J's anti-originalism, see Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *MULR* 677. For judicial rejection of Kirby J's approach to international law see *Al Kateb*, above n26 at 140–144. See generally, Kristen Walker, 'International Law as a Tool of Constitutional Interpretation' (2002) 28 *Mon LR* 77; Amelia Simpson & George Williams, 'International Law and Constitutional Interpretation' (2000) 11 *PLR* 205.

84 For accounts of the framers' attitudes with respect to rights, see Charlesworth, above n1 at 20–27; see Enid Campbell, 'Civil Rights in the Australian Constitutional Tradition' in Carl Beck (ed), *Law and Justice* (1970).

85 *Australian Capital Television*, above n15 at 133 (Mason CJ); *Nationwide News*, above n53 at 41 (Brennan CJ), 69–70 (Toohey J), 209–210 (Gaudron J).

86 *Australian Capital Television*, id at 186 (Dawson J). See also, Jeffrey Goldsworthy, 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue' (1997) 32 *Mon LR* 362.

judges who have accepted that some form of implication exists, there are doubts — inspired by originalist and textualist concerns — about some of its applications. In particular, its application to the common law of defamation in *Theophanous v The Herald & Weekly Times*<sup>87</sup> was almost immediately subject to doubt<sup>88</sup> and soon after revised in *Lange v Australian Broadcasting Corporation*.<sup>89</sup>

The weakness that arises from this controversy has now been offset by the weight of precedent. The existence of the implied freedom of political communication was affirmed unanimously, though confined, in *Lange*. By virtue of the weight accorded to that decision, the existence of the implied freedom is probably beyond challenge for the moment. Nonetheless, the controversy surrounding the doctrine and its insecure textual and historical foundations may have ongoing effects. The freedom of political communication still remains the subject of some judicial opposition,<sup>90</sup> and there may long be a temptation to revisit the foundational question of the doctrine's legitimacy.<sup>91</sup>

In addition, it seems that misgivings about the doctrine's foundation have had a continuing effect on its content. Doubts about the doctrine's textual basis were answered in *Lange* with an attempt to confine the doctrine to the necessary implications from the text and structure of the Constitution.<sup>92</sup> However, as I have argued at length elsewhere,<sup>93</sup> it is not possible to understand or articulate the extent of the freedom of political communication without reference to some ideas or values found outside constitutional text. By discouraging attention to these values, the High Court has deprived itself of the tools it needs to develop the freedom of political communication in a coherent manner.<sup>94</sup>

### (iii) *Text and Context*

A common thread in this discussion relates to the role of constitutional text. Rights implied from text and structure, rights implied from constitutional assumptions, and rights-sensitive tests of application all lack an obvious textual foundation in

87 (1993) 182 CLR 104.

88 See, *McGinty v Western Australia* (1995) 186 CLR 140 at 235–236 (McHugh J), 291 (Gummow J).

89 Above n13 at 566.

90 See *Lenah Game Meats v Australian Broadcasting Corporation* (2001) 208 CLR 199 at 331 (Callinan J).

91 As has occurred with respect to the implied (or 'unenumerated') constitutional right of privacy and consequent limits on state power to regulate abortion recognised by the United States Supreme Court in *Roe v Wade* 410 US 113 (1973). Despite widespread doubts about the decision (see John Hart Ely, 'The Wages of Crying Wolf: A Comment on *Roe v. Wade*' (1972) 82 *Yale LJ* 920; Ruth Bader Ginsburg, 'Some Thoughts on Autonomy and Equality in Relation to *Roe v Wade*' (1985) 63 *North Carolina LR* 375), *Roe v Wade* was affirmed (though modified) in *Casey v Planned Parenthood* 505 US 833 (1992). However, there remains a real possibility that it will one day be overruled. The views of potential Supreme Court Justices on the question are, therefore, closely scrutinised. See, 'Symposium: The Judicial Appointments Process' (2001) 10 *William and Mary Bill of Rights LJ*.

92 *Lange*, above n13 at 566.

93 Stone, 'The Limits of Constitutional Text and Structure', above n1. For a judicial response, see *Coleman*, above n66 at 204–206.

94 For example, the court's commitment to 'text and structure' does not provide an adequate basis for determining the class of communication entitled to protection. On this see Stone, 'Rights, Personal Rights and Freedoms', above n1 at 378–390.

the Constitution. Reliance on constitutional text is a particularly powerful form of constitutional argument, at least where the text is sufficiently specific to resolve the question at issue.<sup>95</sup> Thus without clear textual recognition, rights-protective constitutional interpretations are vulnerable to later revision.<sup>96</sup> It is not surprising therefore to see a judicially created doctrine, like the doctrine of proportionality, revised and considerably confined.<sup>97</sup>

But text *alone* is also an insecure basis for the recognition of constitutional rights. Where constitutional text is read without reference to its context or its historical understanding, that interpretation is likely to be vulnerable to revision because aspects of context and historical understanding will be advanced as reasons to doubt that interpretation, even if that interpretation *could* be reconciled with constitutional text. Consider for example, the peculiarly open-textured s92. The injunction that ‘trade, commerce and intercourse among the States shall be absolutely free’ was once read as a guarantee of an individual right to engage in these activities.<sup>98</sup> However, that interpretation (at least in so far as it applied to inter-state trade and commerce) eventually gave way to an interpretation, informed by the section’s history, aimed at preserving free trade among the states.<sup>99</sup>

(iv) *Are the Express and Implied Rights really ‘Rights’?*

The insufficiency of constitutional text, considered without reference to other sources of constitutional understanding, casts doubt on whether the so-called express rights are properly regarded as ‘rights’ at all. The chief reason for

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95 As I have explained elsewhere, reliance on constitutional text appeals to ‘rule of law’ values. Constitutional text is an ascertainable and generally applicable source of law and is the result (at least it is often argued) of a legitimate law making process. See Stone, ‘The Limits of Constitutional Text and Structure’, above n1 at 706.

96 Michael Dorf has made a similar observation about the use of structural argument in constitutional interpretation: ‘[i]n our legal culture — by which I mean at least the legal culture of the common law countries and probably something substantially broader — interpretive arguments unmoored from text are always vulnerable to being attacked as illegitimate... structuralism in the absence of clear textual warrant is always vulnerable to retrenchment’. Michael Dorf, ‘Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity’ (2004) 92 *Georgetown LR* 833 at 834.

97 The High Court has since held that proportionality has a very limited role in determining whether a Commonwealth law is ‘with respect to’ a (non-purposive) head of legislative power: *Leask*, above n62. There were differences, however as to how that revision was expressed. Brennan J’s approach was to equate the test of proportionality with more deferential (and traditional) tests of application, finding that ‘[p]roportionality is another expression for “appropriate and adapted”...[s]o used, proportionality has nothing to say about the appropriateness, necessity or desirability of the law to achieve an effect or purpose’. *Leask*, above n62 at 593. Dawson J, on the other hand, declared that ‘to introduce the concept of proportionality... is to introduce a concept which is alien to the principles which this court has hitherto applied’: at 602.

98 *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497; *Hughes & Vale Pty Ltd v New South Wales (No 1)* (1954) 93 CLR 1. For an account of the complex history of s92 and its various interpretations see Zines, above n1 at 124–135 and Michael Coper, *Freedom of Interstate Trade under the Australian Constitution* (1983).

99 *Cole v Whitfield*, above n10. Zines, above n1 at 136–143.

regarding these provisions as 'express rights' is that they appear to resemble rights found in constitutional bills of rights in other systems.<sup>100</sup> However, despite this superficial resemblance, there are some other matters — some contextual and some historical — that suggest an opposite conclusion. For one thing, these provisions are scattered through a document otherwise concerned with structures of government and the division of power between the central and state governments. Although that is not entirely unprecedented,<sup>101</sup> their textual manifestation reflects the place they held in the framers' deliberation. At most, rights were an intermittent concern in a task overwhelmed with the more pressing task of forming a federation.<sup>102</sup>

The classification of many constitutional provisions as constitutional rights may therefore be open to challenge by reference to methods of constitutional interpretation that rely on historical meaning. Consider the protection of religion conferred by s116 of the Constitution. An interpretation informed by the history of that provision (and perhaps also the context of the provision, or at least its 'free exercise' and 'non-establishment' requirements, which is placed in a chapter headed 'The States') might interpret the provision to be aimed only at preserving state independence with respect to the regulation of religion.<sup>103</sup> On this analysis, s116 would be devoted to dividing power among the states and the Commonwealth, like much of the rest of the Constitution.

Section 80 could be similarly reinterpreted. James Stellios has shown how such an argument could be made in relation to the jury trial requirement of s80, which he characterises as 'an essential element of [the] federal structure'.<sup>104</sup> His argument is that s80 operates: to qualify the power of state Parliaments over the constitution of state courts;<sup>105</sup> to empower a lay panel of a federal court to exercise the judicial power of the Commonwealth (in the form of jury trials); and to ensure that in federal criminal cases, accused persons face a jury drawn from their own

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100 Compare for example the text of s116 ('The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth') with the relevant parts of the First Amendment to the Constitution of the United States ('Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof').

101 Consider the 'Bill of Attainder' clauses in Art I ss3 and 10 of the United States Constitution.

102 See Charlesworth, above n1 at 20–27; Campbell, above n84.

103 Such an analysis might rely on constitutional history. Delegates at the drafting Conventions appear to have been concerned that 'without the prohibition, the Commonwealth would have been in a position to regulate Sunday observance throughout Australia... it was clear that the mere prospect, however remote, of a federal government legislating in this area was one which most state representatives desired to avoid.' Campbell, above n84 at 307–308. See also, John Quick & Robert Randolph Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 951.

104 James Stellios, 'Section 80 of the Constitution — "A Bulwark of Liberty"' (2005) (1) 27 *Syd LR* 113 (forthcoming).

105 By preventing them from abolishing jury trials when the federal Parliament has provided for a trial by indictment for an offence against Commonwealth law.

state. Stellios' argument is important because it accepts the (undeniable) point that the reasons given for the current interpretation of s80 are unconvincing, but challenges the idea that a 'rights-promoting' interpretation would be the natural replacement. It remains to be seen whether such arguments are available with respect to other 'express rights', but the argument serves as a reminder that, even in this sphere, a rights-promoting interpretation may not be the only coherent alternative to the current interpretation.

At base, the problem with Australia's constitutional rights is that in most cases, there are interpretive arguments that count against them (as well as some that count in their favour). So, many of the Australian constitutional rights are likely to be mired in controversy not just as to their meaning, but also as to their existence. In this sense then they are a particularly weak form of constitutional rights protection.

#### 4. *Conclusion*

Like most other commentators on the Australian Constitution, I regard it as a weak institution for the protection of rights. In this article, I have located the source of that weakness more precisely in the interpretive controversy that inevitably attends rights-protective readings of a constitution that, in textual and historical terms, is so inhospitable to rights. Having reached that conclusion I will not, however, go on to argue for a constitutional bill of rights. Indeed, I regard the current state of Australia's constitutional rights as largely irrelevant to that question.

That conclusion might not be immediately obvious. At first glance, my argument could make an Australian bill of rights seem more attractive. An express bill of rights would, after all, settle interpretive controversy as to the existence of constitutional rights. An express bill of rights would provide judges with two good arguments for the existence of constitutional rights — constitutional text and a clear expression of 'original' intention.<sup>106</sup> If the Australian Constitution contained an explicit right of freedom of expression, a right of due process or an equality guarantee, there would be no point to a debate about whether one should be implied from text and structure or in some other manner. Similarly, guarantee of a right to a jury trial (without a requirement for indictment) would end the attempts to derive such a guarantee from s80, and an express freedom of religion (expressed in terms that made it generally applicable) would render irrelevant the limitation of s116 to Commonwealth laws.

The settling of this interpretive controversy, however, does not make the case for an Australian bill of rights. Certainty is an important legal value, but the adoption of a bill of rights would, if anything, make Australian constitutional law more complex and uncertain. The adoption of a bill of rights would settle

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106 That is, the enactment of a bill of rights would be taken as an expression of intention (by the framers of that bill of rights and by the people who ratified it) to protect rights.

interpretive controversy about the existence of rights, but an interpretive controversy about the precise meaning of the rights adopted would remain.<sup>107</sup>

Importantly, that controversy about the meaning of rights would not be reduced by their recognition in constitutional text. The text itself will provide only limited guidance.<sup>108</sup> Further, though a court interpreting a bill of rights would have various interpretive resources (such as international case law and scholarship on questions of rights), the guidance such resources could provide is also limited.

In each case, these resources are undermined by the prevalence of disagreement about the precise meaning of rights concepts. It is because rights are the subjects of such disagreement that bills of rights are expressed in general terms, leaving disputes about the limits of rights and their competing conceptions unresolved.<sup>109</sup> That same disagreement about rights would be reflected in other interpretive resources. Consider, for example, the suggestion that '[t]he social or political background to rights created [through a bill of rights formulated with wide popular involvement] may ... assist the High Court in its role by giving it the context necessary to balance rights against other community interests'.<sup>110</sup> Although the 'social and political background' may illuminate very general points of agreement (as may the text), it is difficult to see how it would yield much information useful in the rather precise process of determining 'the limits of a right'.<sup>111</sup>

And as a practical matter, a bill of rights would almost certainly expand the realm of constitutional rights. Therefore, even if (contrary to my earlier argument) a bill of rights could achieve greater certainty about the content of, say, constitutional freedom of expression, a bill of rights would give rise to many controversies surrounding rights that currently do not have constitutional status.

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107 In relation to the freedom of expression, I address some of these issues in Stone, 'The Limits of Constitutional Text and Structure', above n1, and Stone, 'Rights, Personal Rights and Freedoms', above n1.

108 It would, of course, be entirely naïve to suggest otherwise. Although rights can occasionally be expressed in a relatively specific form, most rights are expressed in general terms. Moreover, as Leighton McDonald points out, generality in the expression of rights is inevitable. In a diverse society, it is only because rights concepts are indeterminate (and the terms in which they are expressed consequently general) that a bill of rights can obtain general agreement. Leighton McDonald, 'New Directions in the Australian Bill of Rights Debate' (2004) 12 *Public Law* 22.

109 Jeremy Waldron, *Law and Disagreement* (1999) at 220; Andrei Marmor, 'On the Limits of Rights' (1997) 16 *Law and Philosophy* 1.

110 Williams, above n1 at 259.

111 Williams admits these resources would not provide the courts with very precise guidelines for the resolution of particular disputes but maintains that they 'would assist a court in ascertaining the appropriate limits of a right and where it might draw the line between the judicial and political process'. Williams, above n1 at 259. But 'ascertaining the appropriate limits of a right' requires a precise determination of the nature of a right (what activity it covers, how much protection it confers on that activity) and its relative weight with respect to other rights and interests. If 'the social and political background' or 'context' cannot assist with that task then it is difficult to see what it adds to the process of applying rights and in particular how it renders that task more precise than the task of applying implied rights.

An argument for an Australian bill of rights does, of course, remain. By resolving interpretive disagreement about the existence of rights, an express bill of rights would seriously limit the capacity of a court to eviscerate or completely eradicate those rights. However, the weakness of the existing constitutional rights — including the possibility of their eradication — is only undesirable if stronger constitutional rights are desirable. Thus, we return to that fundamental question: whether constitutional rights are, in the final analysis, to be preferred to other methods of rights protection.

# *Feudal Tenure and Native Title: Revising an Enduring Fiction*

SAMANTHA HEPBURN\*

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## *Abstract*

This article argues that the feudal doctrine of tenure continues to endure as the foundation for Australian land law despite its obvious social and historical irrelevance. The doctrine of tenure is a derivation of feudal history. The article examines some of its historical foundations with the aim of highlighting the disparity between the fiction of this inherited form and the reality of a colonial Australian landscape. Particular attention is given to the fact that Australian feudal tenure was always a passive framework. It was disconnected with the landscape and therefore incapable of responding to the needs of colonial expansion. This resulted in a clear disparity between feudal form and the reality of a land system populated by statutory grants. The article argues that feudal tenure was never truly devised as a responsive land system but rather, adopted as a sovereignty device. In this sense, legal history was utilised with the aim of promoting imperial objectives within colonial Australia. Tenure was equated with absolute Crown ownership over all Australian territory despite the fact that this was inconsistent with the orthodox tenets of feudal tenure.

The article argues that the consequence of adopting feudal tenure and absolute Crown ownership has been the estrangement of indigenous rights, title and culture. The creation and legitimisation of a land framework with a fundamentally Eurocentric perspective completely destroyed indigenous interests during the settlement and colonial era. It created an imperial ideology where colonists silently accepted the denial of indigenous identity. The decision of the *Mabo* High Court to reassess this historical perspective and accept the validity of proven native title claims clearly disturbed tenurial assumptions. However, the High Courts' reification of the feudal form created a fundamental paradox: indigenous title was accepted as a proprietary right within a framework incapable of and unequipped to recognise the fundamentally different cultural perspectives of customary ownership. The article argues that native title cannot evolve within a common law framework that regards ownership as a derivation of the English Crown. It is suggested that ultimately, a pluralist property culture, where indigenous and non-indigenous title exist as equalised entities, can only be properly nurtured with the full and absolute abolition of the feudal doctrine of tenure.

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*Time now is a gift for you  
A gift of freedom  
To think and remember and understand  
The ever perplexing past  
And to re-create yourself anew  
In order to transform time  
Ben Okri<sup>1</sup>*

## **1. Introduction**

The purpose of this article is to examine the continuing operation of the doctrine of tenure following the introduction of native title within Australian jurisprudence. Specifically, it is argued that the fundamental nature of feudal tenure, as adopted by the colonial authorities, is an inappropriate and inadequate principle for the regulation of Australian landholding.

In adopting the feudal doctrine of tenure, colonial law-makers within Australia created their own ‘self-interested truth’ — which, in the tradition of such power constructions, perpetuated their own interests. It was not until the *Mabo*<sup>2</sup> decision that the High Court indicated a preparedness to re-examine the validity of the ‘truths’ underpinning the application of feudal tenure within Australia. Nevertheless, whilst *Mabo* altered the character of these truths through the rejection of enlarged *terra nullius* and recognition of the existence of indigenous inhabitants, its ultimate effect was undermined by the decision to retain the doctrine of tenure; in effect this conclusion has reinstationalised the process by which such truths gained acceptance in the first place.

This article argues that it is time to break the inexorable imperial links and develop a distinctive and allodial Australian land system capable of incorporating the range of common law, statutory and indigenous interests which currently populate our land law framework. It is argued that the abolition of feudal tenure and its associated constructs would rid the system of an enduring, ethnocentric fiction, thereby encouraging courts to refocus upon the issue of whether native title exists, rather than how it exists.<sup>3</sup>

## **2. Feudal Tenure and Australian Land Law**

The doctrine of tenure, as it exists in Australian land law today, was inherited from English common law upon settlement. The form of tenure that the Australian colonies adopted was similar to the early feudal version of tenure in that it assumed that the Crown acquired absolute ownership of land upon settlement. The adoption by Australian colonies of *feudal* tenure was rather incongruous given the fact that

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1 Taken from the poem ‘To an English Friend in Africa’, *An African Elegy* (1992).

2 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (hereafter *Mabo*).

3 For a discussion of the relationship between the conceptual nature of property and its structural position see Kevin Gray, *Elements of Land Law* (1987); William Buckland & Arnold McNair, *Roman Law and Common Law: A Comparison in Outline* (2<sup>nd</sup> ed, 1952).

tenure in 19<sup>th</sup> century England had changed significantly from its feudal origins.<sup>4</sup> This incongruity was not a consequence of an injudicious social or historical homage. It is clear that the adoption of feudal tenure in the Australian colonies had a deeper political motivation; feudal tenure was inextricably linked to the notion of absolute Crown ownership, and the application of this principle to acquired territories invested Imperial authorities with power and control. This was particularly important in territories already occupied by indigenous inhabitants. Absolute Crown ownership enabled the courts to rationalise the destruction of indigenous title because no other form of ownership could exist within such a regime.<sup>5</sup>

The distinction between early feudal tenure and its nineteenth century counterpart is significant. By the 19<sup>th</sup> century, the feudal notion of a reciprocal land grant had all but withered; this was a consequence of legislative and social factors.<sup>6</sup> *Statute of Tenures* (1660) 12 Car 11, c24 was an act which resulted in the abolition of most forms of traditional feudal tenure, the fourth section of the Act declaring that any future tenure created by the Crown had to be a tenure in ‘free and common socage’.

A variety of different forms of tenure existed in feudal England. Temporal or lay tenures existed where secular people held land. Such tenures were then divided into two forms, free or base tenures. The frank or freehold tenures were: (1) knights service, with its variety of services including serjeanty, escuage, castle ward and cornage; and (2) free socage, with its varieties of petty serjeanty, borough-English, burgage tenure and gavelkind.<sup>7</sup> The base, customary or ‘villein’ tenures were: (1) pure villeinage, which was either copyhold or customary freehold tenures; and (2) privileged villein or villein socage — this tenure was primarily held by unfree men and is now obsolete having been converted into socage tenure.<sup>8</sup> Where a non-secular person held a tenure, it was classified as an ecclesiastical or spiritual tenure. There were two forms of such tenures: frankalmoign and tenure by divine service.<sup>9</sup>

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4 See in particular the discussion by AR Buck, ‘*Attorney-General v Brown* and the Development of Property Law in Australia’ (1994) 2 *APLJ* 128 at 133 where the author notes that ‘paradoxically the feudal system had a greater force in New South Wales than even in England’.

5 AR Buck, ‘Property, Aristocracy and the Reform of the Land Law in Early Nineteenth Century England’ (1995) 16 *JLegHist* 63 at 68 where the author discusses the nexus between political logic and the perpetuation of Imperial power in England; John Latham, ‘The Migration of the Common Law: Australia’ (1960) 76 *LQR* 54.

6 For a particularly good discussion on the decline of the feudal dynamic see Francis Philbrick, ‘Changing Conceptions of Property in Law’ (1938) 86 *UPa LR* 691 at 710; Theodore Plucknett, *A Concise History of the Common Law* (5<sup>th</sup> ed, 1956) at 506–520 for a general discussion on the impact that feudalism had upon the conception of property rights.

7 Alfred Simpson, *A History of the Land Law* (2<sup>nd</sup> ed, 1986) at 2; William Searle Holdsworth, *A History of English Law Vol II* (4<sup>th</sup> ed, 1936) at 56–78.

8 *Law of Property Act* 1922 (Imp), Pt V.

9 See generally JH Thomas (ed), *Systematic Arrangement of Lord Coke’s First Institute of the Laws of England* (1986).

The principle free tenure was socage and it became the usual form of tenure held in most parts of England. After the *Statute of Tenures* (1660) was passed many forms of tenure ceased. However, in England, much of the land continued to be held in the non-freehold tenure known as ‘copyhold’ — this tenure was not abolished in England until 1925.

When Australian colonies inherited the feudal version of tenure, they did not adopt the old feudal tenures associated with that regime. The only form of feudal grant implemented within Australia was free and common socage; a grant generally regarded as synonymous with absolute ownership in the hands of the possessor, without Crown reservation. It has been argued that the lack of reciprocity associated with a free and common socage actually implies a rejection of feudal principles, as noted by AR Buck in his analysis of *Attorney-General v Brown*. The counsel for defence in that case, Mr Richard Windeyer, expressly highlighted the allodial character of a free and common socage grant. Windeyer felt that the unquestionable meaning of the Statute of Tenures was:

That under the term free and common socage, the possessor of land would have, in effect, allodial tenure; the property meaning of the term allodial as defined by Blackstone was a holding of the entire of the property independent of any superior.... If the Crown as the mere divider of the land among its subjects could reserve anything for itself, then it would follow all that slavery which the Act of Charles II had meant to guard against.<sup>10</sup>

This argument was, however, rejected by the New South Wales Supreme Court, who concluded that in a newly discovered country, settled by British subjects, the feudal system is no fiction and all of its notions and principles must endure. The primacy of the feudal tradition was clearly enunciated in the classic statement of Stephen CJ when he concluded in *Attorney-General v Brown* that the *feudal* system of tenures was part of the ‘universal law of the parent state’, and, ‘on what shall it be said not to be law, in New South Wales’.<sup>11</sup>

The decision of the New South Wales court in *Attorney-General v Brown* is generally accepted as the foundation of Australian land law and effectively revived the ‘ghost of feudalism’.<sup>12</sup> There are, however, a number of significant concerns with this conclusion; in the first place, it was illogical to adopt the strict tenets of feudal tenure when that version no longer existed in England.<sup>13</sup> Second, it is arguable that feudal tenure and its fundamental tenet, absolute Crown ownership, was destroyed with the abolition of the feudal grants under the *Statute of Tenures* (1660). The remaining tenure, free and common socage, is more allodial than

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10 *Attorney-General v Brown* (1847) 2 Legge 312; 2 SCR (NSW) App 30. This is outlined in Buck, above n4 at 132. For a general discussion on the meaning of free and common socage in Australia see Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966).

11 *Attorney-General v Brown*, id at 318.

12 In *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 439 Isaacs J held that the *feudal* principle was certainly applicable to Australian land law; also the decision of Stephen CJ in *Attorney-General v Brown*, *ibid*, was endorsed by *Council of the Municipality of Randwick v Rutledge* (1959) 102 CLR 54.

13 This was raised by Buck, above n4 at 133.

feudal in nature and is therefore inconsistent with the perpetuation of a feudal regime promoting absolute Crown ownership. The final and most compelling concern is the clear absence of any historical nexus with feudalism; how can a tenure regime inextricably linked to a feudal society be adopted by a country with no history or experience of feudalism?

The absence of any clear rationale explicating these concerns indicates the possibility of an alternative motivation. The adoption of feudal tenure and absolute Crown ownership was a convenient political device for land acquisition during the Imperial expansion; if the Crown was presumed to occupy the position of paramount lord, it would hold complete ownership over all land *to the exclusion of any other*. As noted by Professor Jenks:

If no subject could show a recognised title to any of the countless acres of America and Australia, at a time when those countries were first opened up by white men, it followed that, according to this relic of feudal history, these acres belonged to the Crown. It may seem almost incredible that a question of such magnitude should be settled by the revival of a purely technical and antiquarian fiction.<sup>14</sup>

Hence, the most obvious basis for the assumption of a feudal version of tenure by the Australian colonies was, ultimately, political. The Crown, in the words of Blackburn J in *Milirrpum v Nabalco Pty Ltd*, automatically became ‘the source of title to all land’, and ‘every square inch of territory in the colony became the property of the Crown’ in order to preclude the enforceability of any alternative property claim.<sup>15</sup> The political dimensions associated with the adoption of feudal tenure meant that its relevance to the social structure of the colonies was never properly explicated. The difficulty with this is that feudal tenure is, organically, a social dynamic; its tenets, particularly that of absolute Crown ownership, emerged from a feudal society and arguably have no relevance to a non-feudal society with indigenous inhabitants.<sup>16</sup>

If the ‘roots of the doctrine of tenure lie in the economic and political interstices of the feudal system’, an examination of the medieval feudal infrastructure is important to highlight its irrelevance not only to Australian land law, but more significantly, to indigenous inhabitants and indigenous title.<sup>17</sup> Feudal tenure has existed as a fundamental impediment to the recognition of native title interests since its inception in Australian land jurisprudence; it is not just that the doctrine is socially and historically irrelevant to Australia, but more fundamentally, it has come to represent an apparatus for the obliteration of indigenous interests and, ultimately, indigenous existence.

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14 Edward Jenks, *A History of the Australasian Colonies* (1896) at 59.

15 (1971) 17 FLR 141 (hereafter *Milirrpum*). See also *New South Wales v Commonwealth* (1975) 135 CLR 337 at 438–439.

16 *Mabo*, above n2 at 35 (Brennan J).

17 Brendan Edgeworth, Christopher Rossiter & Margaret Stone, *Property Law: Cases and Materials* (7<sup>th</sup> ed, 2004) at 194.

To fully appreciate the need for a systemic change in our land infrastructure, the precise nature of the feudal redundancy must be carefully explored. This analysis begins with a detailed examination of ‘the foundation, upon which what remains is erected’.<sup>18</sup> The nature of the medieval feudal dynamic is examined to properly highlight the distinction between the feudal purity associated with Norman England and the feudal corruption associated with imperial colonialism.

### 3. *The Historical Prototype: The Nature of Medieval Feudal Tenure*

In medieval feudal society, tenure was a vital component of an interdependent social structure.<sup>19</sup> Feudal tenure in Norman England provided much needed social cohesion and was economically and geographically suited to the landscape and community of the time.<sup>20</sup> Feudal tenure was, in essence, a social phenomenon of the feudal society that existed in Norman England; it represented a synthesis of ‘primitive decentralisation and imperial order’ and stratified society on the dual grounds of tenure and fealty.<sup>21</sup> More specifically, Maitland defines feudalism as:

A state of society in which the main social bond is the relation between the lord and man, a relation implying on the lord’s part protection and defence; on the man’s part protection, service and reverence, the service including service in arms. This personal relation is inseparably involved in a proprietary relation, the tenure of land — the man holds of the lord, the man’s service is a burden on the land, the lord has important rights in the land, and (we may say) the full ownership of the land is split up between man and lord.<sup>22</sup>

It is generally accepted that medieval feudalism commenced with the invasion of England by the Normans.<sup>23</sup> Whilst feudalism itself can be traced back to Norman custom, English feudalism flourished with the administrative aptitude of the Normans following the conquest of England in 1066. Feudal society was not unique to England, being a very old system that, with particularised differences, has existed in three-quarters of our hemisphere.<sup>24</sup>

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18 William Blackstone, *Commentaries on the Laws of England* Vol 2 (9<sup>th</sup> ed, 1978) at 44; Samuel Thorne, ‘English Feudalism and Estates in Land’ [1959] *Camb LJ* 193; William Windeyer *Lectures on Legal History* (1957) at 42–45; Stroud Milson, *The Legal Framework of English Feudalism* (1976); Michael Stuckey, ‘Feudalism and Australian Land Law: “A Shadowy, Ghostlike Survival”?’ (1994) 13 *U Tas LR* 102 at 105; Archibald Paton Thornton, *Doctrines of Imperialism* (1982); Archibald Thornton, *The Imperial Idea and Its Enemies: A Study in British Power* (1959).

19 Milson, *id* at 39; John Pocock, *The Ancient Constitution and Feudal Law* (1957) especially at 249.

20 A description of tenure from Stuckey, above n18 at 105.

21 Frederick Maitland, *The Constitutional History of England* (1955) at 143.

22 *Ibid*.

23 It has been suggested that English feudalism existed socially prior to the conquest in 1066 — see Frederic Maitland, *Domesday Book and Beyond* (1897) — the generally accepted premise is that English feudalism was a result of the Norman Conquest: Plucknett, above n6.

24 *Esprit des Lois*, XXX, I; Voltaire, *Fragments sur quelques revolutions dans l’Inde* (ed Garnier, XXIX, p 91).

Feudalism has its origins in the decline of the Roman Empire — which sent much of Western Europe into chaos and disorder. In such an environment, the desire for peace and security was an important contribution to the successful acceptance of feudalism.<sup>25</sup> English feudalism could be distinguished from that which developed in European cities by its sweeping and universal application; the conqueror was the paramount lord over all of the land, meaning that in theory, no allodial or ‘free’ land remained.<sup>26</sup>

Contemporary perceptions of English feudal society tend to focus upon the pyramid nature of the power infrastructure, with power and title to all land emanating from the king who was at the peak of the pyramid — his powers coming in turn from the divine authority of the Church. Whilst this depiction is accurate, the essence of feudal society was deeper and more complex in nature, having legal, political and social manifestations.<sup>27</sup>

Feudal society was firmly embraced by the Normans and the Saxons because it was perceived as the best way of ensuring protection in circumstances where bonds of kinship were inadequate and the power of the state was weakening.<sup>28</sup> Feudal society was based upon social classification and interdependence; being structurally unequal rather than hierarchical in nature, it was a system enunciated by the sovereign lord as a means of reinforcing and retaining ultimate power. In this sense, feudalism represented, in essence, the culmination of coordinated power.<sup>29</sup>

The primary method in which such power was acquired was via the granting of landholdings from the sovereign lord. The mode of holding or occupying land from the sovereign lord became known as ‘tenure’. In accordance with the principles of tenure, all land in the hands of subjects were held of some superior, and mediately or immediately of the Crown. The possessor of the land is known as a tenant, the manner of his possession is known as tenure, and the extent or duration of his interest is as an estate.

Every tenure contained tenurial incidents. In medieval England, the incidents of tenure included: military service; homage, fealty and suit of court; wardship and marriage; relief and primer seisin; aids and escheat; and forfeiture. Most tenurial incidents were abolished in England by the *Statute of Quia Emptores* (1290), the *Tenures Abolition Act* (1660) and the *Law of Property Act* 1922 and 1925.

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25 See Henry Royston Loyn, *Anglo-Saxon England and the Norman Conquest* (2<sup>nd</sup> ed, 1991) at 180–185; Frederick Pollock & Frederic Maitland, *The History of English Law Before the Time of Edward I* Vol 1 (2<sup>nd</sup> ed, 1923) at 233.

26 See Paul Vinogradoff, *Villeinage in England: Essays in English Medieval History* (1892) at 7–9; Frederic Maitland, *The Forms of Action at Common Law* (1969); Michael Evans & R Ian Jack, *Sources of English Legal and Constitutional History* (1984) and the discussion in Peter Butt, *Land Law* (4<sup>th</sup> ed, 2001) at 59–60.

27 Michael Bennett, ‘The English Experience of Feudalism’ in Edmund Leach, SN Mukherjee & John Ward (eds), *Feudalism: Comparative Studies* (1985) at 133.

28 See generally Marc Bloch, *Feudal Society* Vols 1 & 2 (1962); Christopher Brooke, *Europe in the Central Middle Ages, 962–1154* (1974); Stroud Milson, *The Historical Foundations of the Common Law* (2<sup>nd</sup> ed, 1981); John Baker, *An Introduction to English Legal History* (2<sup>nd</sup> ed, 1979); Peter Goodrich, ‘Eating Law: Commons, Common Land, Common Law’ (1991) 12 *J of Leg Hist* 246.

29 For a general outline on Anglo-Saxon social structure see Windeyer, above n18 at 1–29.

Despite the numerous, complex divisions of tenurial arrangements in existence within feudal England, feudalism was far more than simply a landholding system; it was a social configuration which defined both the power infrastructure and social network underlying the entire community. In a legal sense, feudal tenure was an institution with defined tenurial forms and obligations; however, in a broader sense, it was the manifestation of a social exemplar. To gain a greater understanding of the operation and social character of feudal tenure it is necessary to imagine the ingrained texture of power, hierarchy and personal relations; ultimately, the framework of institutions which regulate a society can only be fully understood through a better appreciation of its human environment.

In the feudal society of Norman England, land was regarded as the source of all privilege and the basis of civil rank.<sup>30</sup> One of the reasons for this was that under the feudal regime, the sovereign lord owned all land and decided when and how a land grant should be issued. Consequently, land became a valuable commodity, and a tenurial grant conferred social prestige and acceptance. Rank, social status and military power were important social requirements within English feudal society. In order to retain military strength and ensure the proper protection of English boundaries, a large army was vital. The sovereign lord acquired much military power by exchanging vows of military loyalty in exchange for land grants.

Tenants or vassals to the land were committed to support and protect the sovereign lord and, in return, received a guaranteed possession over their estate. Under such a system, the sovereign lord became the ultimate benefactor, rewarding his vassals with land and rank in return for loyalty and military allegiance. The process of allowing the King's vassals to 'sublet' to their own vassals later became known as subinfeudation — and theoretically the feudal chain was infinite. Each intervening holder was known as a 'mesne lord' and, during the 13<sup>th</sup> century, as many as six or seven mesne lords could be interposed between the sovereign lord and the actual tenant in possession.<sup>31</sup>

Subinfeudation became the cornerstone of the medieval feudal framework; its abolition by the *Statute of Quia Emptores* (1290) changed the whole perspective of tenure, as it removed the feudal pyramid.<sup>32</sup> When Australia adopted feudal tenure, subinfeudation was no longer possible and all land was held directly of the Crown.<sup>33</sup> This is a significant distinction given the fact that in medieval England, the primary rationale for absolute Crown ownership was the legitimisation of subinfeudation landholdings which had not emanated from the King; if the King was the paramount lord, it could presume that *all* land titles were, 'fictionally', held by the King's subjects through a Crown grant. A system that did not recognise subinfeudation had no need for this 'fictional' assumption of control.

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30 See Simpson, above n7; Milson, above n18 at 45–50; JH Spencer, 'The Freeholder and Feudalism Today' (1978) 122 *Solicitors Journal* at 289.

31 See Pollock & Maitland, above n25 at 233.

32 See Frank Merry Stenton, *The First Century of English Feudalism 1066–1166* (1932); Maurice Keen, *A History of Medieval Europe* (1967).

33 *Mabo*, above n2 at 47–48 (Brennan J), 212 (Toohey J); Edgeworth, Rossiter & Stone, above n17 at 195.

Feudalism in medieval England revolved around a complicated system of interdependence; a man's standing in feudal society came to be judged by the rights he enjoyed in his benefice and the ranking of the lord from whom he received such rights. Within such a system, the state had little to do with social regulation; all feudal arrangements were essentially private in nature. Feudal society was bound together by the personal oaths of individual men to individual lords rather than a sense of communal obligation to the state.<sup>34</sup>

The service that a vassal owed in return for a benefice was particularised — each vassal's 'tenurial incidents' were based upon individual convention or tradition. The continuing obligation of the vassal to perform the tenurial services highlighted the reciprocal nature of the relationship and also emphasised the limited nature of the grant. During feudal England it was very clear that the vassal *held* the land of the lord; the continuity of the tenurial obligations and the active presence of the lord provided clear and unequivocal evidence of the mutual acceptance of universal sovereign ownership.

Structured power and social relations provided a strong sense of unity and a greater assurance for the Saxons than that which had existed in the relative 'anarchy' prior to the conquest. In this respect English feudalism gave the 'whole people, one common interest, one common sentiment and one common design'.<sup>35</sup> Upon taking the throne after the Battle of Hastings, King William swore an oath to govern two sets of people under equal laws.

This 'social' duality within Norman England meant that the Saxons never truly regarded themselves as 'assimilated' with the Normans; the direct recognition of 'equal laws' for both the Normans and the Saxons stirred the Saxons to incessantly claim their special right to be regulated according to the Saxon laws of Edward the Confessor.<sup>36</sup> Feudal society within Norman England proved it was capable of recognising the existence of two distinctive groups, however this binary culture was not reflected in the operation of the tenurial system.

Nevertheless, it is significant to note that the customary law that existed prior to feudal tenure continued to be recognised and enforced under the manorial system — in accordance with the individual custom of the particular manor — such relations being subsequently described as 'copyhold tenure'.<sup>37</sup> The continuing enforceability of copyhold tenure within the feudal system indicated the willingness of the common law to recognise and enforce well-established customs existing outside the tenure infrastructure. If the local custom could be proven to have been a 'local law before the time of legal memory' then it was recognised by common law.<sup>38</sup>

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34 Keen, above n32 at 40–42.

35 Id at 334.

36 See Windeyer, above n18; Spencer, above n30.

37 John Scriven, *A Treatise on the Law of Copyholds* (7<sup>th</sup> ed, 1896). Copyhold tenure was formally abolished on 1 January 1926 by *The Law of Property Act 1922* (UK).

38 *Hammerton v Honey* (1876) 24 WR 603 especially the judgment of Jessel MR; *Egerton v Harding* [1974] 3 All ER 691.

The feudal society that emerged after the conquest of the Normans was primarily a reaction to the specific needs and objectives of the social environment and culture in existence at the time. Universal ownership of land by the sovereign lord was a characteristic unique to feudal tenure, allowing the accumulation of great military strength by the sovereign lord and encouraging the creation of complex chains of social interdependence. Significantly, universal ownership within feudal tenure was a lively dynamic; the sovereign lord actively upheld title in order to implement tenurial obligations. This stands in stark contrast to the artifice of a 'stagnant' sovereign holding a 'fictional' ownership in subsequent tenurial overtures within the Australian land system.

Feudal tenure was an integral component of the social filament of Norman England — it flourished because it responded to social demands. The same could never be said of an Australian feudal tenure regime; there was no nexus between the social construction of colonial Australia and feudal tenure. The conspicuous absence of any feudal society within the annals of Australian history made it clear that, unlike the feudal tenure that existed during Norman England, Australian feudal tenure was not a social exemplar and did not reflect a social culture. The adoption of a feudal tenure regime and the assumption of absolute Crown ownership in Australia were, therefore, abstracted and artificial — quite different to its organic evolution within Norman England.

#### **4. *Tenure in Early Australian Colonies***

##### **A. *A Paradoxical Culture***

There is a cogent argument to suggest that strictly, feudal tenure and absolute Crown ownership have no relevance to any society other than Norman England; this was something specifically recognised by Brennan J in *Mabo* when he noted 'universality of tenure is a rule depending on English history and that rule is not reasonably applicable to the Australian colonies'.<sup>39</sup>

When the doctrine of tenure was applied to Australian colonies, there was no need for it to emulate the feudal model that existed within Norman England; Australia had no feudal history and the structure of colonial society was far from feudal in character. The distinct social and geographical landscape of colonial Australia provided a unique potential to develop a specifically Australian doctrine of tenure. Unfortunately, this could only have developed in a responsive environment, and the first Australian settlers were 'already horizoned with precedents, conventions and expectations'.<sup>40</sup> Consequently, it was, in many ways, legally and culturally inevitable that colonial Australia would rigorously enforce a feudal regime with no social or practical relevance.<sup>41</sup> The approach taken by

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<sup>39</sup> *Mabo*, above n2 at 35.

<sup>40</sup> Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: the Politics and Poetics of an Ethnographic Event* (1999) at 26. See also generally Winfried Baumgart, *Imperialism: The Idea and Reality of British and French Colonial Expansion, 1880-1914* (1982).

<sup>41</sup> See for example the *Property Law Act 1974* (Qld) s20(1) which confirms that tenures granted by the Crown within Australia will be granted in free and common socage, without any surviving tenurial incidents or obligations.

Australian colonists in this regard can be starkly contrasted with that of their American counterparts, encapsulated in the claims by Thomas Jefferson that each generation holds a usufructuary right to land and is free to create its own social order without constraint from the actions of past generations.<sup>42</sup>

The lack of a clearly defined and properly structured central sovereign within the colonies meant that there was little logic in adopting a feudal regime founded upon the interchange of land for loyalty and services.<sup>43</sup> Australian colonists wanted to acquire land, apply ownership rights to it, then cultivate, irrigate, build on it and establish an agricultural and pastoral industry. This desire highlighted the perception that land grants issued in colonial Australia were more absolute in nature than traditional feudal tenures; the attitude, endemic within such a vast and inscrutable colony, was that land was ‘theirs for the taking’. As noted by Crispin J in *Re Thompson; Ex parte Nulyarimma*:

the early settlers displayed a seemingly insatiable demand for vast tracts of land. The chance to build up flocks of sheep unrestrained by the familiar confines of the small farms of England held out the lure of real wealth. Few seemed to have been deterred either by their own lack of title or by the rights of the traditional owners.<sup>44</sup>

This acquisitive instinct accorded with the cultural imperatives of early settlers: survival and elimination. Logically, feudal tenets should have been adapted to accord with the practical expectations of a colonial environment.<sup>45</sup> Accepting for the moment that the assumption of feudal tenure within colonial Australia was valid, there was no legal impediment to a formal ‘revision’ of its tenets to better accommodate the unique demands of a different social context. Indeed, it is arguable that revision and modification of this kind is crucial for the survival of any ‘adopted’ infrastructure.<sup>46</sup>

Instead of presuming the validity of a moribund feudal regime it would have been more proactive for colonial jurists to have recast tenure as a colonial phenomenon — capable of adapting to the specific demands of a new social,

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42 See Julian Boyd (ed), *The Papers of Thomas Jefferson* (1958) at 392 where Thomas Jefferson outlines these ideas in a letter to James Madison (6 Sept 1789).

43 Bruce Kercher, *An Unruly Child: A History of Law in Australia* (1995) at 5–10; David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991); John Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (1988) at 20–21.

44 (1998) 136 ALR 9 at 15.

45 Note that this is the position under British Imperial constitutional law where it was open to Parliament to change the laws, but unless and until this occurred the *lex loci* of indigenous land tenure would not be disturbed or abrogated: see *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045.

46 In particular, it has been held that pre-contact indigenous laws and systems, where not expressly altered by legislation, should remain in effect and any new land tenure system must be capable of embracing indigenous occupation. See generally Brian Donovan, ‘Common Law Origins of Aboriginal Entitlements to Land’ (2003) 29 *Manitoba LJ* 298; Brian Donovan, ‘The Evolution of Common Law Aboriginal Title in Canada’ (2001) 35 *UBC Law Rev* 43. These assumptions are, however, founded upon the implied acceptance of indigenous occupation which was legally denied within Australia.

geographical and cultural atmosphere.<sup>47</sup> The failure of colonial lawmakers to even address the suitability of feudal tenure illustrates one of the central paradoxes of Australian settler colonialism — the subversion of a reactive colonial politic into the cumulative narrative of British imperialism.<sup>48</sup>

### **B. *Fact versus Fiction: Statutory and Feudal Tenures in Colonial Australia***

The progression of the colonies, following the inception of the *Imperial Land Act* 1831, produced a period of intense ‘land commerce’. Settlers became increasingly interested in the acquisition of land with the aim of establishing pastoral enterprises.<sup>49</sup> The early days of Australian colonial life were particularly strife-ridden. Formal legislative authority was introduced in the colony of New South Wales in 1823 following the introduction of *The New South Wales Act* (1823) 4 Geo IV, c96. Judicial authority followed close behind with the introduction of *The Australian Courts Act* (1828) 9 Geo IV c83. The colonial secretary was authorised to supervise the granting of land. Small grants of land of approximately 50 acres or less were generally issued as freehold estates and were regulated appropriately by the land authorities; however, as the settlers began to push for more and more land to feed an economy which was essentially pastoral in nature, proper control and regulation became difficult if not impossible.<sup>50</sup>

The conferral of broad, unregulated discretion upon the grantees to deal with the land as they saw fit became common.<sup>51</sup> This discretion was frequently set out within a statutory land grant, as the format was better suited to the detailed nature of pastoral land grants. Furthermore, the utilisation of statutory tenures avoided the problems associated with the regulation of a vast landscape by a difficult and immature government administration.<sup>52</sup>

The early Governors had express powers to issue grants of land and, until granted, such land formed a royal demesne.<sup>53</sup> Land that was not granted from the Crown was considered to amount to ‘waste land’.<sup>54</sup> Up until 1859, with the

47 Nicholas Thomas, *Colonialism's Culture: Anthropology, Travel and Government* (1994); A Frost, ‘New South Wales as Terra Nullius: The British Denial of Aboriginal Land Rights’ in Susan Janson & Stuart Macintyre (eds), *Through White Eyes* (1990) at 65–76.

48 Patrick Wolfe, ‘History and Imperialism: A Century of Theory, from Marx to Postcolonialism’ (1997) *Am Hist Rev* 102; Thornton, *The Imperial Idea and Its Enemies*, above n18.

49 Note the discussion by Buck, above n4 where the author notes that the voracious acquisition of land in Australia was primarily undertaken for the development of pastoralism. See also Lee Godden, ‘Wik: Feudalism, Capitalism and the State: A Revision of Land Law in Australia?’ (1997) 5 *APLJ* 2, where the author notes that the emergence of pastoralism was evidence of the divergence between property as understood in England and in Australia.

50 Alain Pottage, ‘Evidencing Ownership’ in Susan Bright & John Dewar (eds), *Land Law: Themes and Perspectives* (1998); Kercher, above n43; Stephen Roberts, *A History of Australian Land Settlement (1788-1920)* (1924).

51 Robert Crundwell, Hilary Golder & Robert Wood, *From Parchments to Passwords: A History of the Land Titles Office of New South Wales* (1995).

52 See Thomas Fry, ‘Land Tenures in Australian Law’ (1946–1947) 3 *Res Judicatae* 158; Pottage, above n50.

53 See *Randwick Corp v Rutledge*, above n12 at 71 (Windeyer J).

54 See the definition of waste lands in Australian Colonies, *Sale of Waste Lands Act* 1842 (Imp) 5 & 6 Vic, c36 and Enid Campbell, ‘Crown Land Grants: Form and Validity’ (1966) 40 *ALJ* 35.

introduction of representative government in New South Wales, Imperial authorities assumed control over Crown lands and sought to maximise revenue via the settlement and sale of waste lands. Section 2 of the *Constitution Act* 1855 (NSW) vested the control and management of Crown waste lands in the New South Wales legislature and allowed the colonial government to regulate the sale and disposal of such lands.

The corporeal nature of the Australian landscape was not easy to ignore; huge tracts of unexplored, dense, harsh scrub land was supposed to have vested in the Crown and therefore be subject to Crown regulation. English authorities could not possibly hope to regulate such large and inaccessible areas of land under the traditional auspices of common law tenure. Consequently, the Colonial Government began to assert greater regulatory control through the issue of statutory grants and, despite the feudal rhetoric, Australian land grants gradually developed a distinct perspective.<sup>55</sup> The statutory tenure emerged as an identifiable and unique feature of Australian land law quite unlike anything that had been conceived or recognised previously within feudal England.

The fundamental distinction between statutory and traditional feudal tenures lay in the fact that the statutory tenure was capable of direct and specific expression whereas the feudal relationship was more ambiguous and amorphous.<sup>56</sup> The particularisation of rights was, as noted by the High Court in *Wik Peoples v Queensland*, a new ‘institutional form’ far better suited to the local circumstances of the Australian landscape.<sup>57</sup> This was primarily because each statutory tenure could uniquely adapt its provisions and amend its ‘bundle of rights’ to accord with the requirements of the particular region.<sup>58</sup> Statutory tenures enabled colonial administrators to ‘transcend traditional concepts and develop innovative forms of tenure which balanced a range of competing interests thereby demonstrating the ability of a legal system to adapt to particular circumstances as part of the continued viability of that system’.<sup>59</sup> Colonial law-makers were prepared to diverge from strict feudal assumptions in their desire to develop and

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55 This issue is explored by Godden, above n49 at 38 where the author notes that ‘[f]eudal property concepts, while providing a convenient fiction for the establishment of the Crown’s radical title to land, were limited as “regulatory template” for state allocation of land use in the colonial era and beyond’.

56 See generally Joseph Singer, ‘Re-Eading Property’ (1992) 26 *New Eng LR* 711; Morris Cohen ‘Property and Sovereignty’ (1927) 13 *Cornell LQ* 8; Stuckey, above n18.

57 (1996) 187 CLR 1 (hereinafter *Wik*).

58 For a discussion on the ‘bundle of rights’ theory see Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1<sup>st</sup> ed, 1923); Antony Honore, ‘Ownership’ in Anthony Guest (ed), *Oxford Essays in Jurisprudence: A Collaborative Work* (1961) at 107; James Penner, ‘The “Bundle of Rights” Picture of Property’ (1996) 43 *UCLA LR* 711; Lawrence Becker, *Property Rights: Philosophic Foundations* (1977); Jeremy Waldron, *The Right to Private Property* (1988). For a discussion on the bundle of rights theory as applied to native title see Godden, above n49 and Buck, above n4.

59 Godden, above n49 at 179. See also Crawford Macpherson, ‘Capitalism and the Changing Concept of Property’ in Eugene Kamenka & Ronald Stanley Neale (eds), *Feudalism, Capitalism and Beyond* (1975); Paul Brand, *The Making of the Common Law* (1992) for a discussion on the evolving nature of common law property interests within a capitalist framework.

adapt the land infrastructure to the evolving resource economy.<sup>60</sup> In the words of Toohey J in *Wik*:

To approach the matter by reference to legislation is not to turn one's back on centuries of history nor is it to impugn basic principles of property law. Rather, it is to recognize historical development, the changes in law over centuries and the need for property law to accommodate the very different situation in this country.<sup>61</sup>

This is not to deny the patent difficulties that the colonial legislators experienced in the granting and regulation of statutory tenures, and the fact that vast areas of land covered by the pastoral leases were unsurveyed and the activities of the squatters uncontrolled.<sup>62</sup> Gradually, the land of the colony was divided into settled and unsettled areas. The difficulty in policing unsettled areas eventually resulted in statutory intervention in the form of the *Crown Lands Occupations Act* (NSW) and the *Crown Lands Alienation Act* (NSW) in 1861 which were intended to regulate the occupation and sale of unalienated Crown land.<sup>63</sup>

Whilst the aim of the legislation was to introduce a structured range of statutory tenures relevant to particular rural areas, the reality was far different. The legislation promoted the inception of a 'seething trough of tenures of capricious incidents and impenetrable obscurity with little clarity, logic or consistency',<sup>64</sup> as colonial legislators attempted to reconcile tenurial estates with the physical and economic reality of Australian land holdings. The diversity, preponderance and 'bewildering multiplicity of tenures',<sup>65</sup> was not restricted to rural areas of the New South Wales colony; in Queensland, for example, 70 different kinds of Crown leasehold and Crown perpetual leasehold tenures existed.<sup>66</sup>

These difficulties were referred to by Gummow J who, in *Wik*, pointed out that when colonial legislators assumed control over Crown waste lands, it resulted in a proliferation of new forms of statutory tenure, teeming with 'proverbial incongruities' and premised upon the assumption that the local common law did

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60 For an excellent discussion on the relationship between land tenure and the pastoral economy in colonial Australia see generally Philip McMichael, *Settlers and the Agrarian Question: Foundations of Capitalism in Colonial Australia* (1984) at 167. See also Buck, above n4.

61 *Wik*, above n57 at 112.

62 *Wik*, above n57 at 141. See also Fry, above n52; Neal, above n43 at 258–269; Henry Reynolds, *Frontier: Aborigines, Settlers and Land* (1987) at 58–61; John Hookey, 'Settlement and Sovereignty' in Peter Hanks & Bryan Keon-Cohen (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (1984) at 4–8.

63 See Campbell, above n54; AC Millard & GW Millard, *The Law of Real Property in New South Wales* (1985) at 472–474.

64 See Fry, above n52 at 165; Frederick Jordan in *Re Hawkins* (1948) 49 SR (NSW) 114 at 118 where his Honour describes the Crown tenure legislation as a 'jungle penetrable only by the initiate'. See also the discussion in Andrew Lang, *The Law of Real Property* (2<sup>nd</sup> ed, 1996) at 519 and Patricia Lane, 'Native Title – The End of Property As We Know It?' (2000) 8 *APLJ* 1 at 6–9.

65 *Millard on Real Property (NSW)* (4<sup>th</sup> ed, 1930) at 474.

66 *Ibid.*

not recognise any ‘allodial species of estate which was held independently of any grant by the Executive Government or of any grant by or pursuant to statute’.<sup>67</sup>

The statutory tenure was, despite its rapid escalation, a distinctive innovation that clearly distinguished colonial tenure from the classical feudal narrative. There were many other emerging peculiarities within colonial tenure. Australian land grants, unlike their feudal ancestors, were never held of any intermediate or mesne lord because no subinfeudation existed.<sup>68</sup> Furthermore, unlike feudal tenures, most statutory tenures contained express reservations, giving the Crown an enforceable right to the minerals and natural resources existing below the surface of the land. This type of tenure was far removed from rights conferred under traditional feudal tenures that attached services and incidents but never reservations.<sup>69</sup>

The use of reservations within Australian land grants created a different relational perspective. The character of the obligations that the tenant owed to the overlord — the essence being social interaction and exchange — essentially defined feudal tenures. By contrast, the statutory tenures that emerged within the colonies were more akin to an individualised land grant with specified restrictions; the grantee had full control of the land in most situations except for the fact that the Crown retained the right, generally, to dissipate valuable mineral resources.<sup>70</sup>

Other distinctions in the colonial apparition of feudal tenure flowed from the absence of historical circumstance. For example, copyhold tenure was unknown as there was no such thing as ‘manors’.<sup>71</sup> Furthermore, the ‘modernity’ of feudal tenure within colonial Australia meant that original Crown titles were freshly issued and directly traceable, whereas in England, it is largely impossible to trace title back to the original Crown grant. Hence, in England, feudal tenure presumes a ‘notional, yet largely untraceable-out-of-mind infeudation’ whereas in colonial Australia, most grants remain capable of direct and authentic examination.<sup>72</sup>

Each ‘colonial’ variation highlights the fact that Australian tenure has always been far more individualistic than that which existed within Norman England.<sup>73</sup>

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67 See *Wik*, above n57 at 94–95. See also *Blackwood v London Chartered Bank of Australia* (1874) LR 5 PC 92 and *Stewart v William* (1914) 18 CLR 381 for judicial examination of the ability and scope of the colonial legislators in issuing statutory tenures.

68 For a discussion on this see Crundwell, Golder & Wood, above n51.

69 For a discussion on the form and character of Crown restrictions see generally, Millard & Millard, *The Law of Real Property in New South Wales* (1985); Kent McNeil, *Common Law Aboriginal Title* (1989); Brendan Edgeworth, ‘Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared After *Mabo v Queensland*’ (1994) 23 *Anglo-Am LR* 397 at 409. See also the general discussion by John Devereux & Shaunnagh Dorsett, ‘Towards a Reconsideration of the Doctrines of Estates and Tenure’ (1996) 4 *APLJ* 30 and Stuckey, above n18.

70 For a discussion on the form and character of Crown restrictions see generally Millard, above n65. For a discussion on the increasing difference between feudal and localised tenure see McNeil, *ibid*; Edgeworth, *ibid*. See also Devereux & Dorsett, *ibid*; Stuckey, above n18.

71 Butt, above n26 at 67.

72 Edgeworth, above n69.

73 See the discussion by Stephen CJ in *Attorney General v Brown*, above n10 at 38–40 where his Honour discusses the nature of the Crown reservations.

Statutory tenures, particularly fee simple grants, were express, comprehensive and imbued with a more absolute, allodial character.<sup>74</sup> Given the unique social circumstances and isolated geographical context of colonial Australia, it was clearly impossible to emulate the strict binary character of the feudal dynamic in a colonial outpost, hundreds of years after the cessation of feudalism. In such circumstances, the gradual move towards a more allodial perspective is, despite the feudal rhetoric of the colonial courts, inevitable. A similar process occurred within the United States, as noted by Chancellor Kent, in 1828:

Thus, by one of those singular revolutions incident to human affairs, allodial estates, once universal in Europe, and then almost universally exchanged for feudal tenures, have now, after the lapse of many centuries, regained their primitive estimation in the minds of freemen.<sup>75</sup>

In hindsight, the main difficulty that colonial tenure faced was the increasing disparity between fact and fiction; whilst colonial jurists perpetuated the feudal fiction, the actual circumstances of Australian tenure were quite unrelated. The absurdity of importing ‘notions of the common law apt for tenurial holdings under the Crown in medieval England’ into a land system founded upon distinctive expressions of statutory grant was emphasised by Kirby J in the *Wik* decision but nevertheless endured.<sup>76</sup>

This situation highlights two significant points; first, the adoption of the feudal version of tenure was not a consequence of any direct social or contextual relevance. Second, the colonial jurists were prepared and had the capacity to adapt and modify feudal assumptions when it suited. The localisation of Australian tenure made the feudal myth more obvious; in form feudal tenure endured as a static doctrine but in practice its attributes evolved into a unique and highly localised system. As outlined by Dr Fry:

A century of subsequent legislation by the various legislatures of Australia has developed a new system of land tenures in the various Australian States and Territories so that it is now possible to say, with a very high degree of accuracy, that the constitutional supremacy of Australian Parliaments and the Crown over all Australian lands, as much as the feudal doctrines of the Common law, is the origin of most of the incidents attached to Australian land tenures.<sup>77</sup>

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74 The absence of an interactive feudal relationship within Australian statutory tenures and their corresponding resemblance to allodial interests was alluded to by Gaudron J in *Wik*, above n57 at 187, who in examining the nature of pastoral leases noted that there was nothing to suggest that they had to conform precisely to the common law. Gummow J notes the underlying irony in the fact that the early Australian courts were rejecting allodial title whilst at the same time it was reemerging in other parts of the world via indigenous recognition of title. See also Simpson, above n7 at 261–262.

75 James Kent, *Commentaries on American Law* Vol 3 (1828) at 412 and quoted in *Wik*, above n57 at 249 (Gummow J).

76 *Wik*, above n57 at 280.

77 Fry, above n52 at 159.

### C. *Imperial Ideology: A Culture of Constraint*

Colonial jurists consistently upheld the inherited version of feudal tenure despite the highly localised evolution of Australian tenure; in particular, the courts adhered to the feudal presumption of absolute Crown ownership. In the classic words of Isaacs J in *Williams v Attorney-General for New South Wales*:

It has always been a fixed principle of English law that the Crown is the proprietor of all land for which no subject can show a title. When Colonies were acquired this feudal principle extended to the land overseas.<sup>78</sup>

This ‘purely technical and antiquarian fiction’ was resolute despite the social and systemic difficulties associated with the importation of feudal tenure.<sup>79</sup> As noted by Professor Jenks, there was ‘no statute, no struggle, no heated debate’; the Crown quietly assumed the ownership of Australian land under the auspices of feudal tenure.<sup>80</sup>

The adoption of one universal sovereign did have cultural undertones. Colonial Australia had a very strong Imperial allegiance that was nurtured on convention, orthodoxy and constraint.<sup>81</sup> The first settlers were imbued with a keen appreciation of English tradition and regarded themselves as inextricably bound by inherited English law. As noted by Bruce Kercher:

For more than a hundred years after the mid-nineteenth century, most of the judges of the Australian courts subscribed to a combination of imperialism and formalism, under which the law was assumed to derive from England both in its authority and in its detailed content.<sup>82</sup>

The strong sense of Imperial loyalty that pervaded the colonies meant that settlers did not actually perceive themselves and their landscape in an individualistic sense.<sup>83</sup> England had bequeathed a cultural homogeneity; early settlers ardently regarded themselves as an imperial outpost, fundamentally obliged to adopt all of the prescriptive tenets of English land law.<sup>84</sup> In this role, the settlers chose to reinforce the history-drenched ‘English prototype’ of land grants regulated by one paramount lord.<sup>85</sup> There is no clear rationale for the overwhelming sense of obligation and duty displayed by early Australian settlers

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78 Above n12 at 439.

79 See Jenks, n14 at 59.

80 Ibid.

81 For a further discussion on the culture of constraint within colonial societies see generally *ibid*; Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983) at 438–459; and Edgeworth, above n69.

82 Kercher, above n43 at 203.

83 This is in stark contrast to the perception of American colonists who regarded the colony as the new world and a chance to start again. See especially Gordon Wood, ‘Thomas Jefferson, Equality, and the Creation of a Civil Society’ (1996) 64 *Fordham LRev* 2133 at 2139.

84 See the discussion by Edgeworth, above n69.

85 See Neal, above n43; Edgeworth, above n69 at 407, where he stated of early Australian settlers, ‘Far from wanting to take stock of the extent of the differences between the law as it applied locally and its original principles, colonial jurists on the contrary sought to emphasize their continuity and homology. They saw themselves as bearers of an ancient past rather than creators of a new present’.

towards Imperial England. Possibly, the sense of isolation and despair experienced by many new settlers in a vast and harsh landscape led them to seek solace, security and a sense of belonging from the traditions of the 'motherland' instead of seeking ideological revolution.<sup>86</sup>

Feudal tenure and absolute Crown ownership acquired automatic legitimacy as, inherited from England, they were perceived to be a valid component of the established, socially institutionalised discourse. On an economic level, feudal tenure was consistent with 'capitalist colonisation', therefore the primary economic imperative was to reconstitute a social structure that accorded with the overriding requirements of capitalism.<sup>87</sup> This produced an interesting antilogy between imperial culture and colonial context; as the Australian economy evolved, a tension emerged between the perceived economic benefit of the feudal structure and the practical demands of regulating a vast and progressive pastoral industry.<sup>88</sup>

The ideological constraints which characterised early Australian colonists can be starkly contrasted with the individualistic, revisionist ardour of erstwhile American colonists.<sup>89</sup> American settlers perceived themselves as founders of a new and distinctive land, at liberty to develop a free and independent set of landholding rules to suit the individual character of the land and its people. It is clear from the early writings of Thomas Jefferson that the American settlers regarded the new country as a form of political independence, a victory in the pursuit of libertarian and egalitarian ideals.<sup>90</sup>

The sense of self worth and autonomy associated with many American colonists meant that they were more readily able to overthrow the social and legal vestiges of English feudalism and proclaim the feudal origins of land law to be irrelevant to the circumstances of American colonies.<sup>91</sup> In New York, the legislature expressly abolished feudal tenures of every description, with all their accompanying incidents, and declared that all lands within that State were allodial. The desire to move away from feudal tenure and to re-establish an allodial title is patently clear from the express words of s11 of the US Constitution which states:

The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands, the title to which shall fail, from a defect of heirs, shall revert or escheat to the people.<sup>92</sup>

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86 See Edgeworth, above n69; Rosemary Coombe, 'The Properties of Culture and the Possession of Identity: Post Colonial Struggle and the Legal Imagination' in Bruce Ziff & Pratima Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (1997) 74 at 84.

87 See Macpherson, above n59; Wolfe, above n40 at 54–55; Lauriston Sharp, 'Steel Axes for Stone Age Australians' in Edward Spicer (ed), *Human Problems in Technological Change* (1952) at 69–81.

88 See esp Buck, above n4 at 136.

89 See generally Richard Morris, *Studies in the History of American Law* (2<sup>nd</sup> ed, 1959) at 69–125.

90 See Gordon Wood, *The Creation of the American Republic, 1776-1787* (1969) at 47–54; Gregory Alexander, 'Time and Property in the American Republican Legal Culture' (1991) 66 *NYULR* 273; Roscoe Pound, 'The Development of American Law and its Deviation from English Law' (1951) 67 *LQR* 49.

91 Boyd, above n41 at 133 quoted in Alexander, id at 312–313.

The progressive temperament of American colonists led to the development of a more regionalised land system whereby land interests mirrored the social environment in which they were regulated.<sup>93</sup> This distinctive cultural environment encouraged proprietary adaptability over the hierarchical narrative of feudal tenure.

#### ***D. Tenure as a Political Device: Sovereignty Tenure and Colonial Imperialism***

Apart from the obvious cultural constraints faced by Australian settlers, there was a deeper, political motivation underlying the adherence to feudal fiction. Adoption of the direct tenets of feudal tenure meant that, theoretically, the Crown would become the universal owner of all land *to the exclusion of indigenous occupants*.<sup>94</sup> This was a convenient consequence for Imperial authorities; it provided an absolute rationalisation and legitimacy for Crown ownership as against any claim that indigenous occupants might seek to make. It also appeared to represent a solution to the possible problem of prior indigenous possession and occupation of the land, even though the application of feudal absolutes in such circumstances is questionable.<sup>95</sup>

The core political motivations underlying the adoption of feudal tenure make it more accurate to define the doctrine as ‘sovereignty tenure’. Colonial administrators assumed the primacy of the feudal regime, in spite of its obvious practical inadequacies and deficiencies, in order to rationalise the assumption of a full sovereign title by the Crown.<sup>96</sup> Sovereignty tenure functioned as an apparatus for colonial imperialism because it allowed the Crown to take complete control and possession of all land in the colony, without having to take into account the interests of indigenous occupants. Sovereignty tenure was assumed rather than rationalised; it was a product of political aspiration, adopted by colonial jurists without debate, analysis or revision.<sup>97</sup> This represents a stark contrast to the evolution of feudal tenure during Norman England where it was an inextricable component of a comprehensive social revision.

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92 See generally Kent, above n75 at 412; *Kavanaugh v Cohoes Power & Light Corp* 187 NYS 216 (1921) at 236–237; the judgment of Gummow J in *Wik*, above n57.

93 See generally Alexander, above n90 at 310–313.

94 See in particular the judgment of Stephen CJ in *Attorney-General v Brown*, above n10 at 316 where his Honour notes that the lands of this colony ‘are, and ever have been, from the time of its first settlement in 1788, in the Crown’.

95 For example, in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, the Privy Council held that a system of native laws and land tenure did exist and *could* be given effect *within* a feudal regime. See also Donovan, above n46.

96 See Brian Slattery, ‘Aboriginal Sovereignty and Imperial Claims’ (1991) 29 *Osgoode Hall LJ* 681; Jeremy Webber, ‘Relations of Force and Relations of Justice: The Emergence of a Normative Community between Colonists and Aboriginal Peoples’ (1995) 33 *Osgoode Hall LJ* 623; and more generally Gerry Simpson, ‘*Mabo*, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence’ (1993) 19 *MULR* 195 at 207–209.

97 For a discussion on the political motivation underlying the application of sovereignty assumptions to Canadian colonies see generally John Borrows, ‘Sovereignty’s Alchemy: An Analysis of *Delgamuukw v British Columbia*’ (1999) 37 *Osgoode Hall LJ* 537.

There was certainly no legal compulsion behind the adoption of sovereignty tenure within colonial Australia; British law did not *require* the feudal doctrine of tenure to be applied in territories acquired outside England.<sup>98</sup> The supposition that sovereignty tenure automatically applied to Australian colonies is, in the words of Holdsworth, a ‘purely English phenomenon’, and therefore a product of an expansive English homology. Indeed, the legal foundation underlying the adoption of sovereignty tenure within colonial Australia contained many inherent deficiencies. One of the most disturbing was its assumed application to land which was, in clear and unequivocal terms, an inhabited land, occupied by indigenous Aborigines since time immemorial. The legal dilemma faced by the Australian settlers was accurately outlined by Henry Reynolds who noted that:

The presence of the natives was an inescapable political, geographic and legal reality. While the settlers could appeal to ancient principles of law and argue that all property rights must emanate from the sovereign, the natives could stand on an even older and much more ubiquitous legal principle — the rights of immemorial possession.<sup>99</sup>

Colonial lawmakers were able to avoid the legal questions associated with prior possession by ignoring the existence of indigenous inhabitants and *presuming* that such silence sustained the legitimacy of settlement.<sup>100</sup> Had there been a legal examination or judicial inquiry, English common law would undoubtedly have supported the rights of the indigenous inhabitants to the land as prior possessors.<sup>101</sup> However, no such legal inquiry ever occurred; sovereignty tenure applied because colonial jurists chose to assume that indigenous occupants did not exist and that the application of English law was automatic.<sup>102</sup> The silent acceptance of sovereignty tenure by colonial jurists, and the assumption that they had the power to make such a ‘choice’ in the first place, is an innate characteristic of imperialism and its deeper hypothesis: cultural superiority.<sup>103</sup> Recognition of

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98 See generally Holdsworth, above n7 at 199; Pollock & Maitland, above n25 at 9; *Mabo*, above n2 at 34–35 (Brennan J).

99 Henry Reynolds, *The Law of the Land* (1987) at 45.

100 Note the discussion on this by Donovan, above n46 and see also Kercher, above n43 at 36.

101 See Carol Rose, ‘Possession as the Origin of Property’ (1985) 52 *U Chi LR* 73; Hugo Grotius, *On the Law of War and Peace* (1925); John Locke, *Two Treatises of Government* (1st ed, 1924); Blackstone, above n18 at 8–9; *Asher v Whitlock* (1865) 1 LR QB 1; *Perry v Clissold* [1907] AC 73.

102 The High Court in *Mabo* describes this ‘choice’ of the colonists as an application of enlarged *terra nullius* but this is probably a retrospective legal validation of a racially discriminatory assumption. See *Mabo*, above n2 at 32. See also Patricia Lane, ‘Nationhood and Sovereignty in Australia’ (1999) 73 *ALJ* 120; Mark Brabazon, ‘Mabo, the Constitution and the Republic’ (1994) 11 *Aust Bar Rev* 229; and see generally Kercher, above n43.

103 Rosemary Hunter, Richard Ingleby & Richard Johnstone (eds), *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (1995) at 10–16; Alex Castles, ‘The Reception and Status of English law in Australia’ (1963) 2 *Adel LR* 1; Millard & Millard, above n63; Mark Lindley, *The Acquisition and Government of Backward Territory in International Law* (1969).

the existence of indigenous occupants was directly antagonistic to established imperial expansionist goals.<sup>104</sup>

It is nevertheless difficult to understand the unquestioned application of such a legal polemic. Perhaps colonial law-makers feared that without absolute sovereignty, the physical actuality of indigenous occupation might prevail;<sup>105</sup> the early colonial courts were certainly very keen to reinforce the feudal vision of a sovereignty that assumed an unqualified conferral of imperium and dominium to the Crown.<sup>106</sup> In the words of Brendan Edgeworth, in colonial Australia, 'the foundational feudal principle of real property law that characterised ownership as coextensive with sovereignty was held to apply in its entirety'.<sup>107</sup>

Universal ownership was adhered to with an imperturbable conviction by colonial law-makers, despite the physical and historical singularity of the Australian landscape. In *Attorney-General v Brown* Stephen CJ held that 'the wastelands of this Colony are, and ever have been from the time of its first settlement in 1788, in the Crown'. The 'fiction' of original Crown ownership operated to vest the property in waste lands in the sovereign.<sup>108</sup>

This is not to suggest that absolute Crown ownership of all waste lands was a necessary and enduring feature of feudal tenure. Indeed, in Norman England, many land holdings were left undisturbed after the conquest of William I; the Crown acquired power as a sovereign to grant land to others, rather than universal ownership over *all* land.<sup>109</sup> Many Saxons continued to retain allodial ownership over unalienated land.<sup>110</sup> There was nothing particularly unusual about this, as the common law has an established history of upholding the validity of customary law and practices that have been undertaken since time immemorial.<sup>111</sup> Furthermore, it was well established that the mere assumption of sovereignty should not necessarily disturb established proprietary principles.<sup>112</sup>

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104 See generally Simpson, above n96; Andrew Lokan, 'From Recognition to Reconciliation: The Functions of Aboriginal Rights Law' (1996) *Mon LR* 65.

105 Certainly the sovereignty motivations of colonial jurists were consistently invoked and reinforced without reference to indigenous occupation or identity. See generally Simpson, above n96.

106 Note in John Salmond, *Jurisprudence* (6<sup>th</sup> ed, 1920) at 495: in accordance with the feudal law, the 'distinction between territorial sovereignty and ownership was to some extent obscured' because of the conflation of the imperium and the dominium.

107 See Edgeworth, above n69 at 412.

108 Above n10 at 318.

109 See generally Simpson, above n7; Robert Chambers, *An Introduction to Property Law in Australia* (2001). Note also that with the adoption of radical title by the High Court in the *Mabo* decision, it is possible to argue that this view better accords with the essential premise of feudal tenure.

110 See in particular the discussion on allodial landholding in feudal England by Goodrich, above n28; Buck, above n5.

111 See the discussion by Shaunnagh Dorsett, 'Since Time Immemorial: A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry' (2002) 26 *MULR* 32 at 46–50.

112 William Blackstone noted that a change in sovereignty is 'not presumed as meant to disturb rights of private owners', above n18 at 8–9.

Hence, the interconnection between feudal tenure and absolute ownership can be regarded as a peculiarly colonial expression. This point was raised by Gummow J in *Wik* who noted: ‘The concept of ownership by the Crown over all land is a modern one, and its adoption in legal theory may have been related to Imperial expansion ... well after the decline of feudalism’.<sup>113</sup>

The idea, perpetuated by colonial jurists, that the adoption of feudal tenure *necessitates* the assumption of absolute beneficial ownership is essentially a contrivance — an extension of the political agenda.<sup>114</sup> This was raised by the Federal Court in *Lansen v Olney* who noted: ‘territorial sovereignty may not equate, even under the common law doctrine of tenure, to absolute beneficial ownership, the latter being arguably alien to the medieval case of mind’.<sup>115</sup>

Arguably this ‘idea’ transcended the scope of British imperial constitutional principles.<sup>116</sup> Furthermore, the failure of colonial jurists to properly rationalise the need for this feudal ‘extension’ produced a chasm between construct and reality; a legal void where ‘irrational realities are substituted for rationalised fictions’.<sup>117</sup> This was aptly summarised by Kent McNeil when he noted:

The fiction that the Crown once owned all the lands in England, some of which it then granted to subjects, was a device invented by common law jurists to justify the feudal concept of the Crown’s paramount lordship over lands held by subject.<sup>118</sup>

The colonial courts did attempt to legitimate Crown ownership on other grounds. Where territory was uninhabited, British constitutional law entitled the Crown to acquire title by occupancy.<sup>119</sup> Occupancy title was discussed in *Attorney-General v Brown* by Stephen CJ who insisted that title by occupation over waste lands was ‘no fiction’ and did in fact confer a real and actual title upon

113 Above n57 at 106.

114 This process is discussed by Nicholas Blomley in *Law, Space and the Geographies of Power* (1994) at 73 where he notes that the common law has become ‘increasingly territorial rather than predominantly local’ and that this shift is ‘associated with the beginning of crucial changes in the spaces of social, economic and political life, entailing a modernist displacement of the locus of social identity’.

115 (1999) 169 CLR 49 at 63.

116 See Simpson, above n96; Kent McNeil, ‘A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aborigines?’ (1990) 16 *Mon LR* 91 where he notes: ‘The assumption of the Crown and courts of English law that the Aborigines were devoid of sovereignty is rooted in a European view of the World which probably would have been incomprehensible to the Aborigines’. See also Robert Lumb, ‘Aboriginal Land Rights: Judicial Approaches in Perspective’ (1988) 6 *ALJ* 273.

117 For a more general discussion on the nature of legal fictions and dualism in the law see: Alf Ross, *Towards a Realistic Jurisprudence: A Criticism of Dualism in Law* (1946) at 202; Morton Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (1992) at 169–192.

118 McNeil, above n116. See also Blackstone, above n18 at 51.

119 The Crown’s discretionary power to annex colonies and construct a new social system is derived from a broad prerogative power. The acquisition of sovereignty is an act of state and its validity cannot be questioned in the courts: *Cook v Sprigg* [1899] AC 572 at 578. See also McNeil, above n69 at 181–179.

the Crown.<sup>120</sup> The acquisition of occupancy title could, however, only be legitimated in areas actually occupied by the Crown. This level of occupation simply did not occur within colonial Australia.<sup>121</sup> Consequently, *absolute* Crown ownership over all occupied and unoccupied land could not be legitimated under the occupancy rationale alone.<sup>122</sup>

Hence, the assumption of absolute ownership became dependent upon the colonial construct of tenure. Sovereignty tenure was the only means by which Crown dominium could be legitimated.<sup>123</sup> Feudal tenure would only confer absolute ownership over land, which was the subject of a tenurial grant; the colonial version assumed, however, that it was the adoption of tenure, rather than the issuing of the grant, which conferred ownership upon the Crown; consequently, under sovereignty tenure, the Crown held absolute ownership over land where no tenurial grant existed. This was legal fiction in its purest form. Nevertheless, the colonial court consistently upheld it.<sup>124</sup> In *Attorney-General v Brown* the court categorically concluded that feudal tenure was ‘the foundation of the original title of the Crown’ and the source for all other land titles in Australia.<sup>125</sup> In *Williams v Attorney-General for New South Wales*, Isaacs J stated:

It has always been a fixed principle of English law that the Crown is the proprietor of all land for which no subject can show a title. When Colonies were acquired this feudal principle extended to the lands overseas.<sup>126</sup>

In the same case, Barton ACJ<sup>127</sup> observed that upon acquisition of territory under the feudal principles, ‘[t]he whole of the lands of Australia became the property of the King of England’. Nearly 60 years later, in *Milirrpum v Nabalco Pty Ltd*, Blackburn J continued this judicial tradition, concluding: ‘every square inch of territory in the colony became the property of the Crown. All titles, rights and interests whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown’.<sup>128</sup>

120 Above n10 at 316. See also *Doe d Wilson v Terry* (1849) 1 Legge 505 at 508–509 where Stephen CJ specifically described the adaptation of feudal tenure as a ‘fiction’ and occupancy title as a ‘reality’.

121 DC Hodgson, ‘Aboriginal Australians and the World Court I — Sovereignty by Conquest’ [1985] *NZLJ* 85; McNeil, above n116; Hookey, above n62 at 1–18.

122 See McNeil, above n69.

123 In *Attorney-General v Brown*, above n10, Stephen CJ noted that the Crown acquires title to the territory and the waste lands within as a consequence of the ‘possession’ of British subjects in the name of the Sovereign — the occupancy of the Crown being described by his Honour as ‘no fiction’. At common law, once the Crown is in possession of land it cannot be dispossessed: *Commonwealth of Australia v Anderson* (1960) 105 CLR 303. Kent McNeil concludes that if title has already been acquired by occupancy, it is superfluous to adapt the feudal tenure fiction. See McNeil, above n116 at 98; McNeil, above n69 at 161–179.

124 See generally McNeil, above n116.

125 Above n10.

126 Above n12 at 439. These views were approved in *New South Wales v Commonwealth of Australia*, above n15 at 438–439 (Stephen J). See also McNeil, above n116 at 99–100.

127 *Ibid.*

128 Above n15 at 245.

Ultimately, the sovereignty agenda of feudal tenure obscured its practical relevancy to the colonial landscape.<sup>129</sup> In their haste to promote the notion of ‘universal ownership’ colonial lawmakers failed to consider the enduring benefits that adaptation, modification and localisation could provide. English law expressly anticipated that colonists would only take ‘so much of the law as is applicable to their own situation and the conditions of the infant colony’.<sup>130</sup> This approach was categorically endorsed by Sir Kenneth Roberts-Wray who noted that the doctrine of tenure must ‘be applied subject to local circumstances; and in consequence, English laws which are to be explained merely by English social or political conditions should have no operation in a colony’.<sup>131</sup>

As the Australian colonies increased in size, the courts presumed that sovereignty tenure would gain greater practical relevance.<sup>132</sup> In *Cooper v Stuart*, Drummond J noted that English law was applicable to the conditions of the ‘infant colony’ and ‘as the population, wealth and commerce of the Colony increased, many rules and principles of English law, which were unsuitable in its infancy were gradually attracted’.<sup>133</sup> The evolution of the Australian colonies, however, showed no such thing; as the colonies grew in size and commerce, colonial administrators were forced to rely increasingly on legislative innovation and abandon the strict tenets of the feudal regime.

The utilisation of legal history, and in particular the misappropriation of feudal conceptions of sovereignty, was the direct product of an imperial framework.<sup>134</sup> In *Wik*, Gummow J concluded that any methodology which attempts to regulate the use of history in the formulation of legal norms might be said to be ‘but a rhetorical device to render past reality into a form useful to legally principled resolution of present conflicts’.<sup>135</sup> This issue was powerfully addressed by Henry Reynolds, who stated:

Australian jurists didn’t have to keep Australian law in the straight-jacket forged by the eleventh and twelfth century legal armourers. They chose to do so. Whether by design or not it gave them a powerful weapon to use against the Aborigines.<sup>136</sup>

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129 See especially the argument by Pollock & Maitland, above n25 at 236 where the authors suggest that the notion of universal tenure was perhaps only possible in a conquered country. See also Holdsworth, above n7 at 199 where it is suggested that the doctrine of tenure may be a ‘purely English phenomenon’. See also the judgment of Brennan J in *Mabo*, above n2 at 47 where his Honour notes that ‘[i]t is arguable that universality of tenure is a rule depending on English history and that the rule is not reasonably applicable to the Australian colonies’.

130 Blackstone, above n18 at 79.

131 Roberts-Wray, above n10 at 626.

132 *Wik*, above n57 at 196 (Gaudron J).

133 (1889) 14 App Cas 286 at 292 (Lord Watson).

134 For an excellent discussion on the misuse of sovereignty conceptions in international and domestic law see James Brierly, ‘The Basis of Obligation in International Law’, course at the Hague Academy, 1928, in Hersch Lauterpacht (ed), *The Basis of Obligation and Other Papers* (1958) at 19. See also James Brierly, ‘The Sovereign State Today’ in Hersch Lauterpacht (ed), *The Basis of Obligation and Other Papers* (1958) at 348.

135 *Wik*, above n57 at 105.

136 Henry Reynolds, *The Law of the Land* (1987) at 44.

The unquestioned judicial acceptance of sovereignty has, over the years, imbued it with an almost inviolate character. The weight of time and habit has increased the judicial perceptions of the doctrine of tenure as an immutable component of our property ideology, and this has inured it against critical reassessment. This was not a consequence of any increase in its social or proprietary relevance, but rather in the reinforcement of its *perception* as a relevant and foundational principle. As time went on, this perception was increasingly fortified; it was clearly evident in the comments of Brennan J in *Mabo*, who concluded that the doctrine of tenure is an ‘essential principle of our land law’ and that it was ‘far too late in the day to contemplate an allodial or other system of land ownership’.<sup>137</sup> The courts are reluctant to disturb tenure and will generally do whatever they can to maintain the status quo.<sup>138</sup> Nevertheless, the historical reassessment that the recognition of native title necessitated has, it is argued, changed the position so fundamentally that the abolition of sovereignty tenure is now imperative.<sup>139</sup>

## 5. *Tenure within Contemporary Australian Land Law*

### A. *The Mabo Transformation*

As the Australian property infrastructure developed, colonial concerns over sovereignty and the physicality of title were replaced by broader, conceptual concerns. Increased attention was given to the nature of the estate relationship interposed between the Crown and the land grantee, and the rights and incidents it conferred; increasingly, what became relevant was not why we owned the land, but rather *how* we owned it.<sup>140</sup>

In such an environment, the impetus for sovereignty tenure deteriorated. This ‘reductive’ status meant that the ongoing validity of tenure was primarily ‘to enable the English system of private ownership of estates held of the Crown to be observed in the colony’.<sup>141</sup> Sovereignty tenure was gradually transformed into a highly fictionalised articulation of common law estates; courts increasingly overlooked the early sovereignty motivations underlying feudal tenure, and focused upon the idea that all estates and interests were dependent on the doctrine

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<sup>137</sup> *Mabo*, above n2 at 187.

<sup>138</sup> McNeil, above n116. See also Lumb, above n116; *Attorney-General v Lord Hotham* (1823) Turn & Russ 209 at 218 where the court noted: ‘Very high judges have said they would presume anything in favour of a long enjoyment and uninterrupted possession’.

<sup>139</sup> See for example *Lansen v Olney*, above n115 where the Federal Court noted that the practical effect tenure and the vesting of ‘radical title’ in the Crown was merely to enable the English system of private ownership of estates held of the Crown to be observed in the colony, and that in the end, ‘the concept of radical title has little if any relevance to the grant of interests in land in post-federation Australia’, as it was invoked to support native title. Under this approach, tenure and radical title are presented as artificial constructs, with little practical relevance, utilised purely in order to achieve a desired result.

<sup>140</sup> See in particular the discussion in A Davidson & A Wells, *The Land, the Law and the State: Colonial Australia 1788-1890* (1986) at 83–85.

<sup>141</sup> *Lansen v Olney*, above n115 at 57–58.

of tenure for their existence.<sup>142</sup> There is an irrational quality to this assumption, particularly in a landscape where legislative grants and statutory incidents have a significant presence and have evolved *in spite of* the feudal regime, rather than because of it.<sup>143</sup>

When the decision of the *Mabo* High Court was handed down, the landscape was altered so fundamentally it was no longer possible to perpetuate a feudal vision of tenure. The *Mabo* High Court rejected the discriminatory principles that prevented the legal recognition of indigenous existence, allowing them, for the first time, to recognise the proprietary validity of native title. This was a significant shift in judicial perspective. Up until this point, the combined effect of enlarged *terra nullius* and sovereignty tenure absolutely precluded the enforcement of *any* indigenous proprietary interest. The feudal version of tenure that colonial Australia adopted assumed that the Crown was the absolute owner of all land, and that this *necessarily* precluded the recognition of any title that did not emanate from the Crown.

The *Mabo* decision significantly disturbed the prevailing tenurial assumptions. Toohey J in *Wik* summarised the ‘turmoil’:

The decision of the court in [*Mabo (No 2)*] introduced a new and radical notion. It disturbed the previous attempts of the Australian legal system to explain all estates and interests in land in this country by reference to the English legal doctrine of tenure derived ultimately from the sovereign as Paramount Lord of the Colonies as he or she had been in England after the conquest.<sup>144</sup>

One of the significant issues arising from the *Mabo* decision was whether the doctrine of tenure could survive the removal of its sovereignty core: absolute Crown ownership. The rejection of enlarged *terra nullius* and the adoption of a radical Crown title, amenable to native title encumbrances, meant it was no longer possible for the Crown to assert absolute Crown ownership. This revision would not necessarily have destroyed feudal tenure as it had existed within Norman England because absolute ownership was not a vital feature of this regime; it only existed over alienated land and did not exist over land which was not the subject of a Crown grant. However, under the colonial version of feudal tenure, Crown ownership was presumed to be absolute over all alienated *and* unalienated land. Hence, when the *Mabo* High Court adopted radical title, sovereignty tenure, the colonial expression of feudal tenure, was necessarily destroyed.<sup>145</sup>

The *Mabo* High Court did not, however, address this issue. The High Court reinstitutionalised the feudal doctrine of tenure without considering whether it was possible that the doctrine, as it had manifested itself within colonial Australia, could continue. In perpetuating the doctrine of tenure the *Mabo* High Court were

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142 See for example the comments of Brennan J in *Mabo*, above n2 at 36 where his Honour concluded that ‘[l]and in Australia which has been granted by the Crown is held on a Tenure of some kind and the title acquired under the accepted land law cannot be disturbed’.

143 See Davidson & Wells, above n140 at 91–93.

144 *Wik*, above n57 at 59–60.

145 See the outline of radical title by Nicolette Rogers in ‘The Emerging Concept of “Radical Title” in Australia: Implications for Environmental Management’ (1995) 12 *EPLJ* 183 at 185.

following in the steps of a well established history of judicial orthodoxy. The idea that it is ‘too late in the day’ to reject the doctrine of tenure and adopt an allodial regime is somewhat ironic given the fact that it was the first time the courts had actually addressed the issue of sovereignty and tenure validity. It was disappointing that the court did not take the opportunity to further examine the implications their adoption of radical title would have; not just upon the character of sovereignty tenure but upon its basic capacity to regulate and embrace two fundamentally different proprietary interests.

### **B. Terra Nullius and ‘Radical’ Tenure**

The assumption, inherent in the notion of ‘enlarged’ *terra nullius*, that English common law could apply absolutely to the new colonies, because the land was vacant at the time of settlement, was clearly a racially discriminatory doctrine. The only reason the land was regarded as vacant was because indigenous occupants were not deemed civilised enough to have any legal identity conferred; hence the land was treated as if it were vacant. In his leading judgment, Brennan J spoke of the difficulty in continuing to accept such an ‘untruth’ within contemporary law:

It is one thing for our contemporary law to accept that the law of England, so far as applicable, became the laws of New South Wales and of the other Australian colonies. It is another thing for our contemporary law to accept that, when the common law of England became the common law of the several colonies, the theory which was advanced to support the introduction of the common law of England accords with our present knowledge and appreciation of the facts.<sup>146</sup>

All previous judicial decisions had assumed that the application of English law to the colonies, in particular the colonial expression of feudal tenure, was valid and in accordance with British constitutional principles. In *Milirrpum*, Blackburn J concluded that under a valid and enforceable tenure regime there was no doctrinal foundation for the recognition of native title rights and that the ‘doctrine of communal native title does not form and never has formed, part of the law of any part of Australia’.<sup>147</sup> His Honour ignored the physical reality of indigenous occupants at the time of settlement, noting that a mere ‘factual re-evaluation’ could not have any significant impact upon the law.

The conclusions of Blackburn J were influenced significantly by Canadian authority. Blackburn J expressly referred to the decision of the British Columbia Court of Appeal in *Calder v A-G (British Columbia)*.<sup>148</sup> In that case the court held that any property right that might have existed in the Nishga Indian tribe had been extinguished by properly constituted authorities in the exercise of their sovereign powers. Judson J concluded that, following assumed tenure principles, ‘the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga tribe might have had’.<sup>149</sup>

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146 *Mabo*, above n2 at 26.

147 Above n15 at 244, 263.

148 (1971) 13 DLR (3d) 64 (hereinafter *Calder*).

149 *Id* at 244.

Following the conclusions of Judson J in *Calder*, Blackburn J in *Milirrpum* suggested that the failure of colonial law-makers to make any mention of indigenous title was indicative of an implied legislative objective to extinguish any such title.<sup>150</sup> There is, of course, an inherent circularity to this logic: the reason indigenous occupants were not mentioned had more to do with the political and cultural perspectives of indigenous inhabitants at the time, rather than any implied legislative intention, and it suited the colonial government to ignore indigenous inhabitants and quietly assume sovereignty tenure.<sup>151</sup>

It was not until the *Mabo* decision that the High Court actually decided to question the authority and relevance of the assumed truths underlying sovereignty tenure. In addressing the validity of enlarged *terra nullius* as the foundation for the settlement of Australia, Deane and Gaudron JJ made the following comments:

Inevitably, one is compelled to acknowledge the role played, in the dispossession and oppression of the Aboriginals by the two propositions that the territory of New South Wales was, in 1788, *terra nullius* in the sense of unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants. Those propositions provided a legal basis for and justification of the dispossession. They constituted the legal context of the acts done to enforce it and, while accepted, rendered unlawful acts done by the Aboriginal inhabitants to protect traditional occupation or use.<sup>152</sup>

*Terra nullius* provided the ‘legal context’ for the settlement of Australia because it justified the application of British common law in its entirety. Brennan J noted that the indigenous inhabitants of Australia had neither ceded their lands to the Crown nor had them taken as a result of an overt conquest; the indigenous inhabitants had lost their land because the common law itself took the land — without conferring any right to compensation — thereby removing from the inhabitants the ‘religious, cultural and economic sustenance’ which their lands had given them.<sup>153</sup> Indigenous inhabitants were deprived of their land because of a blatantly discriminatory assumption that they were barbarous, and without a civilised legal system or polity, as their culture did not sufficiently resemble what England deemed to constitute a ‘civilisation’.<sup>154</sup>

Brennan J felt that the time had come to reject such discriminatory and offensive assumptions, and made the following comments:

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150 *Milirrpum*, above n15 at 256–257.

151 See especially Davidson & Wells, above n140.

152 See *Mabo*, above n2 at 82.

153 *Id* at 15.

154 In *Mabo*, above n2 at 23, Brennan J refers to the decision of *Advocate-General of Bengal v Rane Surnomoye Dossee* (1863) 2 Moo NS 22; 15 ER 811 as an example of enlarged *terra nullius*. Lord Kingsdown at 824 noted that ‘where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of, and subject to the same laws’. See also the discussion by Lord Watson in *Cooper v Stuart*, above n133.

It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.<sup>155</sup>

Brennan J rejected enlarged *terra nullius* as a proper foundation for Australian land law, describing it as a theory which depended upon a ‘discriminatory denigration of indigenous inhabitants, their social organization and customs’.<sup>156</sup>

Deane and Gaudron JJ agreed with Brennan J and found that the doctrine of *terra nullius* had to be rejected if a common law native title was to be accepted.<sup>157</sup> Toohey J also agreed with Brennan J, concluding that *terra nullius* should be rejected, along with any idea that international law precluded the recognition of native title because that land was regarded as *terra nullius*.<sup>158</sup>

In rejecting enlarged *terra nullius*, the High Court removed the prevailing orthodoxy underlying the legal settlement of Australia. The court justified its abolition on the grounds that it accorded with the expectations of international human rights and reflected the ‘contemporary values of the Australian people’.<sup>159</sup>

The difficulty with the *Mabo* determination is that enlarged *terra nullius* had no previous history as a validating legal principle for the *settlement* of an inhabited territory; it was a theory first advanced by the Privy Council in *Re Southern Rhodesia* where the law lords concluded:

the estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society. Such a bridge cannot be gulfed. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.<sup>160</sup>

The *Mabo* High Court was misguided in its attempt to extrapolate an enlarged *terra nullius* principle from *Re Southern Rhodesia* when, on the facts, the case dealt with a conquered rather than a settled territory. The issue in *Re Southern Rhodesia* was not whether the indigenous occupants were so uncivilised to be deemed *non-existent*, but rather, whether their primitive status justified the perpetuation of indigenous law in accordance with the continuity principle.<sup>161</sup>

In light of this, it is arguable that the enlarged or extended *terra nullius* principle was a construct employed by the *Mabo* High Court to provide legal validation for a patently illegitimate application of established settlement

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155 *Mabo*, above n2 at 30 (Brennan J), 100–101 (Deane & Gaudron JJ).

156 *Id* at 27.

157 *Id* at 82–83.

158 *Id* at 142.

159 For a detailed overview of international human rights in this respect see *Selected Decisions of the Human Rights Committee under the Optional Protocol* Vol 2 at 23 and the International Court of Justice in its *Advisory Opinion on Western Sahara* [1975] 1 ICJR 12. See also the guarantee of equality endorsed, for example, in the *Canadian Charter of Rights and Freedoms* s15 and the *Canadian Human Rights Act*, RS 1985 c H-6.

160 [1919] AC 210 at 233.

principles.<sup>162</sup> *Re Southern Rhodesia* could never justify the assumption that indigenous occupants did not exist; there are no *legal* rationalisations for such a patent act of discrimination. The settlement of Australia and the adoption of sovereignty tenure occurred because of the endemic cultural discrimination associated with imperial expansion.<sup>163</sup> The *terra nullius* principles that the *Mabo* High Court raised were products of a discriminatory colonial attitude that had no formal doctrinal foundation.

Nevertheless, the *Mabo* High Court refused to characterise Australian settlement in this way. The legalisation of *terra nullius* provided the court with a tangible principle to validate a cumulative history of indigenous discrimination, while the subsequent rejection of this legalisation principle gave the decision an illusion of reform. This was mere illusion. The ultimate aim of the *Mabo* High Court was to condemn the discriminatory foundation for the reception of English land law into Australia whilst at the same time reinforcing the institutions upon which this discrimination was founded.<sup>164</sup>

The rejection by the *Mabo* High Court of enlarged *terra nullius* had little utility other than to illustrate a shift in judicial perspective; the High Court revealed its preparedness to accept the legal existence of indigenous inhabitants, thereby rebuking the ‘silent acceptance’ of constitutional assumptions that had characterised the judicial landscape for so long.<sup>165</sup> The *Mabo* High Court did not, however, reject the validity of the settlement principle, nor did it directly reject the assertion of sovereignty tenure. In this way, the rejection of enlarged *terra nullius* became a smoke screen for the re-feudalisation of Australian land law.<sup>166</sup>

On a practical level, however, the rejection of enlarged *terra nullius* had its advantages; it cleared the path for recognition of the factual and legal existence of indigenous occupants at the time of settlement. The reverberations of rejecting this ‘untruth’ were so significant that further legal fissures were inevitable. The rejection of the ‘legal context for settlement’ necessarily affected the entire property infrastructure, which was inevitable, as the whole system is an ‘interconnected series of assumptions’.<sup>167</sup>

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161 This point is raised by Richard Bartlett, *Native Title in Australia* (2000) at 24–25 where the author specifically notes that the emphasis Brennan J gave to *Re Southern Rhodesia* was simply ‘not a correct statement of the common law’. See generally Simpson, above n96; David Ritter, ‘The Rejection of Terra Nullius in Mabo: A Critical Analysis’ (1996) 18 *Syd LR* 5 and Michael Asch, ‘From Terra Nullius to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution’ (2002) *Can JL & Society* 23.

162 See generally Simpson, above n96.

163 This issue is discussed in Richard Bartlett, ‘Aboriginal Land Claims at Common Law’ (1983) 15 *UWALR* 293. See also Mark Walters, ‘British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v British Columbia*’ (1992) 17 *Queens LJ* 350.

164 For a general discussion on the constitutional rationalisations of the *Mabo* decision, see Brabazon, above n102.

165 For a discussion on the shift in judicial attitudes displayed in the *Mabo* decision see generally Nonie Sharp, ‘No Ordinary Case: Reflections Upon *Mabo (No 2)*’ (1993) 15 *Syd LR* 143 at 151–153; Robin O’Hair, ‘*Mabo* and Land Rights: Searching for a Golden Thread’ in Margaret Stephenson & Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993) at 63.

166 This idea is alluded to by Godden, above n49.

The natural and inevitable consequence of rejecting enlarged *terra nullius* was not just recognition of indigenous occupants, but also acceptance of the validity of their prior possession and title. The legal and moral primacy of first possession as a basis for the recognition of land rights is well established in English land law.<sup>168</sup> The problem was how to validate and enforce these interests alongside the established common law and statutory tenures that had existed since settlement.

With the aim of reconciling these issues, the *Mabo* High Court concluded that upon settlement the Crown acquired a sovereignty of *power* which could not be challenged; however this ‘change in sovereignty did not necessarily extinguish native title to land’.<sup>169</sup> The court went on to reassess the assumption that the adoption of feudal tenure *necessarily* resulted in the Crown acquiring absolute plenum dominium to the exclusion of any indigenous title upon settlement.<sup>170</sup> Following the rejection of enlarged *terra nullius*, the court concluded that it was only the *fallacy* of equating sovereignty with absolute ownership that prevented the validation of indigenous native title. To protect the interests of indigenous land holders, it was, according to the *Mabo* High Court, quite appropriate to adopt a feudal regime where the Crown held a radical rather than an absolute title. In the words of Deane and Gaudron JJ:

the effect of an applicable assumption that the interest was respected and protected under the domestic law of the Colony would not be to preclude the vesting of radical title in the Crown. It would be to reduce, qualify or burden the proprietary estate in land which would otherwise have vested in the Crown to the extent which was necessary to recognise and protect the pre-existing native interest.<sup>171</sup>

The recognition by the *Mabo* High Court that the Crown held a radical rather than an absolute title over land — which could be burdened by native title — seemed to represent an appropriate compromise between tenure and native title. Radical title became the interposed link between the common law estates that issued from the Crown and the native title rights that encumbered the Crown. In the words of Brendan Edgeworth, ‘radical title operates as a linking concept between the constitutional or public law notion of sovereignty on the one hand, and the private law of proprietary rights on the other’.<sup>172</sup>

Radical title is the constitutional and political foundation for the enforcement of native title rights. Its presence ensures a non-homogenous proprietary culture that is directly antagonistic to the collective character of traditional feudal imagery, promoting a concordant proprietary culture.<sup>173</sup>

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167 See John Sanders, ‘Justice and the Initial Acquisition of Property’ (1987) 10 *Harv J L & Pub Pol’y* 367 at 372–373.

168 See Locke, above n101; Grotius, above n101; Lokan, above n104.

169 *Mabo*, above n2 at 41 (Brennan J), 61 (Deane & Gaudron JJ) and 143 (Toohey J).

170 *Id* at 51 (Brennan J), 58 (Deane & Gaudron JJ).

171 *Id* at 64–65.

172 Above n69 at 415.

173 See especially the discussion in Samuel Thorne, ‘English Feudalism and Estates in Land’ [1959] CLJ 193.

In this way, the adoption of radical title fundamentally changed the ongoing expression of sovereignty tenure within Australia. The replacement of absolute Crown ownership with radical Crown title created a new tenure articulation; sovereignty tenure was replaced with ‘radical tenure’.

Radical tenure, like sovereignty tenure, is also very different to the feudal version of tenure. The divergences between radical tenure and the feudal imagery are obvious: in Norman England, the Crown acquired absolute ownership over alienated land; in Australia, under a post-*Mabo*, ‘radical tenure’, the Crown acquired absolute ownership over *all* land, subject to enforceable native title rights. Feudal tenure worked well in Norman England because it did not have to deal with a fundamentally oppositional indigenous culture; it did not have to ‘accommodate feudal ideas of tenure with concepts based on a spiritual connection with a given country, comprising both land and sea’.<sup>174</sup> It did not have the responsibility of creating a land system accessible to two fundamentally oppositional cultures.

Radical tenure evolved as a response to the social and cultural changes that had occurred in Australia over time. The acceptance and endorsement of basic human rights was gradually perceived to be more imperative than the perpetuation of an artificial and highly discriminatory sovereignty tenure system.

There are, however, fundamental difficulties with the description of the post-*Mabo* land infrastructure as a tenure regime. It is arguable that the adoption of radical title has transformed the feudal version so extensively that it is no longer legitimate to define the system as tenurial. The tenure that Australia formally adopted at settlement retained a strong feudal narrative; whilst sovereignty tenure was a manifestation of this tenure, and there were distinct differences between fact and fiction in the development of Australian tenure, the feudal foundation endured. However, this has completely changed with the acceptance of radical title. The purpose of radical title is the recognition and enforcement of non-Eurocentric land titles. The feudal doctrine of tenure has, however, always been culturally insular; it is incapable of recognising the nature and validity of land interests that do not emanate from the Crown.

Nevertheless, the *Mabo* High Court was neither ready nor willing to abolish the enduring tenure categorisation. Brennan J insisted that, even with the adoption of radical title, it was a fundamental ‘skeleton’ principle that provided shape and consistency to Australian law, and the courts were:

not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle that gives the body of our law its shape and internal consistency.<sup>175</sup>

The ability of radical tenure to regulate a different proprietary landscape was not even examined by the courts. Deane and Gaudron JJ alluded to some potential problems, noting that because native title is an interest ‘of a kind unknown to English law’, its protection would require:

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174 *Commonwealth v Yarmirr* (2001) 208 CLR 1 (hereinafter *Yarmirr*).

175 *Mabo*, above n2 at 16.

an adjustment either of the interest itself or of the common law: either a transformation of the interest into a kind known to the common law or a modification of the common law to accommodate the new kind of interest.<sup>176</sup>

Whilst the tenure categorisation continues, the necessary ‘adjustment’ has always involved the reduction of native title enforceability; within the radical tenure system, native title has effectively become an estranged misfit.<sup>177</sup> It is inevitable that within such an environment native title will wither. This process is already well under way. The only way to halt the progression and commence the process of creating a land system with multi-cultural perspectives is to fully and absolutely abolish the tenure paradigm. Retaining tenure as the basic substructure for all proprietary rights, when not all interests are informed by this paradigm, raises basic issues of structural fairness.

### C. *A Cultural Intersection: Native Title and Feudal Imagery*

The insular perspective of feudal tenure makes it incapable of adapting to accommodate native title, because it has its origins in a fundamentally different cultural perspective. Never before has feudal tenure had to internalise a proprietary interest so profoundly different from established common law estates. Native title is an interest which the *Mabo* High Court recognised as existing where the indigenous claimants could prove that they held a specific, enduring relationship with the land claimed. Native title has ‘its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title’.<sup>178</sup> Native title can be communal, group or individual in character; however, in practice, it is likely to be communal in form because the traditional laws and customs that prove the connection with the land will generally emanate from an indigenous community. As noted by Gummow J in *Yanner v Eaton*:

The term “native title” conveniently describes the “interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants”. The native title of a community of indigenous Australians is comprised of the collective rights, powers and other interests of that community, which may be exercised by particular sub-groups or individuals in accordance with that community’s traditional laws and customs.<sup>179</sup>

Native title is, where proven, enforceable against the Crown, however it has no parity with the land grants issued under the doctrine of tenure. It is, ‘neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law.’<sup>180</sup> The common law definition of native

176 *Id* at 65.

177 See generally the discussion by Stewart Motha, ‘Encountering the Epistemic Limit of the Recognition of “Difference”’ (1998) 7 *GLR* 79; Jeremy Webber, ‘The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*’ (1995) 17 *Syd LR* 5.

178 *Fejo v Northern Territory* (1998) 195 CLR 96 at 128.

179 (1999) 201 CLR 351 at 383, quoting *Mabo*, above n2 at 57.

180 *Yanner v Eaton*, *id* at 128.

title has now been encompassed under the legislative rubric of the *Native Title Act* 1993 (Cth) (hereinafter *NTA*) in s223(1) where the definition is expressly held to apply to both land and water.

The legislative definition specifically refers, in s223(1)(a), to the rights and interests possessed under the ‘traditional laws acknowledged, and the traditional customs observed’ by indigenous claimants. The meaning of ‘traditional’ was defined narrowly in *Members of the Yorta Yorta Aboriginal Community v Victoria* to refer to ‘the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only these normative rules that are “traditional” laws and customs’.<sup>181</sup> Hence, the only native title rights which are protected by the common law are those which are held to have survived the acquisition of sovereignty by the Crown and which come within the scope of s223(1) of the *NTA*.<sup>182</sup>

It is clear that whilst native title has been recognised and defined according to common law and statutory principles, it is a creature, which has evolved from indigenous custom; this is what renders it distinctive or, *sui generis*.<sup>183</sup> Whilst one of the aims of the *Mabo* High Court was to promote equality between native title and land tenures and to ‘fully recognise and respect’ indigenous people’s rights, this is fundamentally impossible within a tenure regime.<sup>184</sup>

In the first place, native title exists as an encumbrance over the radical title of the Crown; native title will only burden the sovereignty of the Crown where a continuing relationship with the land can be proven and where the Crown has not exercised its power inconsistently. In this sense, the character of native title as an encumbrance over Crown title makes it much more vulnerable than a common law estate which is not amenable to such extinguishment. Even where proven, native title may be destroyed where the Crown, pursuant to the sovereign powers it acquired upon settlement, issues a grant that is inconsistent with native title rights. The rationale underlying this amenability to ‘extinguishment’ is compromise. The *Mabo* High Court explained that even though native title survived the acquisition of radical title by the Crown, it was amenable to extinguishment because of the sovereign power that the Crown acquired at settlement.<sup>185</sup> This has effectively come to be recognised as the ‘pragmatic compromise’ between indigenous and non-indigenous inhabitants, deemed necessary in order to prevent the destruction of 200 years of established land grants.<sup>186</sup>

It is this compromise that has resulted in a gradual erosion of native title rights since the decision of the *Mabo* High Court, and it is clear that this structural inequality is a direct product of a radical tenure which perpetuates the feudal

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181 (2002) 214 CLR 422 (hereafter *Yorta*).

182 See also *Yarmirr*, above n174 at [3] (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

183 *Ibid*; *Western Australia v Ward* (2002) 213 CLR 1.

184 *Mabo*, above n2 at 56 (Brennan J), 82 (Deane & Gaudron JJ).

185 *Id* at 69–70 (Brennan J).

186 See Kristin Howden, ‘The Common Law Doctrine of Extinguishment — More than a Pragmatic Compromise’ (2000) 8 *APLJ* 9; Richard Bartlett, ‘*Mabo*: Another Triumph for the Common Law’ (1993) 15 *Syd LR* 178.

imagery that all land interests relate to the Crown. The continuation of this fiction becomes even more questionable when it is proven to perpetuate systemic and unjustifiable inequality. There would be no need for a 'compromise' if feudal tenure were abolished and each land holder became the absolute 'allodial' owner of their land, subject to the rules and regulations implemented by the state. It is unacceptable to justify the treatment of native title as an extinguishable encumbrance simply because the tenure regime is perceived to be inviolate. The need for cultural equality far outweighs any homage Australia might have to a feudal fiction that was adopted with the primary motivation of acquiring power and control over land first occupied by indigenous inhabitants.

Indeed, the recognition of native title has highlighted the differences between the dynamic tenure relevant to medieval times and the static version that continues to endure within Australian land law. As noted by the court in *Commonwealth of Australia v Yarmirr*:

At least after the Norman conquest, English law did not have to solve the many special problems now presented to Australia's legal system by the intersection of an established written legal system of immigrant settlers and their successors, on the one hand, and the unwritten laws and customs of the pre-existing indigenous peoples on the other. English law did not have to attempt to reconcile notions of individual and communal rights. It did not have to accommodate feudal ideas of tenure with concepts based on a spiritual connection with a given country, comprising both land and sea. It did not have to adjust the universal conception of a single legal sovereignty to a new legal idea affording special legal recognition to the legal claims of indigenous peoples both because their claims relate to rights and interests that preceded settlement and because their recognition is essential to reverse previously uncompensated dispossession.<sup>187</sup>

The emerging difficulties that native title faces within a tenure regime have been made abundantly clear in the cases. In *Wik*, native title was only able to survive the issuing of pastoral legislative leases because those leases were interpreted not to have conferred exclusive possession, and therefore were not regarded as inconsistent with the continued existence of native title.<sup>188</sup> The validity of native title rights over thousands of acres of land most likely to be amenable to native title claims was, therefore, dependent upon a detailed interpretation of the intention of the drafters of the Crown leases. Whilst the *Wik* High Court felt that there was a strong presumption that a statute was not intended to extinguish native title, it is very clear that this is a matter of interpretation for each case, and where the Crown has issued a grant which is 'wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency'.<sup>189</sup>

The result of the *Wik* decision was that at common law the grant of a pastoral lease does not necessarily extinguish native title. However, leases granted after the commencement of the *Radical Discrimination Act 1975* (Cth) and before the

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187 Above n174 at 133.

188 *Wik*, above n57.

189 *Mabo*, above n2 at 69 (Brennan J).

commencement of the *NTA*, which might have been contrary to the discrimination legislation, may now be validated by the *NTA*.<sup>190</sup> The *Wik* decision highlights the precarious status of native title and the difficulty of superimposing a proprietary right from indigenous culture into a highly eurocentric tenure system.

In *Yorta* the High Court emphasised the clear need for native title claimants to prove ‘continuity of acknowledgement and observance of traditions and customs with respect to the claimed land’.<sup>191</sup> The court noted that the only traditions which would satisfy the test were those that had survived the acquisition of sovereignty and continued to the present day. In interpreting the scope of s223(1) of the *NTA*, the High Court in *Yorta* felt that unless the traditions have continued ‘substantially since sovereignty’ they could no longer be described as traditional, and proof of that continuation must be in accordance with the ordinary rules of evidence.<sup>192</sup> This decision highlights the impact that the tenure regime and its associated sovereignty presumptions have had upon the evolution of native title. A tradition capable of proving a connection with the land must not only be proven in accordance with non-indigenous evidential standards, it must be proven to have existed prior to the date when the feudal imagery commenced.

This rigorous continuity requirement is a direct consequence of the tenure infrastructure; the tradition must be proven to pre-date sovereignty as this would justify its enforcement against an all-powerful sovereign. Any traditions not pre-dating sovereignty could not be enforced because they would impugn the radical title of the Crown, and therefore undermine the feudal presumptions. This has effectively created what Richard Bartlett describes as a ‘museum mentality’; it ‘entails the perpetuation of the colonial mentality of Australia’s past now resurrected in a patronising and paternalistic manner so as to disempower indigenous people and deny them rights’.<sup>193</sup>

This deep-rooted tenure ideology pervades the entire property framework; it associates land ownership with possession, control and regulation by a higher authority and is, by its very nature, adversative to alternative property perspectives. In *Western Australia v Ward* the majority of the High Court concluded that the rights and interests protected under s223(1) of the *NTA* were akin to a ‘bundle of rights’ and that each traditional law or custom may raise a range of rights, each associated with the particular tradition or custom.<sup>194</sup> The High Court noted, however, that the *NTA* would only protect traditions and customs capable of being translated into common law rights and interests. This

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190 The *NTA* validates certain classes of interests. For example, Category A interests, which include by the terms of s229(3) pastoral leases, will completely extinguish native title rights. See also the decision of the High Court in *Wilson v Anderson* (2002) 213 CLR 401 where the High Court held that the pastoral lease was of a different character to that in *Wik* and, as a lease in perpetuity, was effectively a substitute for the determinable fee simple which was directly inconsistent with native title claims.

191 *Yorta*, above n181 at [31].

192 *Id* at [49]-[56] and [86]-[88] (Gleeson CJ, Gummow & Hayne JJ). Note also that s82 of the *NTA* now provides for the ordinary rules of evidence presumptively to apply.

193 See especially Richard Bartlett, ‘Humpies not Houses or the Denial of Native Title: A Comparative Assessment of Australia’s Museum Mentality’ (2003) 10 *APLJ* 12.

194 *Western Australia v Ward*, above n183 at 40.

decision has imposed significant strictures upon native title and highlights the chasm between the rights-based perspective of Westernised property interests and the cultural framework of indigenous tradition. Identifying customs and traditions in terms of a rights-based analysis is particularly problematic for Australian aborigines given the fact that their relationship with the land is essentially spiritual in nature. The *Ward* High Court noted this difficulty but felt that it was subsumed by the requirements of the *NTA*:

The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the *NTA*. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests that are considered apart from the duties and obligations which go with them.<sup>195</sup>

The problem, however, is not simply that the *NTA* requires a rights based 'ordering of affairs'; it lies in the fact that the rights projected within a tenurial system, which the *NTA* accommodates, are defined from a specific Eurocentric perspective. Customary native title rights are divergent to the 'feudal imagery of English constitutional theory'; consequently, the tenure system will never be able to provide the framework for structural equality between indigenous and non-indigenous property interests.<sup>196</sup>

One of the entrenched characteristics of Australian feudal tenure is proprietary parallelism; the feudal fiction was adopted by colonial law-makers with the aim of assuming complete sovereignty and control *without regard* to the interests of the indigenous occupants. This ingrained perspective is difficult to eradicate. The Eurocentric assumptions of tenure make it directly inconsistent with the evolution of a diverse property sub-structure and are regressive to the representative needs of democratic Australia.<sup>197</sup> The prospect of 'radical tenure' having the facility to suddenly accept and promote native title within Australian jurisprudence is piling 'fiction upon fiction'. The High Court's insistence in *Mabo* that feudal tenure continue to function as the foundation for Australian land law is retrograde; the prolongation of the tenure system has impeded the development of a *modus operandi* capable of protecting the collective rights of semi-autonomous minorities within Australia.<sup>198</sup> Native title rights will always be unequal within a tenure system. The feudal narrative that pervades all expressions of tenure impedes the capacity of the courts to adopt a more individualistic approach, perpetuating native title as an 'artificially defined jural right'.<sup>199</sup> Within such an infrastructure native title is perceived as a 'burden', defined by its association with the Crown rather than its unique cultural identity.

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195 *Id* at [14].

196 Edgeworth, above n69 at 413. See also McNeil, above n69 at 84–85.

197 For an excellent discussion on common law and customary law see Brian Slattery, 'Rights, Communities and Tradition' (1991) 41 *U of T LJ* 447; Vine Deloria & Clifford Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (1984).

198 See Joseph Magnet, 'Collective Rights, Cultural Autonomy and the Canadian State' (1986) 32 *McGill LJ* 170 at 172; Michael Asch & Patrick Macklem, 'Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*' (1991) 29 *Alta L Rev* 498.

199 *Yanner v Eaton*, above n179.

## 6. *Conclusion*

The feudal doctrine of tenure was only truly functional during Norman England where it operated as an efficient and representative social dynamic. When this feudal expression was adopted by Australia, it had already become moribund within England and had no specific historical or social relevance to the circumstances of the colony. The primary motivation underlying its endorsement was the belief that it would legitimate the assumption of absolute Crown ownership. As the Australian land system evolved, feudal tenure was perceived to have become an entrenched foundation for the entire hierarchy of common law estates. Paradoxically, the acceleration of statutory grants, a form completely foreign to the classical feudal expression, occurred against a background of increasing judicial deference to the tenure regime. Feudal tenure became an institutionalised vestige of a past world.<sup>200</sup>

The introduction of native title rights has, however, fundamentally altered Australian land culture. In accepting native title as a valid and enforceable property interest, Australian land law has now embraced a pluralist property perspective. Within such an environment, it is no longer legitimate or justifiable to perpetuate a feudal fiction intrinsically inconsistent with native title perspectives. The longevity of feudal tenure must not inure it against the demands of social progression.

The difficulties associated with the implementation of native title rights within an insular and unaccommodating tenure framework are gradually destroying the spirit of native title. The literal application of a feudal fiction has always been a strange foundation for Australian land law and, in the words of Jeremy Webber, 'is all the more inappropriate now, given the discriminatory impetus underlying the denial of indigenous title'.<sup>201</sup>

The abolition of feudal tenure and its replacement with an allodial system, where the state holds no presumptive ownership and individual land owners retain proprietary independence, will encourage a greater sense of cultural neutrality and create a system better able to cope with the demands of a new property ideology.<sup>202</sup> Until the courts address this issue and challenge the presumed status of feudal tenure, native title rights, derived from a transcendent connection between indigenous inhabitants and the land, will remain imprisoned within an irreconcilable land culture. The moral judgements of the past will continue to operate and define the present.<sup>203</sup>

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200 See Stuckey, above n18; Thomas Watkin, 'Feudal Theory, Social Needs and the Rise of the Heritable Fee' (1979) 10 *Cambrian LR* 39.

201 Webber, above n177.

202 Note the general comments of John Devereux and Shaunnagh Dorsett, above n69: 'While the doctrine of tenure is often thought to underpin our system of landholding, a move to allodialism would not fracture our land law. In many ways, it would better reflect its true nature'.

203 See esp Gerald Postema, 'On the Moral Presence of Our Past' (1991) 36 *McGill LJ* 1153.

# *The Ethos of Pluralism*

MARGARET DAVIES\*

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## *Abstract*

The purpose of this article is to highlight a tension within contemporary legal scholarship between the idea of legal monism and the idea of legal pluralism. ‘Legal monism’ refers to the pervasive positivist understanding of law as a unified structure of valid rules and principles contained within a single institutional framework. In contrast, ‘legal pluralism’ recognises multiplicity in legal practice and legal theory. The core idea of the article is that some (though not all) versions of legal pluralism can be of use in the construction of a new understanding of law appropriate to contemporary conditions of cultural and political diversity. The argument for a more pluralistic understanding of law centres on four claims. First, it is possible and useful to think of the pluralistic outlook in legal theory as an ‘ethos’ rather than as a theory with defined boundaries. Second, the traditional emphasis on singularity and totality is no more rational as a theoretical preference than even the most open-ended pluralism. Third, the pluralistic approach to theory is both empirically and normatively preferable to the singular view of law, and is more useful to the demands of a plural society. Fourth, it is possible to think of law — even in its conventional positivist sense — as irreducibly plural, rather than essentially singular and limited.

## *1. The One and the Many in Legal Scholarship*

There are several ways of classifying the various approaches in contemporary legal scholarship. One classification, for instance, could distinguish several schools of thought based on an underlying philosophy or social justice perspective as follows: traditional black-letter legal analysis; law and policy analysis; law and economics; Indigenous legal thought; feminist legal theory; socio-legal studies; and critical and postmodern legal studies. Each of these approaches to legal scholarship is comprised of both analysis of legal doctrine from a distinct perspective and more abstract or theoretical research. While very few scholars would sit comfortably within only one category, such a scheme of classification offers one useful way of generalising the current state of scholarship. Another method of classifying legal scholarship might be to focus on the subject matter rather than the theoretical background of an approach: for instance, we could distinguish between legal theory or philosophy, doctrinal legal analysis and socio-legal scholarship.

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Such classifications are useful and valid, although I should add the normal qualifications: no taxonomy is absolute; there are always in-between or crossover approaches; and epistemic classifications tied to a particular discipline very quickly become outdated.

In this article I wish to put aside conventional classifications of legal scholarship and focus on a dichotomy with a long philosophical heritage — the distinction between the One and the Many.<sup>1</sup> Legal scholarship is currently characterised by a division, if not an explicit conflict, between an ethos of singularity or monism and an ethos of pluralism. Monistic conceptions of law as a unified and coherent system are under challenge from pluralistic visions of legal multiplicity. The orthodox jurisprudential, scholarly and practical conception of law is ‘monistic’ in that it depicts law as a single coherent structure of norms derived from a clearly located source — the state. In contrast, pluralistic conceptions of law recognise multiple types of law, emphasise the heterogeneity of narratives constituting the law and identify several origins of law. I will explain monism and pluralism in more detail in the next section of this article.

The division between law as One and law as Many cuts across classifications such as those which I have mentioned above, for it would be superficial to say that those who adhere to the more ‘traditional’ schools of jurisprudence *only* promote monism, while ‘critical’ legal theorists *always* promote pluralism. Instead of seeing the division as one between scholars of different persuasions, my argument is rather that scholars are contending within themselves with the struggle between monism and pluralism, in its many manifestations. Put simply, our context is one in which the default ideology of law is rather singular, but contemporary political and social conditions demand a more pluralistic outlook. We can resolve the conflict in a variety of different ways, but my sense is that the issue remains active for many scholars — how can we maintain the integrity of law as a system, while recognising the need for it to be more socially responsive, flexible, culturally inclusive and adaptive to other normative systems?

Further, while I am of the view that positions based upon an ideal of singularity or Oneness may often be politically justified and pragmatically inescapable, it is now time for legal scholarship to embrace and celebrate the ethos of pluralism. The question of pluralism arises in many contexts in Australian law: for instance, whenever the issue of legal self-determination for Indigenous people is raised,<sup>2</sup> or whenever there is debate about the relationship of international human rights standards to domestic law,<sup>3</sup> there is conflict between the vision of a singular all-controlling law and the vision of co-existing legal orders. Quasi-legal decision-making bodies (such as medical or sporting tribunals), the internal governance systems of large organisations and alternative modes of dispute resolution also

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1 See, for instance, William James, ‘The One and the Many’ in William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (1907) published as *Pragmatism: A New Name for Some Old Ways of Thinking and the Meaning of Truth: A Sequel to Pragmatism* (1975) at 63–79.

2 See Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia’s Future* (2003) at 129–131; Deborah Bird Rose, *Indigenous Customary Law and the Courts: Postmodern Ethics and Legal Pluralism* (1996).

raise the image of a multiplicity of legal or law-like systems in our society. In each case, we see some mode of regulating or normalising behaviour in a specific context, which exists alongside the law, sometimes as an optional alternative to it.

The issue of a pluralist understanding of law is much deeper than these examples suggest, because pluralism also leads to a questioning of the nature and limits of law in its conventional sense. It leads, in other words, to a re-evaluation of what we think law is and how it relates to the social, political and moral spheres of life. There is a great deal of contemporary scholarship dissatisfied with the conventional image of law's separateness and singularity, which is reaching out towards a less totalistic and more fluid understanding of law — one which does not automatically suppress differences of race, culture, sex or sexuality. Such scholarship is driven by a complex of factors: rapid global change;<sup>4</sup> frustration at the inability of conventional understandings of law to explain pluralistic politico-legal entities such as the European Union;<sup>5</sup> a theoretical rejection of objective knowledge and a critique of the partial representation by law of a diverse society;<sup>6</sup> and an appreciation of the influence of highly dynamic forces such as language and cultural symbols on people, their lives and law.<sup>7</sup> The 'ethos of pluralism' evidenced by this scholarship is part of a paradigm shift towards a less positivistic, more open and more responsive concept of law.<sup>8</sup> It represents a 'crisis' only in the sense that it is a turning point for law away from the traditional insular and contained understanding of a legal system.

The purpose of this article is essentially to explain the significance of the pluralistic attitude in contemporary legal scholarship and to outline the reasons for supporting such a shift in thinking. My focus is not primarily socio-legal theories of legal pluralism, although I will later offer a brief synopsis of some of the main themes of such theory. Nor is this article centrally about postmodernism, with which pluralism is sometimes mistakenly identified.<sup>9</sup> Pluralism in relation to law can be perceived and theorised in many different ways, not all of which are associated with any specific theory of legal pluralism. The article is introductory

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3 Although I have stated this as a rather blunt coming together of two monistic systems, it is important to recognise that the systems which come together are also dynamic, interpretable and contextual. See, for instance, Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *NYU J of Int'l Law & Pol* 501; Dianne Otto, 'Everything is Dangerous: Some Poststructural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law' (1999) 5 *Aust J of Human Rights* 17.

4 Jost Delbruck, 'Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State' (2004) 11 *Indiana J of Global Legal Stud* 31.

5 See, for example, André-Jean Arnaud, 'Legal Pluralism and the Building of Europe' in Hanne Petersen & Henrik Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (1995); Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Mod LR* 317.

6 For a summary of this literature, see Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* (2<sup>nd</sup> ed, 2002) at 167–294.

7 See, for instance, Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (1986) at 220–221; Costas Douzinas, Ronnie Warrington & Shaun McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (1991).

8 On the issue of paradigm change in law, see Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalisation and Emancipation* (2<sup>nd</sup> ed, 2002) at 7–20.

in that one of my underlying purposes is to explain the relevance of, and need for, a pluralistic attitude in the Australian context. However, I do not wish merely to rehearse a number of (well-trodden) pluralist arguments and mechanically adapt these to Australian law. A further aim of the article is to present a case for a pluralistic approach to law which extends beyond the often obscure and sometimes overly theoretical accounts of pluralism: simply, I argue in favour of a general ‘ethos’ rather than a ‘theory’ of pluralism.

My argument then, revolves around four core claims: first, that the thought or ‘ethos’ of pluralism extends beyond the defined boundaries of any theory; second, that the philosophical and legal preference for monistic explanations is no more rational than even the most open-ended pluralism; third, that the singular view of law is obstructive to the kinds of social change demanded by a plural society; and fourth, that it is possible to think of law — even in its conventional positivist sense — as irreducibly plural, rather than essentially singular and limited. These four points are considered in sections 2 to 5 of this article.

## 2. *The ‘Ethos of Singularity’ and the ‘Ethos of Pluralism’*

### A. *Ethos*

To begin with, I should outline what I mean by the ‘ethos of singularity’ and the ‘ethos of pluralism’. I have used the term ‘ethos’ to indicate that this is not a debate between two theories, but rather a broad discordance of approaches with cultural, ethical, ideological and aesthetic dimensions. It is not by reference to any *theory* of singularity as such, that legal thought is monistic: rather, the thought or ideal of singularity underpins much Western philosophy, which is the intellectual context of legal philosophy and of the picture of law conventionally manifested in legal scholarship. Given the backdrop of Western philosophy, *legal* philosophy has assumed that its goal is to articulate a unitary concept of law and more practically oriented legal scholarship has reproduced this assumption.

Similarly, while ‘pluralism’ has at times been designated the status of ‘theory’, it can also be described as a set of values, an attitude or an aesthetic emphasis.<sup>10</sup> To speak of the ‘ethos’ of pluralism then, is to highlight the fact that pluralism is itself pluralistic and cannot be satisfactorily reduced to a theoretical model.<sup>11</sup> Most

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9 There is a tendency to label any anti-monistic style of thought as postmodern: however, much legal pluralism is empirical in nature – based on observation of modes of social organisation – while postmodernism critiques the objectivist paradigm upon which much empiricism is based. Both may be pluralistic, though often in different senses. This is not to say that there is no overlap, though, as legal pluralism may be based on a postmodern critique of discourse and the subject (the style of legal pluralism I prefer) and empirical analysis may be situated within a postmodern critique of its own foundations. One conscious effort to associate postmodernism with pluralism is represented in the work of Boaventura de Sousa Santos. See, for instance, Santos, ‘Oppositional Postmodernism and Globalizations’ (1998) 23 *Law & Social Inquiry* 121. However, as Santos himself notes, his work has been criticised for being both too modernist and too postmodernist. See Santos, above n8 at 14.

10 Desmond Manderson, ‘Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory’ (1996) 20 *MULR* 1048; William James, *A Pluralistic Universe* (1977, first published 1909).

importantly, it is to indicate that a pluralist approach is more about practical ethical positioning in the world than about scholarly theory: not only scholars and educators, but also the judiciary, students, practitioners, legislators and all legal subjects may be motivated by a pluralist ethos. For the sake of simplicity, my description of pluralism and monism presents them as opposite theoretical positions, though in fact, as I have indicated, I see them rather as an interplay of voices, desires, discourses and opinions.<sup>12</sup> We can all be drawn as scholars towards the idea of formulating a theory, which describes a unified system, but we can also recognise the need to acknowledge some form of otherness and plurality. The difference between monism and pluralism may often be expressed as scholarly debate, but it may also be expressed as a tension within scholarship. For this reason, there is nothing incoherent about labelling much contemporary legal scholarship as having a ‘singular plural’ outlook,<sup>13</sup> that is, an outlook that is situated within the monistic tradition but is nonetheless pluralistic in its consciousness of otherness. The distinction between the singular and the plural does not necessarily refer to a mutually exclusive ‘either/or’, but rather the co-existence of different elements in a loosely structured ‘both/and’.<sup>14</sup>

### **B. The Singular**

The terms ‘singularity’ and ‘pluralism’ are fairly simply defined, although the ramifications of the distinction are complex. In the context of legal scholarship and in particular legal theory, the terms ‘singular’ and ‘monistic’ refer to modes of thinking about law, which emphasise its nature as a coherent and whole system — ordered, comprehensive, rational and objective. The ‘singular’ in this sense is not to be equated with the commonly used term ‘particular’, but rather with the philosophical concepts of universality and totality — monism or singular thought raises the prospect of thinking about law as a single type of object, a unit or as something which can be described and theorised as a totality or a system. In contrast, the ‘particular’ is that which defies definition and escapes systematisation.

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11 The point that ‘pluralism must itself be pluralistic’ is also made by Emmanuel Melissaris, ‘The More the Merrier? A New Take on Legal Pluralism’ (2004) 13 *Soc & Leg Stud* 57 at 58.

12 In a different but related context (the conflict between seeing gender as a stable dualism, and seeing it as radically fluid) Wendy Brown employs the musical metaphor of counterpoint: ‘At once open-ended and tactical, counterpoint emanates from and promotes an anti-hegemonic sensibility and requires a modest and carefully styled embrace of multiplicity in which contrasting elements, featured simultaneously, do not simply war, harmonize, blend or compete but rather bring out the complexity that cannot emerge through a monolithic or single melody.’ See Wendy Brown, ‘Gender in Counterpoint’ (2003) 4 *Feminist Theory* 365 at 367.

13 The term ‘singular plural’ is from Jean-Luc Nancy, *Being Singular Plural* (2000). While I have framed the issue as the co-existence of a plurality of voices within a philosophy or ideology of singularity, Nancy’s point is more radical – that the singular is inherently or conceptually plural. Law is also ‘singular plural’ in this more radical sense, as I explain in Part 5 of this article.

14 By saying that the singular attitude can co-exist with the plural in a ‘loose structure’ I mean that the appreciation of diversity can co-exist with our frequent assumption that things form a system – but the diversity can never be reduced to that system or explained solely in its terms.

The view that law is derived from a sovereign entity or singular point of reference — for instance, the state, a rule of recognition or a basic norm<sup>15</sup> — and that it therefore has an ideational unity separate from the realms of culture, morality or politics, is a type of monism, known in jurisprudential thought as legal positivism. The positivist view of law is also typically ‘centralist’ because it understands law to be ultimately derived from some central authority such as a state, rather than locating the sources of law in multiple, de-centred sites.<sup>16</sup> Positivism is the most widespread and accepted understanding of law presently in existence, at least in the West and underpins most legal scholarship,<sup>17</sup> including by far the greater part of legal theory. Positivism reproduces the philosophical discourse of singularity in its claim that there is One law in a particular geo-political space and that the One law is itself One system, defined by clear limits, governed by certain principles and unified by a distinct foundation. Equally singular in outlook are less widespread but still powerful standpoints such as those which argue that law is or should be, the expression of rational principles of human nature, such as those associated with economic concepts or in practical reason.<sup>18</sup> The emphasis upon singularity is revealed in legal doctrine in a variety of ways, for instance, in the view that equality means applying an ‘objective’ standard to people, regardless of their own normative positioning (as influenced by their cultural heritage, religion or gender).<sup>19</sup>

Much ‘critical’ scholarship which targets positive, state based law as the object of its critique reproduces monistic assumptions about law.<sup>20</sup> Given the intellectual context of law, this is unavoidable. Critical analyses of specific doctrines of positive law — especially where law reform outcomes are proposed — often assume the positivist definition of law as an autonomous system of norms, rather than questioning the nature of law’s alleged unity. This focus on positive law is an absolute pragmatic necessity, for while law reform may not correct large-scale

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15 HLA Hart, *The Concept of Law* (2<sup>nd</sup> ed, 1994); see also Hans Kelsen, *Pure Theory of Law* (1967).

16 In this article, I use the terms ‘monism’ and ‘centralism’ interchangeably. Monism (opposed to pluralism) refers to the idea that there is a single concept of law adequate to the task of defining law. Centralism (opposed to decentralist models) is the idea that all law has a centre of authority – state, sovereign, or basic norm. A monist account of law is not necessarily centralist, as it is possible to think of a singular account of law which does not trace the source of all law to a central institutional point (arguably, for instance, secular natural law theory). Whether it is possible to have a centralist model of law which is not monist is debatable. However, in the present historical context of Western legal thought, the prevailing monistic concept of law (positivism and its variants) is also typically centralist in that it defines law in terms of its relationship to a central authority.

17 For an analysis of the disciplinary boundaries of law see Douglas W Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *J of Law & Society* 163 at 174–181.

18 See, for example, Richard A Posner, *Economic Analysis of Law* (3<sup>rd</sup> ed, 1986); John Finnis, *Natural Law and Natural Rights* (1980).

19 See generally Luke McNamara, “‘Equality Before the Law’ in Polyethnic Societies: The Construction of Normative Criminal Law Standards’ (2004) 11 (2) *E-LAW*: <<http://www.murdoch.edu.au/elaw/issues/v11n2/mcnamara112.html>>.

20 This is not to suggest that such scholarship is entirely singular in its outlook about law – as indicated above, the ‘singular plural’ outlook is perhaps the most common.

social problems or systemic bias in the law itself, it can make some significant, albeit incremental, differences to people's lives.<sup>21</sup> Moreover (and less commonly in very recent years) some critical legal scholarship conceptualises positive law as a whole in an essentialist fashion — for instance as an instrument for class privilege or male domination.<sup>22</sup> In such theories the doctrinal and symbolic bias evident in many areas of law is reified to the status of a general description of law. Such descriptions of law present a defensible counter-story to the picture of law as a neutral framework which plays no part in the construction or distribution of social power. However, they may also unwittingly entrench the power of law by presenting it as a totality, rather than as fragmented and complex. The presumption of law in its positivist sense does discursively reiterate and therefore reinforce the positivist view of law together with its in-built biases.<sup>23</sup> I do not intend by these remarks to imply any criticism of critical legal scholarship, which understandably and rightly emphasises the defects of law, as it is commonly understood. The point is that the attitude of monism can be said to inform quite different theoretical perspectives about law and crosses the boundary between so-called 'traditional' and 'critical' thought.

Indeed, regardless of our theoretical outlook and because of the need to engage on a pragmatic basis with law, we often need to proceed *as if* it were a singular, self-contained and objective system: if we wish to relate to the system effectively, we need to play by its rules. Even if law is potentially open, essentially indeterminate and responsive to social change, scholars engaging with law nonetheless also have to assume a more singular and fixed concept of law in many circumstances.

### C. *The Plural*

In contrast to the monistic and centralist narrative about law, the 'ethos of pluralism' enshrines an attitude which celebrates multiplicity and difference in the law. A pluralist approach rejects the view that law is one system, imposed on one society. It sees law as diverse and fragmented, not systematic and cohesive. There are many ways of defining pluralism in a broad philosophical sense. For present purposes I would like to adopt the minimalist explanation offered by William James, who said that '[t]he irreducible outness of *anything*, however infinitesimal, from anything else, in *any* respect, would be enough, if it were solidly established, to ruin the monistic doctrine.'<sup>24</sup> What is important in this statement is the phrase 'irreducible outness', which indicates the relationship of pluralism to otherness.

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21 Susan Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists and Sceptics' (2004) 20 *Aust Feminist LJ* 43; Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 *J of Law & Society* 351 at 362.

22 Richard Abel, 'A Critique of Torts' (1990) 37 *UCLA LR* 785; Catharine MacKinnon famously referred to male domination as 'metaphysically near perfect', suggesting that there are few, if any, spaces within law or legal discourse for women to find their own identity. See Catharine MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635 at 638.

23 A classical statement of the position that critics of law, in particular feminist critics, should de-centre law is Carol Smart, *Feminism and the Power of Law* (1989).

Wherever there is an Other which cannot simply be accommodated within a system of thought, monism is under challenge. Faced with such an Other, we can try to assimilate it and make it fit within the unity (the attitude of singularity) or recognise its difference in its own right (the attitude of pluralism).

As with any complex body of work, there are several different ways of classifying the literature on legal pluralism, for instance, according to method (empirical or theoretical), discipline (anthropology, sociology or law) or subject matter (law in former colonies, law in the West or the positive legal system itself). In one of the first attempts to lay out a theoretical terrain for legal pluralism, John Griffiths described it as a sociological fact — an empirical state of affairs attaching to human relations:

A situation of legal pluralism — the omnipresent, normal situation in human society — is one in which law and legal institutions are not all subsumable within one ‘system’ but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another, so that the ‘law’ which is actually effective on the ‘ground floor’ of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism, and the like.<sup>25</sup>

Griffiths says that pluralism is ‘the fact’ about the social field, whereas ‘[l]egal centralism is a myth, an ideal, a claim, an illusion’ which, because of its ideological power, has been ‘able successfully to masquerade as fact’.<sup>26</sup> This explanation, which opposes a true descriptive account of a social field to an ideological (and apparently therefore false) account, may oversimplify the role of convention in constructions of reality.<sup>27</sup> Without going into the epistemological issues raised, however, it seems perfectly reasonable to state that there are competing pictures of law and that monism is only one such picture. Pluralism offers both a better (more useful and more empirically inclusive) descriptive account of the law/society nexus and a normatively preferable account, because it presents opportunities for the legal recognition of social diversity.

Griffiths distinguishes between ‘weak’ and ‘strong’ pluralism.<sup>28</sup> ‘Weak’ legal pluralism exists where a difference is recognised and managed by a dominant state legal system.<sup>29</sup> For instance, the ‘difference’ between Australian Commonwealth

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24 William R James as cited in James O’Shea, ‘Sources of Pluralism in William James’ in Maria Baghramian & Attracta Ingram (eds), *Pluralism: The Philosophy and Politics of Diversity* (2000) at 27.

25 John Griffiths, ‘What is Legal Pluralism?’ (1986) 24 *J of Legal Pluralism & Unofficial Law* 1 at 39. See also McNamara, above n19.

26 *Id* at 4.

27 Legal monism and legal centralism are true because legal agents act on a daily basis *as if* the law were singular and derived solely from the state. To phrase it in Cover’s terms, positivism constitutes powerful constitutive narrative about law. However, it is by no means the only narrative, and therefore, not the only possible truth – as Griffiths illustrates. See Robert M Cover, ‘Nomos and Narrative’ (1983) 97 *Harv LR* 4 at 10.

28 Griffiths, above n25 at 5.

law and South Australian law is managed by the Constitution, in particular by the sections dealing with the distribution of powers and the inconsistencies between the laws of the states and the laws of the Commonwealth. Similarly, Indigenous land entitlement is managed by the common and statutory law on native title: in a weak sense, Australian law has recognised Indigenous law on this issue, but it is a recognition which does not subvert the basic centralist dogma of Australian law, because it is fully effected within that law. Native title illustrates a continuation of standard colonial practices (in Australia and elsewhere), whereby Indigenous laws can achieve some status, but strictly within the framework of colonial recognition.<sup>30</sup> The recognition of such differences as Federal/State and European law/Indigenous law, to the extent that they are contained within dominant law, are no threat to the doctrine of centralism because they are structurally subsumed within state law. With 'weak' pluralism there is no 'irreducible outness', because the law which might otherwise be regarded as 'out' is in fact controlled by the system.

In contrast, 'strong' legal pluralism means essentially that the difference or otherness upon which the understanding of pluralism is based cannot be reduced to the singular authority of a state. There is 'strong' legal pluralism where two or more 'laws' exist in the one place and there is no dominant or overarching system which orders the relations between the different laws. To take once more the example of colonialism, the recognition of Indigenous law granted by the Australian legal system does not end any enquiry about the existence of Indigenous law, which has an independent cultural basis. Strong legal pluralism acknowledges not only a normative difference which is accommodated by the mainstream legal system, but also a difference which is independent of and uncontrolled by, dominant law. Such a difference is irreducible in the manner described by William James. Moreover (although this goes beyond Griffith's analysis) there is also 'strong' legal pluralism when — at the theoretical level — difference or otherness is understood to be intrinsic to the very existence and concept of law. It is a challenge to centralism to point out that its very singularity is inherently unstable and self-contradictory.

Griffiths argued that '[l]egal pluralism is an attribute of a social field and not of "law" or of a "legal system".'<sup>31</sup> However, recent theorists have departed from this focus upon the empirical description of a social field. In keeping with these trends, I would like to distinguish here between two senses in which law can be regarded as plural — first, the sense in which we perceive plural legal systems operating at once in a given social environment (the pluralism described by Griffiths) and second, the sense in which we perceive the plurality inherent in the legal system conventionally characterised by its singularity.

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29 Griffiths also gives the example of a colonial power which (unlike the British in Australia) imports its own law, but recognises the operation of Indigenous law insofar as it affects the Indigenous population. He says such legal pluralism 'is justified as a technique of governance on pragmatic grounds'. However, it is 'weak' because the authority of the Indigenous law is subordinate to the authority of the colonial law – which retains its singularity. *Ibid.*

30 See below n62.

31 Griffiths, above n25 at 38.

First, then, there is the outward-looking pluralism which sees a diversity of legal or law-like normative systems existing in the one space.<sup>32</sup> The term ‘legal pluralism’ is usually taken to refer to theory about the plural normative sectors in a society and across the globe — which may include formal positive law, non-sovereign but still recognisably ‘legal’ orders (such as international law, Indigenous law and religious law), as well as cultural practices with normative resonance, such as behavioural codes. Pluralism of this type has often been empirical in its method,<sup>33</sup> insofar as it is based on the observation that conventional descriptions of law do not match the facts of legal multiplicity. The singular and statist account of law is falsified many times over by the mere existence of normative and even *legal* spheres not reducible to the unity of the state. Pluralist thought and legal scholarship with a pluralist outlook has aimed at better describing and understanding the interface and interaction between the different types of law which order a society. Such legal pluralism does not necessarily displace the conception of state law as a unified and coherent system. It may merely situate state law as one form of law within a context of normative multiplicity.

Second, there is the more inward or reflexive pluralism which looks at positive, state-defined law and sees it as inevitably plural or incapable of being contained within its own limits. Thus, in addition to the observation, description and theorisation of plural legal orders, the term ‘legal pluralism’ can also refer to the pluralism within law in its conventional, institutional sense.<sup>34</sup> Much, though not all, of this theory has a conceptual, rather than an empirical orientation in that it redefines the concept of state law in a pluralistic fashion. Positive law can be regarded as inherently, irreducibly plural — full of gaps, contradictions, unresolved histories, counter-narratives and, most pertinently, composed of multiple dimensions and layers. It can be regarded as derived from plural origins,<sup>35</sup> as conceptually or ‘axiologically’ plural<sup>36</sup> or, as Robert Cover illustrated, from the multiple normative universes existing in any society.<sup>37</sup>

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32 Griffiths, above n25; Sally Engle Merry, ‘Legal Pluralism’ (1988) 22 *L & Soc R* 869; see also Christoph Eberhard, ‘Towards an Intercultural Legal Theory’ (2001) 10 *Soc & Leg Stud* 171.

33 For an anti-positivist and critical approach to the issue of plural normative systems, see Eve Darian-Smith, ‘Law in Place: Legal Mediations of National Identity and State Territory in Europe’ in Peter Fitzpatrick (ed), *Nationalism, Racism, and the Rule of Law* (1995).

34 See, for instance, Manderson, above n10, especially 1062ff; Jørgen Dalberg-Larsen, *The Unity of Law: An Illusion? On Legal Pluralism in Theory and Practice* (2000) at 103–106; Marth-Marie Kleinhaus and Roderick MacDonald, ‘What is a Critical Legal Pluralism?’ (1997) 12 *Canadian J of Law & Society* 25.

35 It has been suggested to me that the pluralism of law’s origins is a third sense of legal pluralism. However, I regard plural foundations of law as one aspect of its inherent pluralism because, ultimately, it is not possible to distinguish between the origins of law and the factors necessary to its ongoing maintenance. Put another way, the ‘irreducible other’ of the legal system is its social and political environments, which account for both the origins and the current nature of law. See Jacques Derrida, ‘Declarations of Independence’ (1986) 15 *New Political Science* 7; Jacques Derrida, ‘Force of Law: The Mystical Foundations of Authority’ (1990) 11 *Cardozo LR* 920.

36 Chantal Mouffe, ‘Democracy and Pluralism: A Critique of the Rationalist Approach’ (1995) 16 *Cardozo LR* 1533 at 1535; see also Chantal Mouffe, ‘Political Liberalism, Neutrality and the Political’ (1994) 7 *Ratio Juris* 314.

37 Cover, above n27. I will explain the important contribution of this article in Part 5.

I will undertake a fuller evaluation of pluralist thought in Part 5. It is important however at this point to distinguish the idea of ‘legal pluralism’ from mere legal respect for ‘value’, ‘cultural’ or ‘moral’ pluralism. Liberal thinkers sometimes speak of ‘value pluralism’ or ‘moral pluralism’ in law, meaning that on some moral issues law does not (and need not) enforce a single set of values, but leaves wide discretion for individuals to practice their own morality. From the liberal point of view (and despite the clear favouritism of law for heterosexual relationships) it might be said that there is a degree of moral pluralism in law regarding sexual preference because same-sex relationships are not prohibited by law. Generally, law takes no notice of what we wear, what religious observances (if any) we favour, how many sexual partners we have, whether we plant trees for a hobby, believe in the supernatural or eat animal flesh. Law may place restrictions on all of these activities and even strongly influence people’s choices, but choice is not wholly determined. In many respects, liberal law permits, though does not always encourage, pluralistic modes of living — indeed, a core belief of the political philosophy of liberalism upon which much of our law is built, is that moral and value pluralism should be tolerated and even promoted, provided a particular belief or practice does not harm others.<sup>38</sup> Law may even accommodate cultural difference by establishing a regime of minority or group rights.<sup>39</sup> For instance, colonial legal systems (including contemporary Australian law) typically provide for limited recognition of native laws while insisting upon the unassailability of state sovereignty: as Griffiths notes, this is regarded as a ‘messy compromise which the ideology of legal centralism feels itself obliged to make with recalcitrant social reality.’<sup>40</sup>

However, this limited realm of moral or cultural pluralism protected by law does not necessarily challenge the monistic view of law which I outlined above, and is furthermore subject to the criticism that it neglects the systemic preferences and biases which flow from the interface between an allegedly neutral law and powerful social norms. The liberal promotion of value pluralism through a supposedly neutral framework of law does not, in other words, challenge the view that law is coherent, logical and systematic and derived from a singular state entity. This is because, in line with the positivist doctrine, it is possible to encourage moral or cultural pluralism while, at the same time, insisting on the monism of law: in fact, some positivists have thought that the monism of law — the singularity, separation and neutrality of law — is just what is needed to allow liberty to flourish.<sup>41</sup> The trouble with that view, however, is that it assumes that it is possible to have a framing legal system which is culturally and morally neutral. It does not recognise that the very idea of a legal system which is separate from the social, political and ethical existence of a community is itself an expression of a particular

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38 John Stuart Mill, ‘On Liberty’ (1859) in Mary Warnock (ed), *Utilitarianism* (1962) at 135.

39 See Will Kymlicka & Raphael Cohen-Almagor, ‘Ethnocultural Minorities in Liberal Democracies’ in Maria Baghramian & Attracta Ingram (eds), *Pluralism: The Philosophy and Politics of Diversity* (2000) at 228–250.

40 Griffiths, above n25 at 7.

41 HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harv LR* 593.

culture.<sup>42</sup> Despite the rhetorical attractiveness of the concept of a legal system which is disinterested in cultural, religious and social differences, its very existence suppresses deeper cultural ideas about the nature of law.<sup>43</sup> While this may be pragmatically unavoidable, that does not mean that we must exclude from the theoretical consciousness other conceptions of law which may point towards a more inclusive legal practice.

### 3. *Order vs Disorder in Philosophy and Legal Theory*

*Parable* — Those thinkers in whom all stars move in cyclic orbits are not the most profound: whoever looks into himself as into vast space and carries galaxies in himself also knows how irregular all galaxies are; they lead into the chaos and labyrinth of existence.<sup>44</sup>

As I will explain in Part 5, the most significant and far-reaching work on legal pluralism has been undertaken in recent years by legal anthropologists and sociologists. Far less attention has been paid to legal pluralism — either as a distinct theory or as a general ethos — by legal philosophers, who have tended to focus upon a monistic concept of law.

The reasons for the lack of interest in legal pluralism on the part of legal philosophy are not difficult to perceive, deriving as they do from the pervasive conditions of modernity. Although pluralism of formal legal systems was a feature of late-medieval English society,<sup>45</sup> the rise of rationalist philosophy and nationalist politics coupled with the uprooting of people from their local contexts in the drive for universalism, set the stage for a legal philosophy which was typically modernist in its objectivism and essentialism. In his campaign for an orderly and known legal regime, for instance, Jeremy Bentham famously criticised the common law — with its reliance on judicial personalities and other indeterminacies — as a ‘shapeless heap of odds and ends’ and a ‘prodigious mass of rubbish’.<sup>46</sup> The common law survived the modernist trend towards a more systematic legal order, but the idealistic view that law *ought to be* objective and certain was transformed (by the force of positivism) into the fiction that it *was so*.

The desire for totality, logic and coherence in legal theory reflects the aesthetic preference of modernist philosophy for order and is not a self-evident necessity.<sup>47</sup>

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42 Margaret Davies, ‘Legal Separatism and the Concept of the Person’ in Tom Campbell & Jeffrey Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (2000).

43 Irene Watson, ‘Power of the Muldarbi, the Road to Its Demise’ (1998) 11 *Aust Feminist LJ* 28.

44 Friedrich W Nietzsche, ‘The Gay Science’ (originally published 1882) aphorism 322, in Friedrich Nietzsche, *On the Genealogy of Morals*, and *Ecce Homo* Walter Kaufmann (ed), (1989) at 195.

45 Such legal systems included the distinct systems of equity and common law, ecclesiastical law and late feudal/manorial law.

46 Jeremy Bentham, ‘Papers Relative to Codification and Public Instruction: Including Correspondence with the Russian Emperor, and Divers Constituted Authorities in the American United States’ in John Bowring (ed), *The Works of Jeremy Bentham Vol 4* (1962) 451 at 459–460.

47 For a discussion of the ‘aesthetic of coherence’ in legal thought see Manderson, above n10 at 1053–1054.

It is a preference which arguably is not based upon reason, but upon the traditional parameters of Western philosophy. As William James noted almost a century ago, the discipline of philosophy seems to promote an aesthetic of clean structure and purity, associated with the attitude of monism:

[p]hilosophers have always aimed at cleaning up the litter with which the world is apparently filled. They have substituted economical and orderly conceptions for the first sensible tangle; and whether these were morally elevated or only intellectually neat, they were at any rate always aesthetically pure and definite, and aimed at ascribing to the world something clean and intellectual in the way of inner structure. As compared with all these rationalizing pictures, the pluralistic empiricism which I profess offers but a sorry appearance. It is a turbid, muddled, gothic sort of an affair, without a sweeping outline and with little pictorial nobility.<sup>48</sup>

Without the association with empiricism, Nietzsche also commented on the attitude of singularity promoted by philosophy, putting the emphasis on the subjectivity of the philosopher: he said that to be ‘philosophically minded’ we ‘usually endeavour to acquire a *single* deportment of feeling, a *single* attitude of mind towards all the events and situations of life’.<sup>49</sup>

Like philosophy in general, legal philosophy has not cultivated an attitude of pluralism in either the objects under its examination or the philosophising subject, preferring instead to emphasise the order to be found in a monistic conception of law and its allegedly rational subjects.<sup>50</sup> For instance, legal positivism has striven for a unifying concept of law, expressed by Joseph Raz as ‘*a test*, which distinguishes what is law from what is not’.<sup>51</sup> In contrast, a pluralistic approach to law is not ‘intellectually neat’ or ‘aesthetically pure’ and a self-described ‘theorist’ or ‘philosopher’ is at increased risk of being challenged for inconsistency if he or she defends a mode of thought which, in the end, cannot be described as a system or theory. This perhaps explains why even legal pluralists have tried ‘to form one uniform theory with a diverse research object’,<sup>52</sup> rather than accepting that such theoretical unity may be impossible. Legal philosophy clearly prefers theories, which profess unity, system and order, to those that appear messy and self-contradictory.

Is there any general reason to believe that the theoretical totalities constructed by legal philosophers are more ‘true’ than the pluralistic perceptions that ‘truth’ may be localised, incommensurable, produced by discourse and partial or relative? On what basis can we say, for instance, that the philosophical crystallisation of a (presumed) lawyer’s law results in a more true or adequate concept of law than the rather more messy description which approaches the subject from the position of

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48 James, above n24 at 26.

49 Friedrich W Nietzsche, *Human, All Too Human* (Hollingdale, trans) (1986) at 195.

50 Manderson, above n10.

51 Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81 *Yale LJ* 823 at 842 (emphasis in original). Examples of such tests would be Austin’s sovereign commands, Hart’s complex of primary and secondary rules, and Kelsen’s basic norm.

52 Melissaris, above n11 at 58.

the legally marginalised or excluded? This is not a question which I can address in detail here, but as I have suggested, the reasons for the dominance of monism may be more aesthetic and historical than rational: faith in singularity is often a mere habit or preference which needs to be subject to the same critical scrutiny as any theoretical claim.

The next section outlines some problems with the prevailing idea that law is singular and begins to make a case for the need to pluralise our understanding of law: by this, I mean that it is necessary for legal theorists to understand the multiplicity of normative orders, to accept the plurality of concepts of law *and* to see the predominant conception of Western law as inherently plural. The arguments I offer are both ethical and epistemological reasons for preferring pluralism. They are, in other words, based on the perception that pluralism is normatively preferable because it promotes a more inclusive concept of law and more empirically useful because it more adequately captures the multiple normative engagements within contemporary society.

#### 4. *The Case for Pluralism*

To attempt to imprison the law of a time or of a people within the sections of a code is about as reasonable as to attempt to confine a stream within a pond. The water that is put in the pond is no longer a living stream but a stagnant pool, and but little water can be put in the pond.<sup>53</sup>

The most powerful and accepted version of legal monism, legal positivism, has been subjected to sustained theoretical critique by legal theorists for the last three decades. Despite the intensity of the critique and evidence of a conceptual shift to a less hierarchical and less formal understanding of law, the positivist model remains influential. However, this concept of law is undermined not only by theoretical critique, but also (perhaps more so) by the practical pressures on monistic legal doctrine. Ideological tension within the academy is not confined to law and is not only driven by theoretical disagreement, but rather by changing socio-political conditions.<sup>54</sup> Debates and counter-hegemonic perspectives within scholarship are symptomatic of global cultural and political developments and are accelerated by technological innovation. While legal philosophy may not have come to terms with the pluralistic demands of globalisation, these demands are inexorable and have already had a marked impact on legal practice and scholarship more generally.

In many respects, the classical positivist concept of law is unsuited to modern circumstances and demands not only critique and re-evaluation,<sup>55</sup> but also the formulation of alternative theoretical methods. While legal centralism may

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53 Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* [1913] (trans Walter Moll) (1962) at 488.

54 Gunther Teubner, 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy' (1997) 31 *L & Soc R* 763 at 768–769.

55 Tom Campbell has attempted to revitalise legal positivism in *The Legal Theory of Ethical Positivism* (1996).

acknowledge the multi-layered character of state law and the multiplicity of legal orders coexisting within and across territorial borders, it tends to focus on structure, hierarchy, theoretical separation and single ideational origins. Centralist models of law therefore pose a number of problems for theorists and practitioners of law, many of which are implied in the preceding discussion. In what follows, I have tried to summarise these problems more systematically (although it should be noted that they are all interrelated).

First, legal centralism does not adequately acknowledge the fact that even the dominant manifestation of law in Western thought — institutionalised, state-derived law — is neither closed nor autonomous.<sup>56</sup> Despite the existence of much critical theory illustrating the inseparability of legal systems and social environments, legal monism has a tendency to reify law so that it becomes an objectively describable set of doctrines or institutional structures, separate from the dynamic and multiple domains of culture and politics. Law is reduced to a proper disciplinary domain, rather than being fully embedded in and a product of, an unsystematic and variable social environment. Against this tendency of legal theory to reify law, Desmond Manderson points out that law ‘is only realised through the actions of particular human beings who exist simultaneously in *several* discourses and who are, therefore, themselves plural.’<sup>57</sup> As actors in the world, we are capable of adjusting to different normative environments and in many cases adapt our actions and decisions accordingly. However, we cannot mechanically switch on and off our basic (and plural) normative infrastructures such as language, cultural heritage, gender expectations, class background or ingrained notions of racial identity. As a construct of human action, law cannot be separated, empirically or conceptually, from such normative plurality.

Second, centralist models are based upon a model of law associated with nationalism and ethnocentrism in the political sphere.<sup>58</sup> In assuming that law is derived from a single source and is tied to a territory with fixed boundaries, centralism fails to theorise the multiplicity of sources of law and fails to conceptualise non-state law, including, but not limited to, Indigenous law and international law.<sup>59</sup> Indigenous law is therefore assimilated and/or excluded by the institutions of law, but is not recognised as law in its own right. Since assimilation

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56 A great deal of attention has been devoted to this issue of autonomy, in particular in relation to the theory of legal autopoiesis. I do not reject outright these claims of autonomy: autopoietic theory as described by Gunther Teubner sees law as at once open and closed. See Gunther Teubner, ‘Introduction to Autopoietic Law’ in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (1988); Gunther Teubner, ‘The Two Faces of Janus: Rethinking Legal Pluralism’ (1992) 13 *Cardozo LR* 1443.

57 Manderson, above n10 at 1064; I should note that Anglo-American legal positivism *does* understand law to be a social phenomenon, but at the same time emphasises the institutional separation of law from the social realm generally conceived.

58 Peter Fitzpatrick, ‘“We Know What it is When You Do Not Ask Us”’: Nationalism as Racism’ in Peter Fitzpatrick (ed), *Nationalism, Racism, and the Rule of Law* (1995).

59 See, for instance, Gunther Teubner, ‘“Global Bukowina”: Legal Pluralism in the World Society’ in Gunther Teubner (ed), *Global Law Without a State* (1997). Teubner envisages the changes to law implied by a global legal order, noting in particular, that global law will need different conceptions of the ‘boundaries’, ‘sources’, ‘independence’ and ‘unity’ of law at 7–8.

generally does not involve recognition of a thing within the terms of its own identity, but is rather a taking over by a more powerful or larger structure, it also involves exclusion — that is, of the thing in its own right. For instance, as many commentators have pointed out, the recognition of native title by Australian courts is an instance of *both* assimilation and exclusion.<sup>60</sup> In an effort to acknowledge the prior custodianship of the land by Indigenous people, the Australian High Court — in *Mabo (No. 2)*<sup>61</sup> — gave some recognition within Australian law to an aspect of Indigenous law. However, in reducing and domesticating a portion of the Indigenous law, the High Court effectively excluded recognition of Indigenous law as law, because it reinforced the unique power of Australian law to decide what counts as law.<sup>62</sup> Yet Indigenous law exists independently of Australian state law and it is a failing of the centralist model of law that it is unable to recognise that fact. I have deliberately stated this matter as a failing and a problem of the dominant conception of law operative within the Australian state, rather than as an objective problem of how two legal systems can co-exist. The ‘problem’ does not arise primarily as the result of the mere co-existence of two legal orders. While this is an issue which also deserves consideration, it only comes into existence in the legal arena once there is actual recognition of two laws, rather than one. The ‘problem’ arises, then, because of the in-built limitations of the positivist, singular, statist conception of law,<sup>63</sup> revealed so clearly in *Mabo*, which prevent equal dialogue between the two systems. Similarly, the resistance shown by some politicians, media commentators and judges to international law,<sup>64</sup> illustrates an over-emphasis on the monistic, nationalistic and self-determining nature of Australian law and limits our ability to participate fully in global transitions.

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60 Irene Watson comments that ‘[n]ative title is the domain of those who want to establish space rocket launching facilities and nuclear waste dumps; of those who want it named and determined for their short time and space on earth’: ‘Buried Alive’ (2002) 13 *Law and Critique* 253 at 260. See also Lee Godden, ‘Grounding Law as Cultural Memory: A “Proper” Account of Property and Native Title in Australian Law and Land’ (2003) 19 *Aust Feminist LJ* 61.

61 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

62 ‘[T]he most remarkable achievement of the “ground-breaking” case of *Mabo* was, not the long overdue legal recognition of Aboriginal prior ownership to Australian land, but the deftness with which the majority judges managed to encircle the symbol of the nation without falling prey to the *open secret* of the dubious foundation of British sovereignty.’ Sangeetha Chandra-Shekeran, ‘Challenging the Fiction of the Nation in the “Reconciliation” texts of *Mabo* and *Bringing Them Home*’ (1998) 11 *Aust Feminist LJ* 107 at 123. See also Irene Watson, ‘Indigenous Peoples’ Law-Ways: Survival Against the Colonial State’ (1997) 8 *Aust Feminist LJ* 39; Michael Detmold, ‘Law and Difference: Reflections on *Mabo*’s Case’ (1993) 15 *Syd LR* 158; Peter Fitzpatrick, ‘“No Higher Duty”: *Mabo* and the Failure of Legal Foundation’ (2002) 13 *Law and Critique* 233; Stewart Motha, ‘The Sovereign Event in a Nation’s Law’ (2002) 13 *Law and Critique* 311.

63 This is not to suggest that there is no problem independent of the positivist concept of law, just that this concept blocks any attempt at dialogue before it has started.

64 Hilary Charlesworth, Madelaine Chiam, Devika Hovell & George Williams, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *Syd LR* 423; Devika Hovell, ‘The Sovereignty Stratagem: Australia’s Response to UN Human Rights Treaty Bodies’ (2003) 28 *Alternative LJ* 297.

Third, legal centralist models tend to maintain the liberal association of law with the public and universal spheres, remaining blind to the ways in which power to coerce and regulate cuts across public and private, universal and particular.<sup>65</sup> Juridical power, as Foucault argued, constitutes only one of many forms of influence over people's social and economic relations and is not the most strongly determinative form of power.<sup>66</sup> Models of law which confine the 'legal' to official, institutional, descriptions of law neglect both 'unofficial' normative environments, as well as the ways in which formal law reaches into the lives of legal subjects. It fails to explore and sometimes even to recognise the reliance of state law on everyday socio-cultural norms, thus maintaining a false air of separation and neutrality. From the point of view of the subject then, whose engagement with normative environments occurs in a multiplicity of sites, monism provides an impoverished and quite unrealistic view of law as something set apart from the realm of the human.

Fourth, legal centralism fails to recognise the ways in which formal law is legitimately circumvented by informal dispute resolution practices, such as some forms of alternate dispute resolution or native title agreements reached outside the formal mechanism established to determine claims.<sup>67</sup> Legal centralism also neglects the postcolonial character of many of the world's nations, where the historical opposition between colonial and Indigenous laws has resulted in hybrid legal systems encompassing two and often more, layers or sources of legal knowledge. It is true that there is a great deal of social, scientific, anthropological and legal pluralist theory concerning such legal hybridity. What is surprising is that there remains a resistant tradition in mainstream legal theory which fails to consider the pluralist possibilities of contemporary formal and alternative legalities for the concept of law, instead continuing to draw upon an outmoded construction of state law and institutional authority for its theoretical debate.

Fifth, centralist models deal poorly with questions of social and cultural difference and assume an unrealistic level of coherence within legal culture,<sup>68</sup> a criticism of positivist legal thought advanced by feminists, race theorists and others. The universal standards assumed by a monistic legal culture reinforce the politically dominant standards of whiteness, heteronormativity and masculinity: a more plural conception of law would arguably pave the way for a diversification of central legal norms.

Finally, legal centralism presumes a single criterion of legitimacy — whether it is known as a sovereign, a grundnorm or a rule of recognition — and fails to

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65 Margot Stubbs, 'Feminism and Legal Positivism' (1986) 3 *Australian J of Law & Society* 63; Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995).

66 Michel Foucault, 'Two Lectures' in Michael Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (1980) at 78–108, especially 95–100.

67 Maureen Tehan, 'A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 *MULR* 523.

68 A criticism which has been levelled at the non-positivist, but still monistic, thought of Ronald Dworkin.

consider the complex and diverse social foundations of law.<sup>69</sup> As legal subjects, we do not act merely on the basis of legal prescriptions as they are identified and interpreted in a formal system, but on the basis of the intersecting demands of our own ethical beliefs, our location in a social field, prevailing discourses about right and wrong and any number of more practical considerations. Judges and lawyers do the same. Law's legitimacy cannot reside solely in a formal concept, but is equally (or more so) the consequence of the ongoing relationships, decisions and actions undertaken in a primarily social environment. This is a descriptive and conceptual argument concerning the inadequacy of the monist concept of law but it is possible to see how it also has normative consequences: if law's legitimacy has a social (ethical, discursive, cultural) and not merely a formal legal basis, then it is a mystification for judges to avoid responsibility for their decisions merely by referring to established doctrine.

Within Western legal systems, the need for the recognition of legal multiplicity has been regarded as urgent in many areas.<sup>70</sup> The European Union brings together diverse national systems, regional conflicts and allegiances, special-purpose 'Euroregions', some Indigenous legal systems (such as that of the Sami in Sweden, Norway and Finland), and an extensive regulatory system, within the increasingly significant context of international law and trade alliances. The traditional unity of law, state and territory is being challenged by these cultural and political forces, resulting in a blurring of the traditional frontiers and certainties of law.<sup>71</sup> It is in Europe that the concept of national sovereignty is most evidently in the process of being transformed.<sup>72</sup> Similarly in Canada, where pluralist thought is well-established, dominion and federal legal jurisdictions operate alongside Indigenous territories, trade alliances such as North American Free Trade Agreement (NAFTA) and broader international frameworks. In the United Kingdom — increasingly symbolically as well as legally associated with 'Europe' — the 'new constitutional culture'<sup>73</sup> includes devolution of state power to regional parliaments, social, political and economic integration within the framework of the European Union and incorporation of European human rights law through the Human Rights Act 1998. Local custom, sometimes only partially incorporated into common law, can play a significant role in social ordering, as has been shown with the conflict played out in the late 1990s over ancient rights of way and modern notions of absolute land ownership.<sup>74</sup>

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69 I am indebted to one of the referees for drawing this point to my attention.

70 Arnaud, above n5; Darian-Smith, above n33.

71 See Darian-Smith, above n33.

72 See in particular the compelling discussion by Neil Walker, above n5. Walker suggests that the concept of sovereignty is not necessarily superceded by 'post-state constitutional polities', but could undergo a conceptual transformation so that 'it becomes possible to conceive of autonomy without exclusivity – to imagine ultimate authority, or sovereignty, in non-exclusive terms' at 345–346. See also Massimo La Torre, 'Legal Pluralism as Evolutionary Achievement of Community Law' (1999) 12 *Ratio Juris* 182.

73 Noel Whitty, Thérèse Murphy & Stephen Livingstone, *Civil Liberties Law: The Human Rights Act Era* (2001) at 1; see also Walker above n5.

74 Culminating in the *Countryside and Rights of Way Act 2000* (UK).

In Australia, a situation of legal plurality also exists in practice but is poorly understood and rarely theorised.<sup>75</sup> As I indicated in the opening section of this article, there are two obvious areas where the question of pluralism arises: the recognition of Indigenous law and the need for the legal system to become better cognisant of international law. In addition, there are numerous arenas of quasi-legal order (such as alternative dispute resolution mechanisms), which interact with the formal legal system, as well as ongoing critical challenges to the depiction of law as a neutral and systematic order. However, the practical and theoretical understanding of legal pluralism in Australia lags behind that of other Western liberal democracies: as I have argued, this presents obstacles in our thinking about vitally important matters such as the relationship between Indigenous and non-Indigenous Australians.

New practices of law, taken together with ongoing theoretical critique, illustrate that state based law can no longer be sustained by the image of a separate and exclusive set of norms derived from a single sovereign centre. Adherence to centralist models generally and positivism in particular, obstructs both an understanding of the existence and nature of legal plurality, as well as the practical development of methods of mutual recognition and co-existence of legal orders. As Boaventura de Sousa Santos has argued, legal theory needs a new practical and conceptual direction, which will recognise *both* the multiple sources underpinning law as conventionally understood and the global scale and plurality of modes of social order.<sup>76</sup>

## 5. *Legal Pluralisms*

Before explaining this general ‘ethos of pluralism’ further, I wish to provide a brief outline of established pluralist theory indicating how it, ironically, could also benefit from a more open and pluralistic mentality. My intention is not to undertake a thorough review of pluralist literature, as that work has been undertaken elsewhere.<sup>77</sup> What follows is merely an outline of some types of traditional pluralist theory, a summary of the main criticisms of pluralism, an indication of where pluralism is headed and some thoughts about how it relates to the tradition of legal philosophy.

### A. *Pluralism in Fact*

Until recently, legal pluralism was divided into two scholarly areas with some overlap.<sup>78</sup> ‘Classical’ legal pluralism refers to anthropological and sociological analysis of the legal situations of those ex-colonial societies, which had dual or plural legal systems derived from Indigenous, folk or customary law and imperial

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75 See, however, Luke McNamara, above n19, for a recent discussion of the relevance of legal pluralism to Australian law.

76 Santos, above n8; Santos, above n9.

77 Melissaris, above n11; Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (2001).

78 Merry, above n32; Masaji Chiba, ‘Other Phases of Legal Pluralism in the Contemporary World’ (1998) 11 *Ratio Juris* 228; see also Warwick Tie, *Legal Pluralism: Towards a Multicultural Conception of Law* (1999) at 59–92, who employs a slightly different scheme of categorisation.

law.<sup>79</sup> The ‘new’ legal pluralism, dating from the late 1970s is based upon the insight that all societies, whether or not formerly colonised, are composed of multiple ‘semi-autonomous’ fields of normative control.<sup>80</sup> Many forms of ‘law’ exist which are regarded as binding, yet which are non-territorial, non-state, local or international, *and* frequently non-hierarchical.

Both forms of pluralism have identified and studied the *fact* of legal plurality and in this sense pose an important challenge to the presumption that law is merely singular and centred on a hierarchically superior source. However, less attention has been paid to the conceptual dimensions of plural law. Several shortcomings have been identified with the theoretical underpinnings of social-scientific and anthropological legal pluralism. The theory of legal pluralism has in particular lacked a rich analytical approach to the different modes of law, which is not ultimately derived from the model of institutionalised law and which is sufficiently flexible to take account of non-discrete, open-textured and dynamic normative systems.<sup>81</sup> It has tended to assume that the pluralism of law consists merely in a multiplicity of objective or positive ‘semi-autonomous’ systems,<sup>82</sup> and has not sufficiently theorised law as a process in which legal subjects and legal norms are interdependent. Finally, one of the shortcomings of monistic legal philosophy which I mentioned above is its insistence that ‘law’ can be defined according to a fixed set of criteria: legal pluralism has often reproduced this assumption, tending to assume that ‘law’ is susceptible to an essential definition, whereas it simply may not be.<sup>83</sup>

These various factors have impeded the development of legal pluralism in its recognition of informal legal orders and in its account of the diverse ways in which formally recognised and informal law interrelate. It has prevented the establishment of a sound theoretical nexus between a plural view of law and the various manifestations of social power.<sup>84</sup> It is worth noting, for instance, that while one of the core concerns of feminist legal theory has been the interface between social norms of gender and formal law and there have been calls for law to be more pluralistic in its recognition of citizens and subjects, little interest in pluralist *theory* has been shown by feminist legal scholars.<sup>85</sup>

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79 For example, MB Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975); June Prill-Brett, ‘Indigenous Land Rights and Legal Pluralism among Philippine Highlanders’ (1994) 28 *L & Soc R* 687; Erin Moore, ‘Gender, Power, and Legal Pluralism: Rajasthan, India’ (1993) 20 *American Ethnologist* 522; Chiba, above n78.

80 Sally Falk Moore, *Law as Process: An Anthropological Approach* (1978); Sally Falk Moore, ‘Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999’ (2001) 7 *J of the Royal Anthropol Inst* 95.

81 Systems theory is one kind of response to the traditional notion of law as objectively static and centralist but – due to reasons of space – I am unable to consider it in detail in this article. See Teubner’s provocative article, ‘The King’s Many Bodies’, above n 54 at 764–767.

82 Such as international law, state law, Indigenous law, human rights law, regional law, social customs, regulated institutions, and so forth.

83 Brian Tamanaha, ‘A Non-Essentialist Version of Legal Pluralism’ (2000) 27 *J of Law & Society* 296.

84 Paul Ricoeur, ‘The Plurality of Sources of Law’ (1994) 7 *Ratio Juris* 272.

To summarise, part of the problem with much (not all) legal pluralist theory of the past few decades is that it is too focused on systematic and totalistic understandings of legal plurality, too insistent on the elaboration of a theoretically singular view of plural laws. To be true to its name, legal pluralism could benefit from the recognition of irreducibly different accounts and experiences of law. As several commentators have noted, there is also a need for legal pluralism to move beyond the empirical description of pluralism as a socio-legal fact, to a deeper understanding of the conceptual pluralities inherent in the relationships of the subject, discursive and symbolic forces, the positive social sphere and law.<sup>86</sup>

### **B. *Pluralism as Inherent***

In response to these criticisms, there have recently been calls for another ‘new’ or ‘critical’ legal pluralism.<sup>87</sup> The, as yet, rather undeveloped approach of ‘critical pluralism’ rejects the empirical notion that the social fact of plurality can be comprehended merely as objective knowledge. In a typical ‘critical’ gesture, the focus is turned upon subjectivity and the ways in which subjects all inhabit multiple conflicting and relating normative worlds.<sup>88</sup> Thus, critical pluralism attempts to move beyond the description of law as fact:<sup>89</sup> it sees the subject as an expression of law and as a site of change;<sup>90</sup> it is attentive to the ways that normative systems are discursive (and not merely positively laid down structures); it sees normativity as a process rather than merely as a structure; and it replaces the aesthetics of control, closure and order with an aesthetics of disorder, chaos and undetermined change.<sup>91</sup>

The newer versions of legal pluralism suggest to me two challenging lines of inquiry for legal philosophy. The first is the pluralisation of *concepts* of law. As Brian Tamanaha redefines pluralism, ‘the plurality I refer to involves different phenomena going by the label “law”, whereas legal pluralism usually involves a multiplicity of one basic phenomenon, “law” (as defined)’.<sup>92</sup> The appreciation of incommensurably different concepts of law ought at the very least to generate reflective analysis of the historical and cultural specificity of the mainstream Western definition of law. As indicated above, traditional legal theory has traditionally marginalised types of law, which do not have an institutional

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85 There are some examples of gender being explicitly addressed in legal pluralist literature. See, for instance, Ambreena Manji, ‘Imagining Women’s “Legal World”: Towards a Feminist Theory of Legal Pluralism in Africa’ (1999) 8 *Soc & Leg Stud* 435; Anne Griffiths, ‘Reconfiguring Law: An Ethnographic Perspective from Botswana’ (1998) 23 *Law and Social Inquiry* 587.

86 Kleinhans & MacDonald, above n34; Manderson, above n10; Tamanaha, above n83; Melissaris, above n11.

87 Santos, above n8; Tamanaha, above n83; Kleinhans & MacDonald above n34.

88 See Max Horkheimer, ‘Traditional and Critical Theory’ in Max Horkheimer, *Critical Theory: Selected Essays* (1968).

89 Kleinhans & MacDonald, above n34 at 39.

90 Id at 38–40.

91 Manderson, above n10.

92 Tamanaha, above n83 at 315.

appearance comparable to Western law, labelling such laws as defective, primitive or merely cultural practices. Extraordinarily, in countries such as Australia where alternative models of law are empirically obvious, this unitary concept has been maintained. The recognition that all law is a cultural practice, that it may therefore be expressed in a variety of different forms and cannot be reduced to a concept, creates quite new — and unavoidable — horizons for legal philosophy.

The second line of inquiry for legal philosophy involves the pluralisation of law in its commonly understood, positivist sense. Beyond the appreciation of a multitude of legal or law-like normative systems, a critically oriented pluralism points to the *inherent* pluralism of law — that is, the recognition that mainstream state based law is itself plural in that it is derived from plural sources, relies upon plural modes of reasoning and interacts in complex and contradictory ways with a plurality of social, ideological and political systems of significance. Chantal Mouffe, for instance, describes plural democracy as ‘not merely a *fact* ... but rather an axiological principle, that is, something constitutive at *the conceptual level*’.<sup>93</sup> Applied to legal theory this approach would not see positive law as a unifiable or monolithic system, but rather as characterised by its own ‘irreducible outness’. From there it may be possible to begin to re-conceptualise the Western concept of positive law as essentially complex and heterogeneous. Such a re-conceptualisation of state based law would celebrate the affirmative elements of existing critical theory, for instance making incommensurability, dynamism and lack of totality a virtue, rather than a fatal flaw in the concept of law.

For instance, in an influential piece written in the early 1980s,<sup>94</sup> Robert Cover theorises ‘jurisgenesis’ or ‘the creation of legal meaning’ as a process that ‘takes place always through an essentially cultural medium’<sup>95</sup> and is not reliant on the state. A normative world or *nomos* is the result of multiple social and cultural factors, including mythologies and ideologies, central texts, language and ‘interpretive commitments’. In relation to state law, the pronouncements of judges and legislatures constitute a particular *nomos*. But that is only one, very narrow, understanding of legal meaning and it is an error to think that this *nomos* is the only one or even the central or superior source of legal meaning. Cover provides examples of several religious communities to show that, even in relation to state law, they each inhabit a distinct *nomos* as they each construct state law and engage with it in the context of their religious affiliations:

Sectarian communities differ from most — but not all — other communities in the degree to which they establish a *nomos* of their own. They characteristically construct their own myths, lay down their own precepts, and presume to establish their own hierarchies of norms. More importantly, they identify their own paradigms for lawful behaviour and reduce the state to just one element, albeit an important one, in the normative environment.<sup>96</sup>

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93 Mouffe, ‘Democracy and Pluralism’, above n36 at 1535.

94 Cover, above n27.

95 Id at 11.

96 Id at 33.

Cover's important insight was that the origin of legal meaning — and thus the origin of law — exists in the multiple sites of social association. While his main examples concern sectarian associations — those separated from the mainstream by some overarching religious or political norm — his point is not confined to the alternative worlds of such groups. Indeed, the quotation above implies that while the degree of normative difference might be less in communities which remain strongly integrated with the mainstream, there is 'jurisgenesis' or the construction of legal meaning in all sites of social association, whether minority, dissenting or largely identifying with mainstream values. In contemporary Australia, for example, we could note that distinct sites of jurisgenesis can be found in Indigenous communities, in religious associations, in feminist groups, in prison populations, among law enforcers, small business people, executives in large corporations and among ethnic minorities. These, and other, associations — all with differing degrees of identification with a 'mainstream' view of law — have their own normative world. Each *nomos* is constituted in part by state law, but each has a different 'take' on it. The result, according to Cover is 'too much law',<sup>97</sup> a plenitude or plurality of laws. In such a context the function of the state is 'jurispathic', that is, to suppress or kill law: 'Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it.'<sup>98</sup> The function of the judge operating conventionally is to suppress the plurality of law by choosing one interpretation as the official one: the judicial choice is not always better, wiser or more insightful than another's understanding of law, but it is conclusive (and therefore invested with the violence of finality and its associated responsibilities).

The focus on singularity conventionally encouraged by legal theory is clearly a source of frustration for a great many legal scholars and decision makers. While much contemporary legal scholarship does not consciously adopt the terminology or even the label of 'pluralism', it is nonetheless arguably motivated by a pluralist ethos because it rejects the view that state law is a totality characterised by its coherence, objectivity and separation from other social and political normative spheres. Such a view encompasses a broad spectrum of legal thinkers, including many feminists, race theorists and postmodernists.<sup>99</sup> For instance, critical legal scholars have argued that law is conceptually inseparable from a heterogeneous society: the inherent pluralism of law from this point of view is derived from the intrusion of the social 'other' into the definition of law. Inherent pluralism can also be located in the contradictory and fictional foundations of any singular structure of law. Since law is incapable of grounding itself, its conceptual foundations rest on some 'other' — a political or social force — which is regarded as outside law, but which is nonetheless inherent to the definition of law.<sup>100</sup> If law is essentially a

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97 Id at 42.

98 Id at 54.

99 The literature is too vast to cite, but see, for instance, Drucilla Cornell, *The Philosophy of the Limit* (1992); Peter Fitzpatrick, *Modernism and the Grounds of Law* (2001).

100 This 'axiological' pluralism has been remarked upon by a number of writers following Derrida's important contribution in 'Force of Law', above n35. See also Margaret Davies, *Delimiting the Law: Postmodernism and the Politics of Law* (1996); Fitzpatrick, above n99.

cultural expression then the foundation for its legitimacy is a radically plural society. Pluralism can also be identified in law's textuality: as with any text, meaning is not determined in advance, but is the product of the engagement of active minds, subjects 'other' to law, with the text of law. In these ways and many others, the plurality of law and its inevitable reliance on an other, is demonstrated.

Even more generally, the pluralistic outlook can also include the approach of scholars and legal commentators who argue broadly that the interpretation of law necessarily relies upon social and other contextual factors:<sup>101</sup> this view, while perhaps not adopting the radically plural stance of rejecting the state-defined concept of law, nonetheless connects the concept of law to an irreducibly pluralistic other — the community at large.<sup>102</sup> As I have indicated, the pluralist attitude to law extends far beyond a self-identified school of legal pluralism.<sup>103</sup> A great deal of scholarship is motivated by a pluralist ethos, even though it may not consciously adopt that position.

To my mind and as I indicated at the outset, these developments in pluralist thought are merely a part of a much larger movement in scholarship and practice. As I indicated above, the 'ethos of pluralism' is not confined to self-consciously pluralist theory, but is to be found wherever there is a critique of the autonomy and separateness of law, and, wherever the coherence of law as a neutral system of norms derived simply from state authority is challenged. Such critique suggests that law is fully embedded in social life, it uncovers its historical and political contingencies and it illustrates the indeterminate and essentially plural possibilities for legal decision-making. Such an 'ethos of pluralism' is also to be found in the extensive scholarship striving for a more just recognition of Indigenous law in its own right or a more open negotiation with the norms of international law.

### C. *A Changing Concept of Law*

The two pluralist attitudes outlined above — that which sees a multitude of types of law within a social space, and that which argues in favour of the openness and intrinsic heterogeneity of any 'single' expression of law (including state law) — have both a descriptive and a normative dimension. They identify and describe certain entities as reflecting a state of legal pluralism, but they are also underpinned by the view that, for political and social reasons — pluralism is normatively preferable to monism. These descriptive, conceptual and normative justifications for a pluralistic epistemology of law have been explained and critiqued more fully in Part 4. Importantly, the two types of pluralism I have described are also structurally related. Seeing the positive legal system as

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101 Although this is a view adopted by Ronald Dworkin, I do not regard his work as reflecting a pluralist ethos, since he reduces the pluralism of the 'community' into a singular entity with a definable set of values. See Ronald Dworkin, *Law's Empire* (1986).

102 A good recent example is the interpretation of 'man' and 'woman' in the case *Re Kevin (Validity of Marriage of Transsexual)* (2001) 165 FLR 404; *Attorney-General for the Commonwealth v Kevin and Jennifer* (2003) 172 FLR 300.

103 It might even be said that some varieties of legal pluralism are in fact characterised by an 'ethos of singularity', insofar as they understand plural normative orders to comprise a theoretical totality rather than an irreducibly open multiplicity.

essentially open and flexible (to some degree) provides the space in which the co-existence of quite different normative orders can be understood, rather than rejected as a contradiction in terms.<sup>104</sup> Put bluntly in the Australian context: a recognition of the inevitable difference and plurality *within* Australian law (a recognition that it is not as coherent and systematic as it is often presumed to be) is a precondition for the recognition of the co-existence of Australian state law with other fields of law, whether Indigenous law, International law and other normative fields not routinely dignified with the name of ‘law’.

A version of this claim is also made by Larissa Behrendt: she argues that a pluralist co-existence of Indigenous law and non-Indigenous law can only be achieved by institutional change, in particular, the ‘embodiment of differences in institutional forms’.<sup>105</sup> One concrete example of the emergence of difference within mainstream law might be the increasing involvement of Indigenous people in the court system — not as judges or magistrates, but as community participants in the sentencing process.<sup>106</sup> At the very least, such practices point to the inadequacy of ‘normal’ non-Indigenous legal practices and acknowledge the existence of a significant difference — Indigenous law and culture. Recognition of the ‘Other’ outside non-Indigenous law requires an opening up or pluralisation in the thinking and the practices of non-Indigenous law.<sup>107</sup> Early indications seem to be that the coming together of white law and Indigenous law which these practices represent (albeit within the umbrella of white law) may lead to genuine change within non-Indigenous law<sup>108</sup> in a direction which is useful to Indigenous people.<sup>109</sup> If the change is successful in the long term, this may be a consequence of the fact that it is not enforced and controlled by state law, but has rather drawn on the grassroots willingness of non-Indigenous judicial officers to alter their own legal culture and to ‘think laterally, outside the box of the white legal frame’.<sup>110</sup> To generalise, recognition of and co-existence with anything conventionally defined as ‘Other’ to mainstream law will require a fundamental change in the conceptualisation and institutional manifestation of the mainstream.

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104 The contradiction arises simply by virtue of the monistic assumption that state law covers the field, space or territory completely. Speaking as though there is another law within the space of a state law is, by this account, nonsensical.

105 Behrendt, above n2 at 131.

106 Sentencing circles have existed in Canada for some time, and started to appear in Australia in the 1990s in both remote and urban areas. See Elena Marchetti & Kathleen Daly, ‘Indigenous Courts and Justice Practices in Australia’ May (2004) *Trends and Issues in Crime and Criminal Justice*, No 277.

107 If this sounds one-sided, it is because it is: obviously I write from the perspective of a theorist of non-Indigenous law and am not in a position to evaluate the need for change from another person’s perspective. Indigenous people have had the difference of white law forced upon them, while we have the luxury of thinking and theorising before we need to acknowledge difference.

108 Marchetti & Daly, above n106 at 4–5.

109 In contrast, in the more economically significant area of native title, there may have been a recognition of legal difference, but this has been fully subordinated to white bureaucracy and white legal dominance.

110 Marchetti & Daly, above n106 at 5.

## 6. *Conclusion*

To speak of ‘the law’ in the singular is to impose the unity of an idea upon a plurality of sources, subjects, interpretations and institutions. It is to reduce multiple experiences of law to a narrowly defined ‘lawyer’s law’, an elitist entity artificially detached from its social foundations. Law is an ‘it’ with clear boundaries only in the positivist imagination. However, the discursive force of that view of law confers upon it a self-fulfilling truth status: it is ‘true’ because we assume it, and perform it on an ongoing basis. At the same time, the ethos of pluralism suggests alternative concepts of law and points to the possibility of a less totalistic, but nonetheless affirmative (not negatively critical) understanding of law’s heterogeneous nature.

The argument elaborated here about the ethos of pluralism is not only theoretical, but is also ethical and political. As indicated above, the concept of law based on singularity and separation is obsolete and obstructive: it is no longer politically useful and nor does it reflect the needs of a diverse and complex world which remains nonetheless in the grip of divisive and absolutist ideas relating to race, culture, gender and religion. As Manderson notes, pluralism offers an alternative to the modernist and positivist aesthetics of systematicity and coherence: a pluralist legal aesthetics values change, multiplicity,<sup>111</sup> and even chaos.

Critical theorists have demonstrated that the dominant legal order is implicated in systems of social power such as gender and race, thereby undermining the legal positivist claim of the neutrality and separateness of law. Rarely, however, has the possibility of an alternative concept of law which would elaborate upon these complexities, been discussed. The development of a legal pluralism, as opposed to (the often tokenistic) liberal legal tolerance of moral and cultural pluralism, is a necessary precondition for the equal co-existence of diverse social orders. However, it is not necessarily the theory of pluralism as such which is evidence of the changing paradigm of law, but rather the sustained challenges to law’s closure and singularity coming from a variety of sources — not only critical theorists, but also scholars and practitioners operating at the interface between dual or plural legal orders. It is my view that only by developing a more open concept of law, which can recognise and accommodate cultural, sexual and other forms of difference, will non-state laws such as Indigenous law, international law and the multiplicity of informal normative relationships be acknowledged.

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<sup>111</sup> Manderson, above n10 at 1068.

# *The Constitutional Jury — 'A Bulwark of Liberty'?*

JAMES STELLIOS\*

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## *Abstract*

Despite a string of High Court cases over the last five years considering s80 of the Constitution, a clear statement by a majority of the Court as to the purpose of s80 is yet to emerge. A number of ideas have been put forward suggesting that s80 protects rights, but it is not always clear what it means to say that s80 is rights-protective. This paper considers how the recent High Court cases have affected the main s80 controversies. It then explores more closely the various ideas put forward about s80, the predominant one being rights protection. The paper will then argue that s80 may be explained as a federal provision that is central to the operation of Ch III of the Constitution. Viewed in that way, s80 need not be given a rights-protective explanation.

## *1. Introduction*

The High Court increasingly has had an opportunity to map out the scope and operation of s80 of the *Constitution*.<sup>1</sup> The decided cases now indicate (albeit incompletely) the circumstances that will trigger its operation and the requirements of the provision once it is enlivened. However, it cannot be said with great confidence that these matters are entirely settled. Indeed, some of the key judgments predate modern approaches to the interpretation of constitutional limitations and are underpinned by unsatisfactory reasoning.

Furthermore, unlike the reworking of constitutional limitations like ss92<sup>2</sup> and 117,<sup>3</sup> a broad cohesive vision of s80 continues to elude the High Court. There has been no clear statement by a majority of the Court as to the purpose of s80. Many

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1 *Commonwealth of Australia Constitution Act 1900* (Imp) (hereafter the *Constitution*). ‘Trial by jury – The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes’.

2 *Cole v Whitfield* (1988) 165 CLR 360 (hereafter *Cole*).

3 *Street v Queensland Bar Association* (1989) 168 CLR 461.

judges and commentators have put forward a ‘rights-protective’<sup>4</sup> vision of s80, the assumption apparently being that the only plausible purpose of s80 is to protect rights. However, it is not always clear what it means to say that s80 protects rights, nor has there been a clear and sustained attempt to identify alternative explanations. This paper seeks to explain s80 as a federal provision that is central to the operation of Ch III of the *Constitution*.

Part 2 of this paper provides an overview of the main s80 controversies: first, the circumstances that enliven s80 (‘the constitutional trigger cases’) and, secondly, the requirements of that provision once triggered (‘the s80 requirements cases’). This overview will provide the background and platform for Parts 3 and 4. In particular, Part 2 will demonstrate three points: first, that many of the important constitutional trigger cases lack a clear doctrinal foundation; secondly, that there is a contrast between the way s80 is applied in relation to constitutional trigger cases when compared with constitutional requirements cases; and, thirdly, that s80 doctrine has not developed by reference to a clearly expressed theory.

Part 3 will examine more closely the various strands of ideas that have been put forward about s80, the predominant idea being one of rights protection. None of these ideas have been explained clearly or applied consistently. It will be argued in Part 4 that much of the uncertainty surrounding s80 results from a failure to differentiate between the purpose of s80 and the function of a jury trial.<sup>5</sup> An alternative view of s80 will then be put forward that integrates it into the broader operation of Ch III of the *Constitution*. In short, it will be argued that s80 is a provision that facilitates and regulates the exercise of Commonwealth judicial power. Viewed in that way, s80 has a real and substantial constitutional operation, and rights-protective explanations are not necessary to give it life. The paper will conclude by briefly reflecting upon how the suggested interpretation might be applied to the controversies outlined in Part 2.

## 2. *The Section 80 Controversies*

### A. *Constitutional Triggers*

In this section, I will outline the main cases dealing with the circumstances that trigger s80. It will be seen that recent cases have not significantly affected existing authority. Under this heading, I will also consider the possibility of waiving s80 juries.

#### (i) *‘Law of the Commonwealth’ and Territory Laws*

On current authority, the expression ‘law of the Commonwealth’ in s80 does not include territory laws. In *R v Bernasconi*<sup>6</sup> the accused had been tried before a court of what was then the Territory of Papua. A Commonwealth Act provided that trials

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4 I use the expression ‘rights-protective’ to cover a range of statements by judges and commentators to the effect that s80 should protect ‘rights’. See further Part 3 below.

5 Although not uniformly, the cases tend to speak in terms of a s80 *purpose* on the one hand, and a jury *function* on the other hand. I have adopted that terminology in this paper.

6 (1915) 19 CLR 629 (hereafter *Bernasconi*).

of persons of European descent for offences — other than those punishable with death — should be without a jury. Delivering the leading judgment, Griffith CJ (with whom Gavan Duffy and Rich JJ agreed) held that s80 did not apply to the local laws of a territory, whether enacted by the Commonwealth Parliament or by a subordinate legislature set up by it.<sup>7</sup> His Honour read the words ‘laws of the Commonwealth’ in a limited way in light of the federal context. Chapter III, his Honour said, ‘is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to territories’.<sup>8</sup> Despite criticism in later cases,<sup>9</sup> the decision in *Bernasconi* remains good law.<sup>10</sup>

(ii) *Trial ‘on indictment’ — the Archdall Burden*

In what circumstances will an offence be tried ‘on indictment’ for the purposes of s80? This issue (hereafter referred to as the *Archdall* issue) was first considered in *R v Archdall and Roskrug*; *Ex parte Corrigan and Brown*,<sup>11</sup> a case in which the offence in question was punishable either on indictment or on summary conviction. It was argued that the offence was an indictable one at Federation and, thus, could not be prescribed by Parliament to be tried summarily. The joint judgment of Knox CJ, Isaacs, Gavan Duffy and Powers JJ cursorily dismissed the argument without reasoned analysis: ‘[t]he suggestion that the Parliament, by reason of sec 80 of the *Constitution*, could not validly make the offence punishable summarily has no foundation and its rejection needs no exposition’.<sup>12</sup> Higgins J also dismissed the argument in the following terms: ‘if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment’.<sup>13</sup>

7 Id at 635.

8 Ibid. Isaacs J expressed a similar view id at 637. Although there was no differentiation by their Honours between external and internal territories, the significance of the kind of territory in question was apparent from Isaacs J’s comment at 638 that ‘Parliament’s sense of justice and fair dealing is sufficient to protect them, without fencing them round what would be in the vast majority of instances an entirely inappropriate requirement of the British jury system’. As Nick O’Neill has noted in ‘Constitutional Human Rights in Australia’ (1988) 17 *Fed LR* 85 at 91: ‘In 1915 in Papua it would have been difficult in many districts to assemble an impartial jury of four Europeans to hear a capital offence. Requirement of regular jury service of the tiny and scattered European population would have been resisted strongly. No one in the colonial administration of the time would have considered Papuans suitable for jury service’.

9 See the cases compiled by Kirby J in *Fittock v The Queen* (2003) 197 ALR 1 (hereafter *Fittock*) at nn17 and 18; *Frost v Stevenson* (1937) 58 CLR 528 at 592–593; *R v Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1938) 59 CLR 556 at 580–584 (hereafter *Lowenstein*); *Spratt v Hermes* (1965) 114 CLR 226 (hereafter *Spratt*); *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 598; *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 198–202 (hereafter *Rankin*); *Gould v Brown* (1998) 193 CLR 346; *Re Governor, Goulburn Correctional Centre*; *Ex parte Eastman* (1999) 200 CLR 322 at 380–383; compare to *Northern Territory v GPAO* (1999) 196 CLR 553 at 650.

10 In *Fittock*, above n9, the applicant sought to re-open the decision in *Bernasconi*, above n6. As will be discussed below, the Court decided the case on other grounds and, therefore, did not need to reconsider *Bernasconi*, above n6: at 3 (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ), 7 (Kirby J).

11 (1928) 41 CLR 128 (hereafter *Archdall*).

12 Id at 135 (Knox CJ, Isaacs, Gavan Duffy & Powers JJ).

These few statements have had a remarkably enduring influence. The *Archdall* decision gained considerable momentum in *Lowenstein*,<sup>14</sup> *Sachter v Attorney-General for the Commonwealth*,<sup>15</sup> *Zarb v Kennedy*,<sup>16</sup> *Rankin*<sup>17</sup> and *Kingswell v The Queen*.<sup>18</sup> In *Kingswell*, Gibbs CJ, Wilson and Dawson JJ<sup>19</sup> summarised the accepted position:

It has been held that s80 does not mean that the trial of all serious offences shall be by jury; the section applies if there is a trial on indictment, but leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily. This result has been criticised, but the Court has consistently refused to reopen the question and the construction of the section should be regarded as settled ...<sup>20</sup>

Like cases before it, the restatement of the *Archdall* principle in *Kingswell* was unsupported by constitutional analysis. Despite a persistent line of dissenting judgments,<sup>21</sup> more recent cases have not significantly affected the majority view

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13 Id at 139–140 (Higgins J), referring to Isaacs J in *Bernasconi*, above n6 at 637, who said ‘[i]f a given offence is not made triable on indictment at all, then sec 80 does not apply. If the offence is so tried, then there must be a jury’.

14 Above n9 where three judges of a six member Court accepted *Archdall*, above n11 at 570 (Latham CJ; Rich J agreeing), 591 (McTiernan J). Starke J said nothing about the issue. In a joint judgment, Dixon & Evatt JJ at 581–584 wrote a powerful dissent favouring an interpretation of ‘indictment’ as meaning a prosecution of an offence that would result in imprisonment or some graver form of punishment. The dissenting judgment will be discussed further below. *Lowenstein* was an unfortunate occasion for the consideration of the issue by the Court as it is clear from the report that s80 was not argued by the parties: id at 571 (Latham CJ), 592 (McTiernan J).

15 (1954) 94 CLR 86 (The Court). The Court (comprising Dixon CJ, McTiernan, Webb, Kitto & Taylor JJ) declined to reconsider the decision in *Archdall*, above n11.

16 (1968) 121 CLR 283, where the *Archdall* principle was followed: at 294 (Barwick CJ; Kitto & Taylor JJ agreeing), 297 (McTiernan J), 298–299 (Menzies J), 305 (Windeyer J), 312 (Owen J).

17 *Rankin*, above n9 where a majority followed the *Archdall* line: (Barwick CJ; Mason & Aickin JJ agreeing), 193 (Gibbs J). In a joint judgment, Stephen and Jacobs JJ found s80 to be inapplicable on the facts, and explicitly refused to be drawn into the issue: at 196. Murphy J broke from authority, holding that the words ‘trial on indictment of any offence’ served to exclude petty offences from the protection afforded by s80. However, his Honour considered it unnecessary to determine with any precision the line between petty and serious offences: id at 201–202.

18 (1985) 159 CLR 264 (hereafter *Kingswell*). As with many cases that went before it, *Kingswell* was not an appropriate vehicle to reconsider the established authority on the *Archdall* issue. The case involved a trial on indictment before a jury and, thus, there was no issue as to whether the appellant was entitled to a jury trial.

19 In a separate judgment, Mason J agreed generally with Gibbs CJ, Wilson & Dawson JJ on the s80 issues. It is not clear whether his Honour’s agreement extended to what was said in the joint judgment about the *Archdall* issue. However, given Mason J’s agreement with Barwick CJ in *Rankin*, above n9 at 196, it reasonably can be concluded that his Honour agreed with the way that Gibbs CJ, Wilson & Dawson JJ determined the *Archdall* issue.

20 *Kingswell*, above n18 at 276–277 (Gibbs CJ, Wilson & Dawson JJ). In a detailed judgment, Deane J rejected the *Archdall* reasoning, and instead adopted a modified version of Dixon & Evatt JJ’s view. Brennan J did not consider the issue.

in *Kingswell*. The case of *Cheng v The Queen*<sup>22</sup> concerned a trial on indictment during which the defendants pleaded guilty and, therefore, a trial by jury was not required by s80.<sup>23</sup> Accordingly, their Honours did not need to consider the correctness of *Archdall*. Nevertheless, Gleeson CJ, Gummow and Hayne JJ seemed to suggest that the *Archdall* interpretation was consistent with the Convention debates and contemporary commentary,<sup>24</sup> was supported by precedent and, given the decision in *Brown v The Queen*<sup>25</sup> (a case discussed further below) that a s80 jury cannot be waived, offered Parliament an alternative mechanism for the ‘effective administration of justice’.<sup>26</sup> McHugh J turned to the Convention debates in some detail, and concluded that the history and purpose of the provision confirmed what the text said: s80 ‘guarantees trial by jury only when the trial is on indictment’.<sup>27</sup> Callinan J also applied *Archdall*, but with some reservation.<sup>28</sup>

(iii) ‘Offence’ — *The Kingswell Problem*

The word ‘offence’ in s80 was also considered by the Court in *Kingswell*. A section of the *Customs Act* 1901 (Cth) contained a basic offence provision prohibiting the importation of certain narcotics. The penalty to be imposed by a court for a contravention of the prohibition was to be determined according to the presence of certain aggravating factors. It was for the trial judge, and not the jury, to determine whether the aggravating factors were present. The question for the Court (hereafter referred to as the *Kingswell* issue) was whether Parliament could differentiate between, on the one hand, the elements of the offence — which were to be determined by the jury and, on the other hand, aggravating factors that would determine the penalty — which would be determined by the trial judge.

Gibbs CJ, Wilson and Dawson JJ (with Mason J agreeing)<sup>29</sup> held that it is for Parliament to determine the elements that constitute the offence. In their Honours’ view, there is nothing:

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21 *Lowenstein*, above n9 at 583 (Dixon & Evatt JJ); *Rankin*, above n9 at 201–202 (Murphy J); *Kingswell*, above n18 at 319 (Deane J); *Re Colina*; *Ex parte Torney* (1999) 200 CLR 386 at 422, 426–427 (hereafter *Re Colina*) (Kirby J).

22 (2000) 203 CLR 248 (hereafter *Cheng*).

23 As Gleeson CJ, Gummow & Hayne JJ said, ‘[i]n the ordinary case, if, instead of contesting a charge, an accused person, by a plea of guilty, enters a formal admission of the elements of the offence, no jury will be empanelled, for there will be no issue for the jury to try’: id at 266. This has been reaffirmed in *Weininger v The Queen* (2003) 196 ALR 451 at 453 (Gleeson CJ, McHugh, Gummow & Hayne JJ).

24 *Cheng*, above n22 at 268–269 (Gleeson CJ, Gummow & Hayne JJ).

25 (1986) 160 CLR 171 (hereafter *Brown*).

26 *Cheng*, above n22 at 270 (Gleeson CJ, Gummow & Hayne JJ). McHugh J also pointed to the difficulties created by *Brown* that could be overcome by maintaining the view that the Parliament could determine which trials would and would not be by indictment: id at 298.

27 Id at 295. His Honour had applied *Archdall*, above n11 in *Re Colina*, above n21 at 405 (McHugh J).

28 Id at 344 (Callinan J). His Honour had applied *Archdall*, above n11, in *Re Colina*, above n21 at 439 (Callinan J) despite displaying some sympathy for the concerns expressed by Dixon & Evatt JJ in *Lowenstein*, above n9.

29 *Kingswell*, above n18 at 285: ‘[I]t is open to Parliament to define the ingredients of offences and the circumstances to be taken into account in sentencing in whatever way it pleases’.

that requires the Parliament to include in the definition of an offence any circumstance whose existence renders the offender liable to a maximum punishment greater than that which might have been imposed if the circumstances did not exist. The existence of a particular circumstance may increase the range of punishment available, but yet not alter the nature of the offence, if that is the will of the Parliament.<sup>30</sup>

In light of their conclusion on the *Archdall* issue, their Honours considered that ‘it would serve no useful constitutional purpose’ to read the word ‘offence’ in s80 as requiring certain aggravating factors to be included as elements of the offence.<sup>31</sup> However, their Honours suggested the practice of charging circumstances of aggravation in the indictment, a practice later endorsed by a majority in *R v Meaton*.<sup>32</sup> In that way, when taking the circumstances of aggravation into account at the sentencing stage, the trial judge would be able to ascertain whether the aggravating factors were accepted by the jury.<sup>33</sup>

Brennan and Deane JJ dissented in *Kingswell*. Brennan J was of the view that an ‘offence’ in s80 ‘can be identified only in terms of its factual ingredients, or elements, and the criminal penalty which the combination of elements attracts’.<sup>34</sup> Thus, in his Honour’s view, ‘a person should not be held liable to punishment ... unless the jury’s verdict makes him liable to that punishment’.<sup>35</sup>

Again, more recent cases do not take the issue much further. In *Cheng*, a case involving the same offence provision considered in *Kingswell*, Gleeson CJ, Gummow and Hayne JJ declined to re-examine *Kingswell*. Following the practice established in *Meaton*, the circumstances of aggravation were charged in the indictment, to which the defendants had pleaded guilty. Thus, however the offence was to be defined, the circumstances of aggravation were accepted by the guilty pleas.<sup>36</sup> In separate judgments, McHugh and Callinan JJ accepted the majority view in *Kingswell*.<sup>37</sup> On the other hand, in separate judgments, Gaudron J<sup>38</sup> and Kirby J<sup>39</sup> rejected the majority view in *Kingswell*, instead preferring the dissenting judgment of Brennan J.

30 Id at 276 (Gibbs CJ, Wilson & Dawson JJ; Mason J agreeing).

31 Id at 277 (Gibbs CJ, Wilson & Dawson JJ; Mason agreeing). Indeed, their Honours said, ‘Parliament might feel obliged to provide that some offences, which would otherwise be made indictable, should be triable summarily’: *ibid*.

32 (1986) 160 CLR 359 (hereafter *Meaton*) (Gibbs CJ, Wilson & Dawson JJ). Brennan & Deane JJ dissented in *Meaton*, pointing to the incompatibility of the practice with the decision of the majority in *Kingswell* that the matters of aggravation were for the trial judge: id at 368–369. Mason J earlier had strongly rejected the practice in *Kingswell*, above n18 at 282–283.

33 *Kingswell*, above n18 at 280 (Gibbs CJ, Wilson & Dawson JJ).

34 Id at 292.

35 Id at 294 (Brennan J). Deane J reached a similar conclusion that the elements of the offence need to be identified as a matter of substance, and not of mere form: id at 308.

36 Indeed, as Gleeson CJ, Gummow & Hayne JJ noted, even if there is no plea of guilty, provided the *Meaton* practice is followed, it is unlikely that the *Kingswell* issue would arise for consideration as ‘any issue respecting aggravating circumstances ... will be tried by jury’: *Cheng*, above n22 at 268.

(iv) *Waiver*

In *Brown*, the Court was asked to consider whether an accused person could choose not to be tried by jury when tried on indictment for an offence against a law of the Commonwealth. The appellant had been presented for trial on indictment in the Supreme Court of South Australia for an offence against the *Customs Act* 1901 (Cth). Prior to a jury being empanelled, the appellant elected to be tried by judge alone pursuant to s7(1) of the *Juries Act* 1927 (SA). A bare majority of a five member Court (Brennan, Deane and Dawson JJ; Gibbs CJ and Wilson J dissenting) held that s7(1) could not be picked up and applied by the judge because s80 mandated a trial by jury which could not be waived by the accused.<sup>40</sup>

In three separate judgments, the majority relied upon an assortment of arguments denying the possibility of waiver. On the one hand, each judge emphasised the mandatory language of s80,<sup>41</sup> and the lack of supporting authority or common law practice.<sup>42</sup> However, on the other hand, their Honours went on to identify and emphasise to varying degrees different rationales for the operation of s80. There were the familiar ideas of s80 protecting liberty,<sup>43</sup> or facilitating the community's involvement in the administration of criminal justice.<sup>44</sup> Additionally, there were observations that s80 is concerned with a governmental structure: 'the constitution or organization' of a court exercising federal jurisdiction.<sup>45</sup> The dissenting judgments of Gibbs CJ and Wilson J favoured a rights-protective view of s80 that sees it as a personal privilege that can be waived by the accused. Their Honours' judgments will be discussed further in Part 3.

In *Brownlee v The Queen*,<sup>46</sup> the Attorney-General for the Commonwealth applied for leave to re-open *Brown*. *Brownlee* will be discussed further below. It is sufficient to note for present purposes that only Kirby J considered the issue of whether *Brown* should be overruled, and held that it should. His Honour relied upon a range of reasons, including the capricious inconsistency that would arise between the ineffectiveness of s80 in other respects (that is, the *Archdall* and *Kingswell* issues) to ensure an accused the right to a trial by jury and the insistence

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37 Id at 300–301 (McHugh & Callinan JJ). Although, Callinan J reiterated the point his Honour made earlier in *Re Colina*, above n21 at 439 that he shared some of the concerns expressed by Brennan J in *Kingswell*, above n18, but felt compelled to follow authority: *Cheng*, above n22 at 344–345 (Callinan J).

38 Id at 282–283 (Gaudron J).

39 Id at 322 (Kirby J). See also id at 325 (Kirby J).

40 Section 68(2) of the *Judiciary Act* 1903 (Cth) could not pick up the provision.

41 *Brown*, above n25 at 197 (Brennan J), 201 (Deane J), 209 (Dawson J).

42 Id at 196 (Brennan J), 203 (Deane J), 211 (Dawson J). Their Honours all rejected the analogy to the position in the United States where jury trials may be waived in accordance with a legislative mechanism to that effect. In their Honours' views, the United States position is greatly influenced by the presence of the Sixth Amendment which provides for 'the right to a speedy and public trial, by an impartial jury': at 194 (Brennan J), 204 (Deane J), 209 (Dawson J).

43 Id at 197 (Brennan J), 201 (Deane J).

44 Ibid.

45 Id at 197 (Brennan J). See also id at 202 (Deane J), 214 (Dawson J).

46 *Brownlee v The Queen* (2001) 207 CLR 278 (hereafter *Brownlee*).

of such a trial against the accused's interests and desires;<sup>47</sup> the inefficiency of jury trials in the context of complex commercial and corporate offences;<sup>48</sup> the availability of a 'larger effective facility for appeal against the reasoned decision of a judicial officer when compared with the much more limited facilities'<sup>49</sup> available in the case of a jury verdict; and the personal nature of the privilege conferred by s80.<sup>50</sup> Kirby J concluded that the accused could legally waive his trial by jury and, on the facts, held that the accused did in fact waive that right.<sup>51</sup>

(v) *Observations on the Constitutional Triggers Cases*

The decided cases on the constitutional triggers give rise to the following problems. First, the majority decisions on the meaning of 'indictment' and 'offence' display little doctrinal foundation, and are not explicitly guided by any view about the purpose of s80. Secondly, the majority judges in *Brown* reached their conclusion on the basis of a range of arguments, not all of which were common to each judgment. In particular, Deane J's decision appeared to be more informed by rights protection, and less concerned with the institutional aspects of s80 emphasised by Brennan and Dawson JJ. Thus, again, there is no solid doctrinal foundation for that decision. Thirdly, the constitutional trigger decisions shed very little light on the purpose of s80. As will be developed further below, many of the judges (particularly dissenting judges) put forward rights-protective views of s80 but it is not always clear what these views mean. Nor are they applied in a consistent way. For example, Gibbs CJ and Wilson J in *Brown* referred to rights-protective purposes of s80, but do not apply those views to the issues in *Kingswell*. Although McHugh J in *Cheng* attempted, in some detail, to justify the *Archdall* line by reference to the text and intention of the framers, his Honour's conclusion says nothing more than the intended purpose of s80 was to guarantee a jury trial only when the trial was on indictment. Since that purpose could be achieved without constitutional entrenchment, McHugh J's rationale is less than satisfying.

**B. *The Requirements of a s80 'Trial ... by Jury'***

(i) *The Nature of a Trial by Jury — A Common Law Institution*

In *R v Snow*,<sup>52</sup> the Court was asked to consider whether it had appellate jurisdiction under s73 of the *Constitution* to set aside a not guilty verdict. In the course of

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47 *Id* at 318 (Kirby J).

48 *Id* at 319 (Kirby J).

49 *Ibid*.

50 His Honour quoted with approval the decision of Frankfurter J in *Adams v United States; Ex rel McCann* 317 US 269 (1942), 280, that to deny the right of waiver would 'imprison a man in his privileges and call it the *Constitution*': *Brownlee*, above n46 at 319 (Kirby J).

51 In *Cheung v The Queen* (2001) 209 CLR 1 (hereafter *Cheung*), Kirby J maintained his view that *Brown* should be overruled, but his Honour did not entertain the waiver argument because *Brown* was still good law and because on the facts in that case the accused had not consented to that waiver. Similarly, in *Ng v The Queen* (2003) 197 ALR 10 at 15 (hereafter *Ng*), his Honour did not press the issue because there was no indication of waiver on the facts. His Honour stated that '[t]he challenge to *Brown* must therefore await another day': *id* at 37 (Kirby J).

52 (1915) 20 CLR 315 (hereafter *Snow*).

denying jurisdiction, Griffith CJ famously said that s80 is ‘a fundamental law of the Commonwealth’. His Honour continued:

The history of the law of trial by jury as a British institution ... is, in my judgment, sufficient to show that this provision ought prima facie to be construed as an adoption of the institution of ‘trial by jury’ with all that was connoted by that phrase in constitutional law and in the common law of England.<sup>53</sup>

This passage sets out a number of ideas that have been picked up in subsequent cases. First, s80 is often described as ‘a fundamental law’ or in similarly evocative language. Secondly, the reference to ‘trial ... by jury’ in s80 is a reference to trial by jury as a common law institution. Thirdly, there are some common law features that are beyond legislative modification, including the authority of the jury to determine the verdict of acquittal. However, his Honour gave little guidance as to the way in which we are to identify the features that will be constitutionally protected. His Honour alluded to the familiar connotation/denotation device, however, that does not advance the inquiry significantly. Griffith CJ decided the issue in question by combining the prevailing common law rule at Federation with a negative implication to be read from the *Constitution*: it was accepted at common law that verdicts of acquittal could not be set aside, the *Constitution* did not expressly deviate from that position and, therefore, the *Constitution* must be read subject to that common law rule. However, this technique for interpreting the *Constitution* does not provide a satisfactory basis in this context to identify the features of a jury trial that are constitutionally protected. If it were to be applied as a guiding principle, then the constitutionally entrenched features of a ‘trial ... by jury’ would be those features that characterised the institution at 1900.

(ii) *Cheatle* — *Essential Features*

The High Court revisited the nature of a s80 jury trial in *Cheatle v The Queen*,<sup>54</sup> where a unanimous Mason Court held that ‘history, principle and authority combine[d] to compel the conclusion’ that s80 requires unanimous guilty verdicts.<sup>55</sup> Thus, s57 of the *Juries Act 1927* (SA), that allowed majority guilty verdicts, could not apply to the trial on indictment of an offence against the law of the Commonwealth. The Court made important observations about the requirements of s80. First, the Court re-iterated the view of Griffith CJ in *Snow* that s80 is ‘a fundamental law’ that ‘guarantees’ a trial by jury in the common law sense. Secondly, the Court introduced the distinction between essential and inessential features, with s80 constitutionally entrenching the former from legislative impairment. Thus, a trial will only be ‘by jury’ in the constitutional sense if the jury exhibits certain essential features.<sup>56</sup> In addition to *unanimity* being

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53 Id at 323 (Griffith CJ).

54 *Cheatle v The Queen* (1993) 177 CLR 541 (hereafter *Cheatle*).

55 Id at 562 (The Court). The Court expressly left open the question of whether s80 precludes legislation allowing for majority acquittals. In *Glynn v The Queen* (2002) 82 SASR 426 (Wicks & Gray JJ; Perry J dissenting on the point), a majority of the South Australian Court of Criminal Appeal held that acquittal verdicts must also be unanimous.

56 *Cheatle*, above n54 at 557–558 (The Court).

an essential feature, the Court noted that a jury must be *representative* of the wider community, an essential feature which may require *random* and *impartial* selection, rather than selection by the prosecution or the state.<sup>57</sup> Jury selection rules that excluded ‘females and unpropertied persons’ would be inconsistent with such a requirement.<sup>58</sup> Thus, not only does s80 prevent Parliament departing from certain essential jury features, but it can also be used as a basis to challenge the validity of traditional jury practices.

The features of *impartiality* and *random selection* were put to the test in *Katsuno v The Queen*,<sup>59</sup> where the Court held the practice of jury vetting to be compatible with s80 in circumstances where information about juror criminal convictions held by Victorian police had been forwarded to the prosecutor in breach of the *Juries Act* 1967 (Vic). The information was then used by the prosecutor when making peremptory challenges. In the leading judgment on the point, Gaudron, Gummow and Callinan JJ (with Gleeson CJ<sup>60</sup> and McHugh J<sup>61</sup> agreeing in that respect) held that, despite the breaches of statutory procedure, the panel was still randomly selected and impartial, and the use of the information for peremptory challenge ‘was not such a departure from a mandatory provision relating to the authority and constitution of the jury as to deny the constitutionality of the appellant’s trial’.<sup>62</sup>

(iii) *Cheatle and Katsuno Refined — The Emergence in Brownlee of a Framework for the Identification of Functional Attributes*

*Cheatle* and *Katsuno* made it clear that *random selection* and *impartiality* are features essential to a trial by jury for the purposes of s80. However, the cases did not, with sufficient precision, explain the framework or guiding principle for identifying those essential features. In *Brownlee*, the Court was asked to consider whether two provisions of the *Jury Act* 1977 (NSW) were compatible with s80 of the *Constitution*: first, s22(b) which allows for the reduction in the number of jurors from 12 to 10 during the course of the trial; and, secondly, s54(b) which allows the jury to separate at any time after its members retire to consider their verdict. On the facts in the case, during the trial, the jury was reduced from 12 to 10, and the trial continued to conclusion with a jury of 10. Additionally, after the commencement of jury deliberations, the jury was allowed to separate at the end of each day.

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57 *Id* at 560 (The Court).

58 *Ibid*. As Kirby J said in *Brownlee*, above n46 at 321, ‘[t]hose provisions reflect the characteristics thought, at the time, to be essential to the type of “right thinking man” who could be trusted with the serious responsibilities of jury service’.

59 (1999) 199 CLR 40 (hereafter *Katsuno*).

60 *Id* at 51 (Gleeson CJ).

61 *Id* at 65 (McHugh J).

62 *Id* at 65 (Gaudron, Gummow & Callinan JJ). Kirby J decided the case in the appellant’s favour on other grounds and, therefore, held that there was no need to consider the s80 argument: *id* at 97–98.

In four separate judgments, all members of the Court held that both sections were compatible with s80.<sup>63</sup> A number of interesting points were made about the essential features of a jury trial for the purposes of s80, and the framework for ascertaining those features. In a joint judgment, Gleeson CJ and McHugh J noted the difficulty of identifying essential features for the purposes of s80. The historical development of trial by jury, both before and following Federation, has shown quite clearly ‘that the incidents of the procedure never have been immutable; they are constantly changing’.<sup>64</sup> How does one then identify those features that are constitutionally entrenched? Is the constitutional institution defined by reference to features frozen at 1900?<sup>65</sup>

Gleeson CJ and McHugh J pointed to the ‘functional approach’ applied in the United States for determining the validity of State legislation permitting juries to be reduced below 12. That functional approach involves ascertaining the function performed by a jury and, then, seeing which attributes are essential to the performance of that function. Their Honours then quoted from *Williams v Florida*:<sup>66</sup>

The purpose of the jury trial ... is to prevent oppression by the Government ... Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen [sic], and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence.<sup>67</sup>

In the passages that followed this quote, Gleeson CJ and McHugh J seemed to identify the essential functional attributes of ‘independence, representativeness and randomness of selection’ and ‘the need to maintain the prosecution’s obligation to prove its case beyond reasonable doubt’.<sup>68</sup> The protection of the ‘integrity of the jury’s verdict’<sup>69</sup> was also identified as a positive objective of the jury’s functional attributes.

Gaudron, Gummow and Hayne JJ also focused on functional essential features: ‘[c]lassification as an essential feature or fundamental of the institution of trial by jury involves an appreciation of the objectives that institution advances or

63 *Brownlee*, above n46 at 290 (Gleeson CJ & McHugh J), 295–296 (Gaudron, Gummow & Hayne JJ), 329 (Kirby J), 341–342 (Callinan J).

64 *Id* at 286 (Gleeson CJ & McHugh J). Gaudron, Gummow & Hayne JJ made the same point: ‘the constitutional expression identifies a particular legal institution which evolved in England over a long period by a combination of common law and statute and, after some vicissitudes, was adopted and developed in the Australian colonies. That development has continued in the Australian States since Federation’: *id* at 291 (citations omitted).

65 To borrow the words of Austin Scott, is the institution ‘suddenly congealed in the form in which it happened to exist at the moment’ the *Constitution* was adopted? See ‘Trial By Jury and the Reform of Civil Procedure’ (1918) 31 *Harv LR* 669 at 670, quoted in *Brownlee*, above n46 at 291–292 (Gaudron, Gummow & Hayne JJ).

66 399 US 78 (1970), 100 (White J) (hereafter *Williams*).

67 *Brownlee*, above n46 at 288. Gaudron, Gummow & Hayne JJ also quoted from this passage at 302, although without any reference to protecting against government oppression.

68 *Id* at 289.

69 *Ibid*.

achieves'.<sup>70</sup> According to their Honours, the function of the jury is to determine guilt according to law, and it would appear that their Honours considered that independent 'measured group deliberation' and 'attention to the evidence'<sup>71</sup> were essential to that function.<sup>72</sup>

Thus, a clear framework emerged for the determination of whether contemporary rules and practices are compatible with the conception of trial by jury provided for in s80 of the *Constitution*. Those rules and practices will be incompatible with s80 if they are incompatible with the functional attributes of a trial by jury. As to what those functional attributes are, their Honours all seemed to gravitate towards representativeness, impartiality, randomness, measured group deliberation, and the efficient administration of justice.

Applying those essential attributes to the legislative scheme in question, the Court held that the sequestration of the jury for the whole period following retirement for deliberations was not necessary to protect the integrity of the jury's verdict or to secure that independent deliberative process.<sup>73</sup> As to the number of jurors that is essential to a trial by jury for the purposes of s80, the Court accepted that a jury can start with 12 jurors and be reduced to 10 through the course of the trial.

The *Brownlee* framework subsequently was given a ringing endorsement by the joint judgments of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ in *Ng* and *Fittock*,<sup>74</sup> cases involving challenges to State statutory systems for supplementary jurors.<sup>75</sup> In Australia, there are essentially two models for the use of supplementary jurors.<sup>76</sup> Broadly speaking, the first involves the use of *additional* jurors who are then discarded prior to jury deliberation. The second involves the use of *reserve* jurors. The first of these models was considered in *Ng*, and the second was considered in *Fittock*. Challenges to each model, on the basis that they were incompatible with s80, were rejected by the Court.

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70 Id at 298.

71 Id at 302 (Gaudron, Gummow & Hayne JJ).

72 Despite Kirby J's emphasis at 321 that his approach was different because it sought to give the words in s80 a contemporary meaning, his Honour also adopted a functional approach, and seemed to gravitate towards the core ideas of representativeness, impartiality, randomness, measured group deliberation and efficient administration of justice: id at 332–333. His Honour's views are, thus, largely consistent with the views of the other judges. Callinan J also appeared to identify as essential attributes: first, a jury size that is more representative of the community: id at 341–342; and, secondly, the independence of the jury from influences: id at 342.

73 Indeed, to the contrary, 'strict confinement may have retarded rather than encouraged measured group deliberation and, in former times, appeared to be calculated to pressure jurors to reach a unanimous verdict and to do so with expedition': id at 302 (Gaudron, Gummow & Hayne JJ). See also id at 332 (Kirby J).

74 The applications for special leave to appeal to the High Court in both cases were heard together.

75 These systems were left untouched by *Brownlee*: see *Brownlee*, above n46 at 304 (Gaudron, Gummow & Hayne JJ). Special leave to appeal to the High Court had been refused on an earlier occasion in relation to the reserve juror provisions in Western Australia: see *Ah Poh Wai v The Queen* (1995) 15 WAR 404 (hereafter *Ah Poh Wai*); (1996)14 LegRep C24.

76 Kirby J in *Ng*, above n51 at 23 described the two models for supplementary jurors adopted in Australia.

In *Ng*, the joint judgment of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ said that the constitutionally entrenched essential features 'are to be discerned with regard to the purpose which s80 was intended to serve and to the constant evolution, before and since Federation, of the characteristics and incidents of jury trial'.<sup>77</sup> Their Honours did not elaborate on what the purpose of s80 is, but they cited<sup>78</sup> passages from *Brownlee* identifying the function of the jury trial as that described by White J in *Williams*. Thus, it is clear that the Court has endorsed a functional approach to identifying the essential features of a trial by jury: in light of the way that trial by jury has developed, the Court will ask what features are essential to the function that it performs.<sup>79</sup>

Applying that approach to the schemes in question, their Honours held that the additional juror system did not offend the essential attributes of a trial by jury. The requirement from *Cheatle* of *unanimity* is one that applies at the time the verdict is pronounced.<sup>80</sup> There is no incompatibility with this essential attribute when there is a reduction in jurors by reason of death or incapacity. Similarly, their Honours said, there could not be an objection on this basis if a ballot system is used to reduce the number of jurors prior to retirement.<sup>81</sup>

Their Honours also considered that the jury's *independence* and *randomness* of selection are not threatened by a reduction by ballot. As it is compatible with independence and randomness of selection to allow a reduction in number for death or incapacity, then it appears that, similarly, it is compatible with those features to allow a reduction by ballot. In any of those circumstances, their Honours explained, the jury number is being reduced for reasons that are unrelated to the jurors' views.<sup>82</sup> Thus, when the jury retired to consider its verdict, 'it claimed the character of a panel randomly or impartially selected rather than one chosen by the prosecution or by the State'.<sup>83</sup>

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77 Id at 13 (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ) (citations omitted).

78 See n7 of *Ng*, above n51 at 13.

79 Kirby J also has accepted that functional analysis: id at 18.

80 Id at 13 (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ).

81 See also id at 26 (Kirby J).

82 Id at 13. See also id at 25 (Kirby J).

83 Id at 14 (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ). In *Fittock*, above n9 at 4, the joint judgment of Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ rejected the claim of incompatibility of the reserve juror system with s80 for the same reasons. The Court further highlighted that similar provisions in Western Australian legislation were held to be compatible with s80 in *Ah Poh Wai*, above n75. Kirby J also rejected the claim by reference to his reasons in *Ng*, above n51. In a separate judgment, McHugh J rejected the claim of incompatibility: *Fittock*, above n9 at 5.

(iv) *Observations on the Court's Approach to Identifying the Requirements of s80*

The cases on the requirements of s80 once enlivened stand in contrast to those on the constitutional triggers. While majority decisions on the meaning of 'indictment' and 'offence' display a marked reluctance to apply s80 in a rigorous way, the cases on the requirements of s80 describe it as a 'fundamental law',<sup>84</sup> a 'constitutional right'<sup>85</sup> or a 'constitutional guarantee' that strictly protects certain essential jury features from legislative interference.<sup>86</sup> This has led commentators to say that to allow the Commonwealth to 'opt-out' of s80, but to then require strict adherence to s80 requirements once it is triggered, gives rise to an incongruity.<sup>87</sup>

However, an incongruity only arises on the assumption that s80 has a particular rights-protective operation. There are two responses to that claim. First, although the Court has referred to s80 as a 'fundamental law', a 'constitutional right' or a 'constitutional guarantee', those expressions say nothing about the reasons why s80 is fundamental, what right it confers or what it guarantees.<sup>88</sup> The view that s80 is rights-protective in the senses that will be explained in Part 3 is not one that has been accepted by a majority of the Court. The closest the Court has come to accepting a rights-protective reading was in *Ng* where Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ linked 'the purpose which s80 was intended to serve'<sup>89</sup> to a passage in the judgment of Gleeson CJ and McHugh J in *Brownlee* that cited the discussion of the function of a jury trial as preventing oppression by government. However, the Court in *Ng* was concerned with the framework for identifying the essential features of a jury trial once the constitutional triggers had been pulled, and the references to *Brownlee* must be seen in that context. Rather, as will be pursued further in Parts 3 and 4, the passage highlights the Court's conflation of the purpose of s80 and the function of a jury trial.

Secondly, it is possible for the difference between the *Archdall/Kingswell* lines and the *Cheatle/Brownlee* approach to be explained on another basis. The only

84 *Snow*, above n52 at 323 (Griffith CJ); *Cheatle*, above n54 at 549 (The Court); *Brownlee*, above n46 at 304 (Kirby J).

85 *Katsuno*, above n59 at 65 (Gaudron, Gummow & Callinan JJ).

86 *Cheatle*, above n54 at 549 (The Court); *Brownlee*, above n46 at 304 (Kirby J); *Re Colina*, above n21 at 422 (Kirby J), 438 (Callinan J); *Katsuno*, above n59 at 69 (Kirby J). There are also statements to this effect in constitutional trigger cases, although only by majority judges in *Brown*, above n25, or dissenting judges on the meaning of 'indictment' or 'offence': see *Rankin*, above n9 at 202 (Murphy J); *Brown*, above n25 at 201 (Deane J), 214 (Dawson J); *Kingswell*, above n18 at 312 (Deane J).

87 Amelia Simpson & Mary Wood, "'A Puny Thing Indeed": *Cheng v The Queen* and the Constitutional Right to Trial by Jury' (2001) 29 *Fed LR* 95. This claim of incongruity would apply particularly to the judgments of Mason CJ, Dawson J & McHugh J, who have upheld the *Archdall/Kingswell* lines, but who have also adhered to a *Cheatle/Brownlee* view of the requirements of s80.

88 For example, in *Cheng*, above n22 at 340 Callinan J said '[i]t is true that both the majority and the minority in *Brown* recognised the status of s80 as a fundamental constitutional guarantee. The difference between them related to whether the guarantee gave rise to a personal right capable of waiver by the accused, or whether the guarantee looked to, and was a safeguard of, the public interest in the administration of justice'.

89 See *Ng*, above n51 at 13.

judge to have attempted to reconcile the ‘incongruity’ is McHugh J, who has said that the purpose of s80 is to guarantee trial by jury when trial is on indictment. However, as indicated earlier, this procedural view of s80 is not an appealing one. In Part 4, I will put forward a view of s80 that would reconcile that difference.

### 3. *Section 80 Theories*

The constitutional debates reveal no clear guidance on the broader plan intended for s80.<sup>90</sup> Additionally, as Part 2 demonstrates, a cohesive theory of s80 is yet to emerge from the Court’s jurisprudence. Many of the major doctrinal controversies in relation to both the constitutional triggers and the requirements of s80 have been decided without reference to any view of the purpose of s80. Many judges have put forward their views, but no clear majority view has prevailed as to the intended ‘larger purpose’.<sup>91</sup>

The clearest view put forward about s80 is that it is a ‘rights-protective’ provision. However, the constitutional scheme largely does not show a concern for rights protection.<sup>92</sup> To the contrary, the generally accepted understanding at 1900 was that freedoms were to be protected by the common law and the English institutions of parliamentary supremacy and responsible government.<sup>93</sup> Therefore, a ‘rights-protective’ view needs a convincing foundation.<sup>94</sup> In this section I will explore what might be meant by that idea, and then canvass alternative ideas that have been put forward about the operation of s80.

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90 See the discussion of the debates in *Re Colina*, above n21 at 409–410 (Kirby J), 438–439 (Callinan J); *Cheng*, above n22 at 269 (Gleeson CJ, Gummow & Hayne JJ), 293–295 (McHugh J), 321 (Kirby J). With the exception of Kirby J, the judges who have turned to consider the debates have not seen them as displaying a rights-protective intention. Amelia Simpson and Mary Wood have identified an alternative rights-protective reading of the debates to that relied upon by the majority judges in *Cheng*. However, as those authors have suggested, it probably is the case that ‘the silence of most of the delegates makes confident predictions about the participants’ intentions simply impossible’: Simpson & Wood, above n87 at 110.

91 *Re Colina*, above n21 at 419 (Kirby J).

92 As Dawson J said in *Brown*, above n25 at 214 the *Constitution*, ‘with few exceptions and in contrast with its American model, does not seek to establish personal liberty by constitutional restrictions upon the exercise of governmental power’.

93 See, for example, Jeffrey Goldsworthy, ‘The Constitutional Protection of Rights in Australia’ in Greg Craven (ed), *Australian Federation* (1992) at 151; Owen Dixon, *Jesting Pilate* (1965) at 102; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 71–76 (hereafter *Kable*) (Dawson J); *Australian Capital Television Pty Limited v The Commonwealth* (1992) 177 CLR 106 at 135–136 (Mason CJ), 182 (Dawson J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 128 (Mason CJ, Toohey & Gaudron J), 193 (Dawson J); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 361–362 (Dawson J).

94 Of course, this may not be the case if a view of constitutional interpretation is taken that seeks to give the *Constitution* a contemporary meaning that is completely divorced from the framers’ intention. However, that is not an approach favoured by the current Court: see *Singh v Commonwealth of Australia* (2004) 209 ALR 355 at 362–364 (Gleeson CJ), 372–373 (McHugh J), 403 (Gummow, Hayne & Heydon JJ), 427 (Kirby J), 436–437 (Callinan J) (hereafter *Singh*).

## A. *Section 80 and ‘Rights’*

### (i) *‘Rights’ Terminology*

I think it is important at the outset to be precise about the terminology used in this area. Section 80 often is described as a ‘constitutional right’.<sup>95</sup> It also has been seen as a ‘rights-protective’ provision. As I will explain below, the expression ‘rights-protective’ is a shorthand way of describing a range of arguments that see s80 operating as a limitation on legislative and executive power for the purpose of protecting ‘rights’.<sup>96</sup> However, the two are not necessarily co-extensive concepts. Viewing s80 as a ‘constitutional right’ does not necessarily translate into viewing s80 as a constitutional limitation that has as its *purpose* the protection of rights. Section 80 may be seen as conferring a constitutional right in circumstances where it has been triggered, without it being seen as a rights-protective provision. In that sense, to describe it as a right merely indicates that there is a legal entitlement to have the constitutional requirements of s80 complied with.<sup>97</sup> By analogy, s72 sets out certain requirements for the appointment of Justices of the High Court and federal courts. If Parliament were to appoint Justices in a manner that departed from the requirements of s72, a litigant to a dispute could press a ‘constitutional right’ to have his or her dispute determined by Justices properly appointed in accordance with s72. Section 72, like s80, imposes both a limitation on legislative power and a correlative right to have those limitations enforced. But, the limitation does not necessarily operate for some further rights-protective purpose.

### (ii) *Rights-protective Views*

The advocates of a ‘rights-protective’ view of s80 clearly see it as going beyond this narrower conception. However, within the broad category of ‘rights-protective’ perspectives, it is not always clear what ‘rights’ are said to be protected by s80. At least two possible rights-protective arguments may be discerned from the cases: first, an individual rights view of rights protection; and secondly, a community entitlement to participate in the exercise of judicial power.

The clearest judicial conception put forward by some judges has been that s80 protects the rights of the accused to have a trial by jury. The classic statement that s80 should be given this kind of rights-protective operation was expressed by Dixon and Evatt JJ in their dissenting judgment in *Lowenstein*.<sup>98</sup> The question considered by their Honours was whether Parliament was able to avoid s80 simply

<sup>95</sup> See, for example, *Katsuno*, above n59 at 65 (Gaudron, Gummow & Callinan JJ).

<sup>96</sup> For academic commentary to this effect, see George Williams, *Human Rights under the Australian Constitution* (1999) at 33–37, 103–110; Peter Bailey, *Human Rights: Australia in an International Context* (1990) at 92–94; Peter Bailey, “‘Righting’ the Constitution without a Bill of Rights” (1995) 23 *Fed LR* 1; Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (2002) at 20–30; Hilary Charlesworth, ‘Individual Rights and the Australian High Court’ (1986) 4 *Law in Context* 52; Simpson & Wood, above n87; Nick O’Neill, above n8.

<sup>97</sup> As I will develop in Part 4, it can be seen as an entitlement to have a constitutional structure complied with.

<sup>98</sup> *Lowenstein*, above n9.

by prescribing that an offence be tried summarily. As to the purpose of s80, their Honours said:

The *Commonwealth Constitution* contains no guarantee against deprivation of life, liberty or property without due process of law, like the fifth and fourteenth amendments of the *United States Constitution*. To establish personal liberty by constitutional restrictions upon the exercise of governmental power was not a guiding purpose in framing the Australian instrument, which in this respect departs widely from its American model. It is true that checks against legislative encroachment on individual freedom are not completely absent from the *Australian Constitution*. There are two or three; and one of them, that contained in sec 80 relating to trial by jury, cannot be dismissed from consideration.<sup>99</sup>

Thus, their Honours conceived of s80 as a provision that secured individual liberty by way of constitutional limitation. This view was also put forward by Gibbs CJ and Wilson J in *Brown*, where their Honours saw s80 as conferring a personal right or privilege which could be waived. Following a quote from Warren CJ in the United States Supreme Court case of *Singer v United States*,<sup>100</sup> that Art III of the United States *Constitution* ‘was clearly intended to protect the accused from oppression by Government ...’, Gibbs CJ concluded that ‘[s80] was inserted for the benefit of persons accused of offences against the law of the Commonwealth and not for any wider public interest.’<sup>101</sup> Similarly, Wilson J saw the legislative purpose expressed in s80 as being ‘wholly directed to effectively securing to an accused person presented for trial on indictment the right to have the general issue between him and the Crown determined by the verdict of a jury’. His Honour could ‘attribute no other sensible purpose to it.’<sup>102</sup> An individual rights concern is also apparent in McHugh J’s recent comments in *Fittock* that the ‘purpose of s80 is to protect the citizen from the executive and judicial power of the Commonwealth by ensuring that trials on indictment will be determined by representatives of the community who are unanimous in their verdicts’.<sup>103</sup>

Even the identification in these statements of s80 as having an individual rights-protective purpose does not tell us much about the nature of the interest that is being protected. It does not tell us whether s80 is concerned about the protection of a jury trial as a right in itself, or an aspect of a right to a fair trial. Nor does it tell us whether either of these ideas is protected as an end in itself, or as means to protect liberty.

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99 *Id* at 580 (Dixon & Evatt JJ). It is interesting to contrast this statement with comments made by Dixon J (as he then was) in an address to the American Bar Association in August 1942, where his Honour referred to s116 as the only exception to the framers’ rejection of constitutional guarantees of personal liberty: See Dixon, above n93.

100 380 US 24 (1965), 31 (Warren CJ).

101 *Brown*, above n25 at 179 (Gibbs CJ).

102 *Id* at 190 (Wilson J).

103 *Fittock*, above n9 at 5. By contrast, McHugh J in *Cheng*, above n22 at 290 implicitly rejected the idea that s80 operated as a limitation on legislative power to protect individual liberty. Instead, his Honour suggested that, in that respect, ‘the section seems to serve little purpose’.

A variation on this individual rights-protective view might see s80 operating as a means by which governmental power is further divided within the judicial branch.<sup>104</sup> Thus, not only is governmental power divided into legislative, executive and judicial power for the purpose of guaranteeing liberty,<sup>105</sup> but within the judicature, it is further divided for the protection of the accused's liberty. The nearest (although not clear) expression of this view may be seen in the judgment of Kirby J in *Cheung*. His Honour saw the division of duties between the trial judge and the jury as compatible with the broader constitutional division of governmental power:

The delineation of their respective functions assigns different responsibilities to the legislature (which frames the offence for which the law provides),<sup>106</sup> the executive (which frames the indictment and nominates the specific offence(s) charged), the jury (which decides whether the prosecution has proved the accused guilty of such offence(s)) and the judge (who instructs the jury on the law and, following a guilty verdict and conviction, passes the sentence according to law, subject to appeals provided by the Constitution against 'all judgments ... orders, and sentences'.<sup>107</sup>

Contrastingly, other judicial statements (including by Kirby J) have focused, at least in part, on the broader protection for the wider community. The protective effect of s80 for the accused is usually conceded, but broader community entitlements and benefits also are emphasised. In many cases, judges refer to both dimensions without differentiating between the two. The nature of this broader protection is not entirely clear, but it appears that what is contemplated is a community entitlement to exercise Commonwealth judicial power and the associated benefits that accrue from that participation. In other words, this broader view seems to entail some sort of democratic participation in the exercise of governmental power. Again, however, judicial statements tend not to identify this idea with any precision, and often run the idea together with an apparent community concern for the protection of the individual and/or the preservation of the integrity of the judicial process. For example, Deane J saw s80 as an 'important constitutional guarantee against the arbitrary determination of guilt or innocence' that operates 'for the benefit of the community as a whole as well as for the benefit of the particular accused',<sup>108</sup> which reflects 'a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases',<sup>109</sup> and which serves the purpose of maintaining public confidence in the administration of justice.<sup>110</sup>

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104 I am grateful to Fiona Wheeler for suggesting this to me.

105 See *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (hereafter *Wilson*) (Brennan CJ, Dawson, Toohey, McHugh & Gummow JJ).

106 Of course, this is not entirely accurate as Kirby J would appear to adhere to the view his Honour expressed in *Cheng*, above n22, that the Court cannot determine for itself how an 'offence' is to be defined under the legislation: *Cheung*, above n51 at 43 (Kirby J).

107 *Cheung*, above n51 at 44 (Kirby J) (citations omitted).

108 *Brown*, above n25 at 201 (Deane J).

109 *Kingswell*, above n18 at 298 (Deane J).

Similarly, Gaudron J referred to this broader rights-protective purpose in *Cheng*:

Respect for the rule of law and, ultimately, the judicial process and the judiciary is enhanced if the determination of criminal guilt is left in the hands of ordinary citizens who are part of the community, rather than in the hands of judges who are perceived to be, and, sometimes, are, 'remote from the affairs and concerns of ordinary people'.

The participation of the people of this country in the exercise of judicial power, through their service on juries, provides a basis for community acceptance of verdicts in criminal trials and, more broadly, an understanding of the judicial processes.<sup>111</sup>

While accepting that s80 'is a guarantee of individual rights',<sup>112</sup> Kirby J also has emphasised trial by jury 'as something of real concern to the community as well as to the accused',<sup>113</sup> and a mechanism to allow citizens to participate in the exercise of judicial power.<sup>114</sup>

(iii) *The Conflation of s80 and Jury Trials*

The task of trying to ascertain the nature of the claim that s80 is rights-protective is made more difficult by a tendency for judges to slide from discussing the purpose of s80 to the function of jury trials, without clearly differentiating between the two inquiries. When talking about the function of a jury trial, a similar range of rights-protective ideas have been put forward by judges reflecting either or both the individual rights conception and the broader community-focused conception. In *Brown*, Gibbs CJ agreed with the description of the jury as a 'bulwark of liberty, a protection against tyranny and arbitrary oppression, and an important means of securing a fair and impartial trial'.<sup>115</sup> Brennan J in *Brown* described a jury trial as not only 'the chief guardian of liberty under the law', but also as the 'community's guarantee of sound administration of criminal justice'.<sup>116</sup> Gleeson CJ and McHugh J in *Brownlee* also highlighted the prevention of oppression by

110 Id at 303 (Deane J). However, having given to s80 a wider purpose, his Honour concluded that 'the institution of trial by jury remains as important a safeguard of the liberties of free men and women as it ever was': id at 303 (Deane J).

111 *Cheng*, above n22 at 277–279. However, her Honour also described s80 as a 'constitutional guarantee' which was 'designed to protect the individual': at 279 (Gaudron J).

112 *Cheng*, above n22 at 324; *Brownlee*, above n46 at 330; *Ng*, above n51 at 17. Allowing waiver in *Brownlee* is consistent with an accused-centered view of s80.

113 *Re Colina*, above n21 at 425 (Kirby J). His Honour also agreed with Murphy J's characterisation of s80 in *Rankin*, above n9 as 'a guarantee of a fundamental right to trial by jury in criminal cases (at least in serious ones)': *Re Colina*, above n21 at 420 (Kirby J). See also *Cheung*, above n51 at 32–33 (Kirby J).

114 *Cheng*, above n22 at 328–329, referring, with approval, to the remarks by Scalia J in *Apprendi v New Jersey* 530 US 466 (2000). His Honour also has said that 'being a mode of trial envisaged within Ch III of the *Constitution*, it is essential that it should continue to hold public confidence and "through the involvement of the public, societal trust in the system as a whole": *Brownlee*, above n46 at 330 (Kirby J).

115 *Brown*, above n25 at 179 (Gibbs CJ). Kirby J has also described the jury as 'a bulwark of liberty': *Cheung*, above n51 at 38.

116 *Brown*, above n25 at 197 (Brennan J).

government as well as ‘community participation and shared responsibility’.<sup>117</sup> In *Rankin*, Murphy J explained that ‘[t]he jury system is the main social defence against governmental or other oppression, the main instrument for preserving the liberties of the people’.<sup>118</sup> His Honour then quoted from De Tocqueville: ‘[t]he institution of the jury ... places the real direction of society in the hands of the governed, and not in the hands of the government ... He who punishes the criminal is ... the real master of society ...’.<sup>119</sup>

These statements reflect two sources of confusion. First, there has been insufficient attention given to the identification of the ‘rights’ said to be advanced by a trial by jury. Secondly, as I will argue further below, there has been a failure to distinguish between the purpose of s80 and the function of a jury trial.

### **B. Other Ideas about s80**

There is no clear alternative view of the purpose of s80. Certainly, there are judgments that give clues as to alternative explanations, particularly those of Brennan and Dawson JJ in *Brown*. Viewed in its Ch III context, s80 was said to be ‘part of the structure of government’:<sup>120</sup> a provision that ‘entrenches the jury as an essential constituent of any court exercising jurisdiction to try a person charged on indictment with a federal offence’.<sup>121</sup> On this basis, waiver of s80 was not seen as possible. The significance of its location in Ch III was also central to the Court’s decision in *Bernasconi*, as was the federal context in which Ch III operates. In rejecting the application of s80 to an offence under a territory law, Griffith CJ (with Gavan Duffy and Rich JJ agreeing) said that Ch III ‘is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to territories’.<sup>122</sup>

Despite these suggestions, there is not yet a clearly articulated theory to tie these ideas together. In the next section, I will endeavour to develop a conception of s80 that builds upon these ideas.

## **4. A Federal Vision for Section 80**

### **A. Section 80 Must Do Something**

One of the main reasons that a rights-protective interpretation of s80 is so attractive is the absence of a clearly explained alternative. Rights-protective advocates are right when they say that s80 ‘must *do something*’.<sup>123</sup> If it does not protect rights,

117 *Brownlee*, above n46 at 288 (Gleeson CJ & McHugh J), quoting from the United States case of *Williams*, above n66.

118 *Rankin*, above n9 at 198 (Murphy J).

119 *Id* at 199 (Murphy J).

120 *Brown*, above n25 at 214 (Dawson J).

121 *Id* at 197 (Brennan J). Other judges also have highlighted the place of s80 in the structure of government and the Ch III context: see *Brown*, above n25 at 201 (Deane J); *Cheng*, above n22 at 277 (Gaudron J); *Brownlee*, above n46 at 330 (Kirby J); *Cheung*, above n51 at 38 (Kirby J); *Ng*, above n51 at 17–18 (Kirby J).

122 Above n6 at 635 (Griffith CJ). Isaacs J expressed a similar view: at 637.

what does it do? Surely the answer is not to view s80 as ‘a mere procedural provision’,<sup>124</sup> intended ‘to prevent a procedural solecism’.<sup>125</sup> The view that s80 was aimed at avoiding ‘the mischief that would result if Parliament could not determine which offences against the laws of the Commonwealth were to be tried by juries’,<sup>126</sup> seems to avoid meeting the anterior questions head on. Nor is it convincing to view s80 as representing ‘the high water mark of uncritical and seemingly senseless copying of inappropriate American precedent’.<sup>127</sup> By providing an alternative explanation of the purpose of s80, I hope to refocus the s80 debate. If the analysis below is accepted, s80 does something. The question will be how much does it do?

The confusion in the way that s80 has been seen to operate, and the confused range of ideas about the purpose of s80, reflect, in my view, two significant problems. First, there has been a failure to differentiate between the purpose of s80 and the function of a jury trial. Secondly, the High Court has had difficulty identifying, with sufficient precision, the function of a jury under our constitutional arrangement. In the next section, I will address the first of these problems by considering a federal purpose of s80, divorced from the function of a jury trial. In the subsequent section, I will address the second problem by exploring the function of a jury under our constitutional arrangement.

### ***B. Federal Purpose of s80***

What follows is an explanation of the constitutional meaning or purpose of s80. It is not an attempt to discern the *subjective* intentions of the framers, as it is accepted that those views are not relevant to the exercise of determining constitutional meaning.<sup>128</sup> Although the *objective* intentions of the framers has been referred to by some judges as the relevant inquiry for determining constitutional meaning,<sup>129</sup> any reference to the framers’ objectives is misleading in the context of s80.<sup>130</sup> There is no clear understanding in the debates of what purpose s80 was intended to serve and, therefore, the debates shed insufficient light on its meaning.<sup>131</sup> The federal view put forward in this paper is one that derives the constitutional

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123 Simpson & Wood, above n87 at 112.

124 *Spratt*, above n9 at 244 (Barwick CJ).

125 *Lowenstein*, above n9 at 581–582 (Dixon & Evatt JJ).

126 *Cheng*, above n22 at 292 (McHugh J).

127 Clifford Pannam, ‘Trial by Jury and Section 80 of the Australian Constitution’ (1968) 6 *Syd LR* 1 at 24.

128 See *Singh*, above n94 at 362 (Gleeson CJ), 372–373 (McHugh J), 403 (Gummow, Hayne & Heydon JJ), 426–427 (Kirby J).

129 *Id* at 362 (Gleeson CJ), 372–373 (McHugh J), 436–437 (Callinan J).

130 See *id* at 403 (Gummow, Hayne & Heydon JJ): ‘Metaphorical references to “the founders’ intention” are as apt to mislead in the constitutional context as are references to the intentions of the legislature when construing a statute or references to the intentions of the parties to a contract when considering its construction’.

131 See Simpson & Wood, above n87. Compare the view of Gleeson CJ in *Singh*, above n94 at 364 that the debates were useful for the resolution of the issue in *Cheng*, above n22. However, although the statements made during the debates were relevant to the issue in *Cheng*, they did not illuminate the purpose of s80 unless a procedural view of s80 is assumed.

meaning or purpose of s80 from its constitutional context, in particular, its place in Ch III of the *Constitution*.

It is clear that the *Constitution* is concerned largely with the creation of a new governmental entity. With the creation of this new body politic, decisions had to be made about the institutions, structures and processes for the exercise of governmental power of the new entity. The framers adopted the separation of powers from the United States *Constitution*. Thus, the *Constitution* clearly identifies three separate governmental powers, and the way in which those powers are to be exercised. The *Constitution* was intended to provide for the institutions of representative and responsible government,<sup>132</sup> and valid laws of the Parliament were intended to be ‘binding on the courts, judges, and people of every State and of every part of the Commonwealth’.<sup>133</sup>

The new Commonwealth entity was not given general legislative power in relation to criminal law but, as Griffith CJ recognised in *Bernasconi*, the imposition of criminal sanction would be incidental to the exercise of many heads of power.<sup>134</sup> The prosecution of such an offence would be a matter of federal jurisdiction, and the quelling of the justiciable controversy underlying that matter (that is, the ‘adjudgment and punishment of criminal guilt under a law of the Commonwealth’)<sup>135</sup> would involve the exercise of Commonwealth judicial power. As Brennan, Deane and Dawson JJ (with Mason CJ generally agreeing on this point) said in *Lim*:<sup>136</sup>

There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth.<sup>137</sup>

Although the judgment of Brennan, Deane and Dawson JJ has recently come under attack,<sup>138</sup> this statement of principle appears to remain well-accepted doctrine.<sup>139</sup>

Section 71 of the *Constitution* vests the judicial power of the Commonwealth in certain courts: the High Court, federal courts created by Parliament and ‘in any such courts as it invests with federal jurisdiction’. The autochthonous expedient

132 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557 (hereafter *Lange*) (The Court). As the Court said in *Lange*, ‘[s]ections 1, 7, 8, 13, 24, 25, 28 and 30 of the Constitution give effect to the purpose of self-government by providing for the fundamental features of representative government’: at 557.

133 *Constitution*, above n1 at covering cl5.

134 Above n6 at 635 (Griffith CJ).

135 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 (hereafter *Lim*) (Brennan, Deane & Dawson JJ). See also *Nicholas v The Queen* (1998) 193 CLR at 173 (hereafter *Nicholas*).

136 *Lim*, above n135.

137 *Id* at 27. See also *Nicholas*, above n135 at 187 (Brennan CJ); *Kable*, above n93 at 107 (Gaudron J); *Harris v Caladine* (1990) 172 CLR 84 at 147 (hereafter *Harris*) (Gaudron J).

138 *Re Kit Woolley; Ex parte Applicants M276/2003* (2004) ALR 369 at 383–386 (McHugh J) (hereafter *Woolley*).

was to allow Parliament to vest federal jurisdiction in State courts (s77(iii)) — as an alternative to creating its own courts — and, thus, those State courts were to exercise the judicial power of the Commonwealth.

Thus, Ch III of the *Constitution* creates a federal structure: Commonwealth judicial power to be exercised by the High Court, courts created by Parliament and State courts. The adjudgment and punishment of criminal guilt under a law of the Commonwealth is exclusively an exercise of Commonwealth judicial power and, leaving aside s80, it can be exercised only by a court referred to in s71 of the *Constitution*.

In vesting federal jurisdiction in State courts, it is well established that the Parliament has no power to alter or affect the constitution of the court or the organisation through which its jurisdiction and powers are exercised.<sup>140</sup> As McHugh J recently said in *Fardon*, High Court cases ‘have often demonstrated that, subject to the *Kable* principle, the Parliament of the Commonwealth must take State courts as it finds them’.<sup>141</sup> The expression ‘State courts’, for the purposes of s77(iii), means the institution, rather than the individual members who constitute the court.<sup>142</sup> Thus, it is for the State Parliament to determine the organisation of the court through which that court’s powers (including Commonwealth judicial power) and jurisdiction (including federal jurisdiction) are to be exercised.<sup>143</sup> Instead, if Parliament were to choose to vest federal criminal jurisdiction in federal courts, that jurisdiction must ‘be exercised by a court whose members are judges appointed under s72 of the *Constitution*’.<sup>144</sup> Therefore, leaving aside s80, in relation to the High Court or courts created by Parliament, the judicial power of the Commonwealth could only be exercised by s72 judges or delegates under their supervision.<sup>145</sup>

It is possible to see s80 as an essential element of that federal structure: a statement about how the judicial power of the Commonwealth is to be exercised in circumstances involving an offence against a law of the Commonwealth. The

139 See *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 562 (Gleeson CJ, Gaudron, Gummow, Kirby & Hayne JJ); *Baker v The Queen* (2004) 210 ALR 1 at 12, 16 (McHugh, Gummow, Hayne & Heydon JJ), 29 (Kirby J); *Woolley*, above n138 at 374-375 (Gleeson CJ), 383 (McHugh J), 418 (Kirby J); *Al-Kateb v Godwin* (2004) 208 ALR 124 at 159-160 (Gummow J), 163 (Kirby J); *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 208 ALR 271 at 277 (Gleeson CJ), 300-301 (Kirby J); *Fardon v Attorney-General for the State of Queensland* (2004) 210 ALR 50 (hereafter *Fardon*) at 73 (Gummow J; Hayne J agreeing), 91-92 (Kirby J).

140 *Le Mesurier v Connor* (1929) 42 CLR 481; *Brown*, above n25 at 198 (Brennan J). The only exception is s79 of the *Constitution* which provides that ‘[t]he federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes’.

141 *Fardon*, above n139 at 63 (McHugh J). See also the cases cited in n48 of his Honour’s judgment.

142 *Commonwealth v The Hospital Contribution Fund of Australia* (1982) 150 CLR 49 (hereafter *HCF Australia*).

143 *Id* at 58 (Gibbs CJ; Stephen & Aickin JJ agreeing), 60 (Mason J), 65 (Murphy J), 71-72 (Wilson J).

144 Leslie Zines, *Federal Jurisdiction in Australia* (3<sup>rd</sup> ed, 2002) at 209.

145 *Harris*, above n137 at 95 (Mason CJ & Deane J), 122 (Dawson J), 149 (Gaudron J), 160, 164 (McHugh J).

function of s80 in that federal structure is at least three-fold. First, it qualifies the exclusive power of State Parliaments to determine the constitution of a State court when a trial is on indictment. Where the Commonwealth Parliament prescribes an offence to be tried on indictment, the judicial power of the Commonwealth has to be exercised by a jury. This is particularly important in a system which relies heavily upon State courts to administer Commonwealth criminal law. Thus, as Brennan J said in *Brown*, provided it is possible for a State court to sit with a jury, the Commonwealth Parliament can require a jury trial. This could not have been done without s80. The significance of this federal aspect may have been enhanced by the decision in *Kable*. Various statements in *Kable* suggest that the States must maintain courts that are capable of being repositories of federal criminal jurisdiction. In other words, the States must maintain courts that are capable of exercising criminal jurisdiction in a way required by s80.<sup>146</sup> Applying the reasoning in *Kable*, it may be said that if a State were free to abolish trial by jury completely, the autochthonous expedient would be frustrated.<sup>147</sup> This proposition does not prevent the States from abolishing jury trials in relation to state offences, but it would require the States to maintain courts that can sit with a jury when Commonwealth offences are tried on indictment. When read with *Kable*, s80 guarantees to the Commonwealth Parliament a particular vehicle through which Commonwealth judicial power may be exercised. Thus, because of s80, State Parliaments are not free to abolish jury trials completely. Although the Court's decision in *Fardon* has limited the effect of *Kable* in some respects, the aspect of *Kable* discussed above is unaffected by that decision.<sup>148</sup>

Secondly, when regulating the exercise of federal criminal jurisdiction by the High Court, or when setting up federal courts to exercise that jurisdiction, s80 provides for the exercise of Commonwealth judicial power by a panel of lay people. If not for s80, jury members could not exercise the exclusively judicial power to adjudge guilt. When performing their function, the members of the jury would not be judges appointed under s72, nor would they be exercising judicial power delegated to them by, or under the supervision of, judges. Section 80 provides the Parliament with that facility for the exercise of Commonwealth judicial power. However, s80 also is an exhaustive statement of the alternative ways in which Commonwealth judicial power may be exercised: it limits the alternative form of trial to a 'trial ... by jury'. As I will explain below, I think it is reasonable to conclude, as the Court has, that the words 'trial ... by jury' describe

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146 I am indebted to Professor Leslie Zines for discussing these ideas with me.

147 *Kable*, above n93 at 101 (Gaudron J), 111 (McHugh J), 142 (Gummow J).

148 Some statements by McHugh J in *Fardon*, above n139, seem to be inconsistent with the effect of *Kable*, above n93, discussed here. His Honour said that a State parliament could 'abolish criminal juries and require breaches of the criminal law to be determined by non-judicial tribunals', and that 'no process or legal or logical reasoning leads to the conclusion that, because the Federal Parliament may invest State courts with federal jurisdiction, the States cannot legislate for the determination of issues of criminal guilt or sentencing by non-judicial tribunals': *Fardon*, above n139 at 64 (McHugh J). Although it is not entirely clear, it would appear that, if read consistently with his Honour's judgment in *Kable*, above n93, the *Fardon* comments are probably limited to state criminal offences.

an institution that developed at common law, rather than allowing Parliament to define the institution. Thus, the Commonwealth Parliament could not prescribe, for example, a military tribunal<sup>149</sup> as the method for trial, or a panel of expert assessors, since lay membership of the jury seems to be what is contemplated by the common law institution of ‘trial ... by jury’.

Thirdly, when the Commonwealth Parliament requires a trial by jury, the second limb of s80 provides that the ‘trial shall be held in the State where the offence was committed’. Under current arrangements for the exercise of federal criminal jurisdiction, it is for the State in which the offence was committed to determine the composition of the jury panel. The practical reality of this limb is that the jury will be chosen from the State in which the offence was committed. Thus, while the *Constitution* allows the Commonwealth Parliament to create criminal offences that would otherwise have been within the plenary power of the Colonies, it ensures that offences under Commonwealth laws, as they would have been under colonial laws prior to Federation, are tried by those selected from the neighbourhood of the offence. Thereby, s80 guarantees a local involvement in the exercise of Commonwealth judicial power in the administration of criminal justice.<sup>150</sup>

Thus, far from being a mere procedural provision or an example of senseless copying from the United States *Constitution*, s80 is an essential ingredient of the federal structure: it facilitates the exercise of Commonwealth judicial power and strikes a balance between the needs of the federal polity and the concerns and continued involvement of the States in the exercise of criminal justice. Seen in this way, s80 is a fundamental statement about federal institutions and structures: how Commonwealth judicial power is to be exercised where there is an offence against a law of the Commonwealth.

There is thus no *necessary* reason to give s80 a rights-protective interpretation on the basis of avoiding depriving s80 of an operation. Section 80 already performs an important function. This is not to say that s80 does not have a protective operation for the accused once it is triggered. Once Parliament prescribes the structure of a jury trial through which Commonwealth judicial power is to be exercised, s80 compels the use of that structure.<sup>151</sup> An entitlement to have a jury trial under s80 may be described as a constitutional right, but it is a right to have a constitutional structure complied with, and only arises once the constitutional triggers have been satisfied.

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149 As occurred in colonial times in New South Wales: see generally, for example, *Brownlee*, above n46 at 338 (Callinan J); Nick O’Neill, above n8 at 89; Herbert Evatt, ‘The Jury System in Australia’ (1936) 10 *ALJ* (Supp) 49. The exception, of course, is a military trial for a breach of military discipline: see, for example, *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311.

150 It might be possible to see the preservation of this local involvement as a reflection of a State right or entitlement to retain for the State an involvement in the exercise of federal power.

151 A useful analogy is to s92 of the *Constitution*. The rights-protective view of s92 was rejected by the Court in *Cole*, above n2 at 360. Section 92 was seen as a provision preventing discrimination of a protectionist kind, not to guarantee a right to engage in interstate trade. However, compliance with that provision would have a protective operation for those engaged in interstate trade.

If this federal purpose were accepted as exhausting the operation of s80, the accused's right to a trial by jury would remain a common law one, the preservation of which rests with the system of representative and responsible government created by the *Constitution*.<sup>152</sup> Any community entitlement to participate in the exercise of Commonwealth judicial power would be contingent on the legislative judgment of the Commonwealth Parliament. Finally, s80 would not operate to further constitutionally entrench a division of governmental power to protect liberty, unless Parliament specifies an offence is to be tried on indictment. The separation of judicial power from legislative and executive power, and the exclusive exercise by courts of the power to adjudge and punish guilt, would operate as a constitutional protection of liberty.<sup>153</sup> This view of s80 makes no normative judgment about the desirability of jury trials. Instead, it leaves those judgments to the Parliament.

The consequence of this argument is that rights-protective advocates would have to argue that s80 performs an *additional* function of rights protection. It could no longer be asserted that s80 must be rights-protective in order to give it some work to do. I do not dismiss the possibility of an additional layer of operation for s80, but a persuasive argument for this possibility remains to be provided. It is sufficient to say for present purposes that the normal indicators of constitutional interpretation do not support a rights-protective view. First, the text and structure of s80 do not support such a conception. As Dawson J noted in *Brown*, it is not expressed in terms of a right in contrast to the Sixth Amendment in the United States.<sup>154</sup> Secondly, as discussed earlier, it is not consistent with the general nature of our constitutional arrangement, nor does it find strong support in the constitutional debates. Additionally, the difficulties in application of s80 encountered in describing a rights-protective view with any clarity,<sup>155</sup> and the difficulties experienced by judges who have adopted a rights-protective view,<sup>156</sup> might suggest that these matters are inherently contestable and, therefore, an interpretation of s80 should be preferred that does not constitutionalise particular rights-protective conceptions, but rather leaves these matters to the legislature.<sup>157</sup>

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152 This would be consistent with how the framers generally saw the protection of rights. As a common law right, its curtailment by the Commonwealth Parliament might, in some circumstances, be relevant to the characterisation of a law within power: see Dan Meagher, 'New Day Rising? Non-Originalism, Justice Kirby and Section 80 of The Constitution' (2002) 24 *Syd LR* 141.

153 There are many High Court cases that emphasise the role of an independent judiciary in the protection of liberty: see, for example, *Wilson*, above n105 at 11 (Brennan CJ, Dawson, Toohey, McHugh & Gummow JJ); *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 11 (Jacobs J; Barwick CJ, Gibbs, Stephen & Mason JJ agreeing); *Nicholas*, above n135 at 231 (Gummow J), 254 (Kirby J); *Harris*, above n137 at 159 (McHugh J); *Kotsis v Kotsis* (1970) 122 CLR 69 at 109-110 (Gibbs J), adopted by a majority of the Court in *HCF Australia*, above n142 at 49; *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ); *Fardon*, above n139 at 74 (Gummow J; Hayne J agreeing), 91-92 (Kirby J).

154 *Brown*, above n25 at 211 (Dawson J).

155 See above Part 3.

156 For example, on the meaning of 'indictment' see text accompanying nn11-21 in this paper.

For the remainder of this paper, I will assume that the federal purpose described above exhausts the operation of s80, and briefly address the consequences of this view for the s80 controversies described in Part 2 of this paper. Before turning to those questions, however, I will deal with the second problem identified earlier; that is, the difficulty experienced by the High Court in identifying the function of the jury under our constitutional arrangement.

### ***C. Function of a Jury***

Under the federal vision of s80, only when a trial by jury is prescribed by the Commonwealth Parliament does the constitutional function of the jury become relevant. There has been a confused range of ideas put forward about the function of a jury trial. As indicated earlier, there has been a failure to differentiate between the purpose of s80 and the function of a jury trial, so many statements of jury function have been attributed to s80.

Section 80 jury trials have been described as: ‘a bulwark of liberty, a protection against tyranny and arbitrary oppression, and an important means of securing a fair and impartial trial’;<sup>158</sup> a protection against ‘the corrupt or over-zealous prosecutor and against the compliant, biased, or eccentric judge’.<sup>159</sup> ‘the main social defence against governmental or other oppression, the main instrument for preserving the liberties of the people’;<sup>160</sup> ‘the chief guardian of liberty’;<sup>161</sup> ‘a guarantee against the arbitrary determination of guilt or innocence’;<sup>162</sup> ‘the protection of the citizen against those who customarily exercise the authority of government’;<sup>163</sup> a protection for ‘the citizen from the executive and judicial power of the Commonwealth’;<sup>164</sup> a protection ‘against oppressive laws and supine judges’;<sup>165</sup> and a prevention of ‘oppression by the Government’.<sup>166</sup>

While many of these statements add colour to the description of the function of a jury, they do not capture precisely the constitutional function. Many of the statements are largely derived from ideas about the role of the jury at some point in English constitutional history, in circumstances where governmental power was exercised according to arrangements that do not reflect our constitutional system of government. It may be accepted that the reference to ‘trial ... by jury’ in s80 is

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157 See, for example, the arguments put forward by Jeremy Waldron, ‘A Right Based Critique of Constitutional Rights’ (1993) 13 *Oxford Journal of Legal Studies* 18 at 31–34; and Jeremy Waldron, *Law and Disagreement* (1999) at 11–12.

158 *Brown*, above n25 at 179 (Gibbs CJ). Kirby J has also described the jury as ‘a bulwark of liberty’: *Cheung*, above n51 at 38.

159 *Brown*, above n25 at 179 (Gibbs CJ, quoting from *Duncan v Louisiana* 391 US 145 (1968)).

160 *Rankin*, above n9 at 198 (Murphy J).

161 *Brown*, above n25 at 197 (Brennan J).

162 *Id* at 201 (Deane J).

163 *Kingswell*, above n18 at 300 (Deane J).

164 *Fittock*, above n9 at 5 (McHugh J).

165 *Cheung*, above n51 at 38 (Kirby J).

166 *Brownlee*, above n46 at 288 (Gleeson CJ & McHugh J, quoting White J of the United States Supreme Court in *Williams*, above n66 at 100). The passage from Gleeson CJ & McHugh J was referred to by Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ in *Ng*, above n51 at 13.

a reference to the English institution of trial by jury.<sup>167</sup> However, English legal and political institutions cannot be viewed in the abstract; they must be viewed in their Australian constitutional context.<sup>168</sup> We should not assume that this range of ideas has been constitutionalised by s80.

The function of a jury, in my view, is correctly identified by Gaudron, Gummow and Hayne JJ in *Brownlee*. The jury – being a lay panel exercising the judicial power of the Commonwealth – is interposed between accused and accuser and determines guilt according to law created by Parliament. Thus, its role under our constitutional system is to protect liberty by ensuring that guilt is determined according to the law as required by covering clause 5 to the *Constitution*. Exercising Commonwealth judicial power together with the trial judge, the jury ensures that the exercise of prosecutorial power by agents of the executive does not result in the deprivation of liberty without legislative authority. Thereby, the function of the jury is to uphold the rule of law. To the extent that the observations listed above about the function of a jury go beyond this rule of law rationale, they do not accurately reflect the constitutional function of a s80 jury.<sup>169</sup> In particular, the function of the jury is not to protect against an exercise of legislative power by Parliament. Its role is to give effect to an exercise of that power.

#### **D. Application of this Federal View to s80 Issues**

If it is accepted that the operation of s80 is exhausted by the conception suggested above, the controversies discussed in Part 2 of this paper would be determined in the following way.

##### *(i) Laws for Territories*

The Court was correct in *Bernasconi* to view s80 in a federal context. Chapter III of the *Constitution*, including s80, is limited to circumstances where Commonwealth judicial power is being exercised. Consequently, whether s80 applies to laws for territories depends upon whether a court will be exercising Commonwealth judicial power when trying the offence. This is a difficult question which is beyond the scope of this paper. However, if Commonwealth judicial power is being exercised, then s80 applies to facilitate the exercise of that power.

##### *(ii) Indictment*

If s80 is about federal institutions and structures — that is, the imposition of a constitutional structure on a State court exercising Commonwealth judicial power and the facilitation of the exercise of Commonwealth judicial power by a lay panel in a federal court — there is no reason why the Commonwealth Parliament should not be allowed the discretion to decide whether Commonwealth offences should be tried by judge sitting alone or with a jury.

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167 *Snow*, above n52 at 323 (Griffith CJ); *Cheatle*, above n54.

168 See, for example, *Lange*, above n132; *Sue v Hill* (1999) 199 CLR 462; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Attorney-General (Western Australia) v Marquet* (2003) 202 ALR 233.

169 Any further function would require an additional layer of operation to be given to s80.

(iii) *Offence*

Once the structure of a jury trial has been prescribed, s80 contemplates a division of functions between the trial judge and jury. Both the trial judge and the jury exercise the judicial power of the Commonwealth in relation to the matter before them, but the role of the jury is to decide whether the accused is guilty of an offence. In other words, it is the function of the jury to determine that part of the justiciable controversy that constitutes the offence. However, the justiciable controversy arises only because of the enactment of a criminal offence by Parliament. Thus, the right, duty or liability giving rise to the justiciable controversy and the matter<sup>170</sup> is determined by the legislature. There appears, then, to be no obstacle in the path of the legislature creating the right, duty or obligation in whichever way it wants, provided the judge and jury are not simultaneously exercising judicial power to quell the same aspect of the justiciable controversy.

(iv) *Jury Waiver*

Once Parliament decides on trial by jury as the particular structure through which Commonwealth judicial power is to be exercised, s80 requires that legislative direction to be complied with. There is no possibility of waiving that constitutional structure.

(v) *Nature and Essential Attributes*

Once s80 is triggered, questions about what is required by a ‘trial ... by jury’ should be guided by: (i) its nature as a common law institution; and (ii) its constitutional function: namely, *the exercise of the judicial power of the Commonwealth to ensure that guilt is determined according to law*. In *Katsuno*, Gaudron, Gummow and Callinan JJ asked whether the jury vetting practice there in question undermined the constitution or authority of the jury. The words *constitution* and *authority* probably are a rough approximation for the same inquiry put forward here; however, precision may be lost in the approximation.

Care must be taken not to draw too much from the common law history of jury trials. As the Court highlighted in *Brownlee*, the institution has evolved and continues to evolve. We should not be too eager to constitutionalise pre-1900 conceptions of juries. What should be constitutionalised are the *essential nature* and the *essential features* of a s80 jury. Lay membership is probably enough to identify the essential nature of a jury as a common law institution. A jury of that nature cannot perform its constitutional function unless it is characterised by essential functional attributes. Those essential attributes should not be derived from the common law history of juries, but rather by reference to the constitutional function that is performed. The Court in *Brownlee*, *Ng* and *Fittock* has adopted an appropriate framework for the determination of the essential attributes. However, the inquiry must be undertaken by reference to a clear conception of the jury function that is appropriate to the Australian constitutional arrangement, not one derived from pre-1900 conceptions.

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170 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

Some of the attributes considered in cases to date are obvious examples that may be derived from the exercise of Commonwealth judicial power: *impartiality*, *randomness* and *measured group deliberation*. *Representativeness* may also enhance impartiality and randomness. Alternatively, *representativeness* may reflect the essential nature of the common law institution as comprising lay members. The essential feature that is not entirely convincing is unanimity. Judicial power is not necessarily exercised unanimously by judicial panels (for example, appellate courts). It may be that we cannot place as much faith in lay panels exercising Commonwealth judicial power as we do in judges, and need the safety net of unanimity to preserve the integrity of Commonwealth judicial power. For now, it is sufficient to note that a principled distinction between these cases must be identified so as to justify differential treatment. The matters referred to by the Court in *Cheatle* — history, principle and authority — may not be sufficient to justify that distinction.

## 5. Conclusion

Section 80 has had a troubled development. Although some aspects of s80 have now emerged, some uncertainty continues in relation to fundamental questions concerning the circumstances in which s80 is triggered. That uncertainty exists because insufficient attention has been given in majority judgments to developing a solid foundation for the operation of s80. In cases where such an analysis has been attempted, one is left to search individual judgments for common threads.

Of particular importance is a consideration of the vision that underlies s80. The most coherent approach put forward to date relies upon a rights-protective view of the provision. However, the many obstacles in the way of such a vision have resulted in it being relegated to ‘a marginal perspective on the High Court’.<sup>171</sup> The approach discussed in this paper suggests that s80 might be seen in a new light – a view that sees it as central to the federal compact, and to Ch III of the *Constitution* which sets out the system for the exercise of Commonwealth judicial power. If viewed in this way, s80 performs an important federal purpose, and need not be explained in a rights-protective way.

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171 Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights*, above n96 at 28.

# *Before the High Court*

## *Ruddock and Others v Taylor*

SUSAN KNEEBONE\*

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On 8 October 2004 the High Court granted leave to appeal from a decision of the New South Wales Court of Appeal, *Ruddock and Others v Taylor* (hereafter *Taylor*).<sup>1</sup> The case involves an action in trespass for false imprisonment arising from cancellation of Mr Taylor's visas on two separate occasions, pursuant to s501 of the *Migration Act* 1958 (Cth) (hereafter *Migration Act*), and subsequent immigration detentions, for the purpose of removal from Australia. The second cancellation gave rise to the litigation reported in *Re Patterson; Ex parte Taylor* (hereafter *Re Patterson*)<sup>2</sup> in which, inter alia, a majority of the High Court decided that the exercise of power pursuant to s501 was not a valid exercise of power in relation to Mr Taylor, as although he was a 'non-citizen', he was not an 'alien' within the meaning of s51(xix) of the Constitution. The Court of Appeal found that the 'ministers' who cancelled the visas had acted unlawfully and were liable for false imprisonment. The appeal is brought by Mr Philip Ruddock, the then Minister for Immigration and Multicultural Affairs (hereafter the Minister for Immigration), Senator Kay Patterson and the Commonwealth.<sup>3</sup> The issue that the High Court is asked to consider in this case is whether the circumstances of the detentions give rise to liability in tort for false imprisonment.

The Minister for Immigration argues that the principles of liability in trespass should be modified when his liability is in issue. The case thus raises important issues about the basis of the Minister's liability for intentional torts in the context of immigration detention. The Minister also argues that it is immune from liability under the statutory framework of the *Migration Act*. In particular the Minister attempts to avoid liability on the basis that the acts of cancellation and the detentions were separate. The Minister argues that he is not responsible for the acts of the officers who effected the detentions. This case thus raises the issue of whether a remedy in tort can be given for unlawful exercises of power under s501, and whether non-citizens have the same rights as others in our legal system.

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1 (2003) 58 NSWLR 269.

2 (2001) 207 CLR 391.

3 I shall refer to the appellants collectively as the Minister for Immigration, or the Minister, and to the actions of both Mr Ruddock and Senator Patterson as the 'ministerial acts'. References to the Minister and the Department will be to the Minister for Immigration and Department of Immigration, irrespective of the current title of the Department.

## 1. *The Context of the Decision*

The *Migration Act* establishes a system of entry into, and remainder in, Australia by visas. The object of the Act is stated in s4(1) as being ‘...to regulate, in the national interest, the coming into and presence in Australia of non-citizens’. Mr Taylor is a non-citizen, that is, a person who is not an Australian citizen,<sup>4</sup> and as I will explain below in the discussion of the High Court decision in *Re Patterson*,<sup>5</sup> his prospective removal was purportedly in the ‘national interest’.

Very briefly, for the purpose of a discussion of the relevant powers, the detention provisions were applicable to him if he was an ‘unlawful non-citizen’<sup>6</sup> and he fitted that category if s501 applied to him, and his visas were validly cancelled.<sup>7</sup> In that situation the immigration detention provisions in ss189 and 196 of the *Migration Act* were activated. I deal first with the nature of the powers exercised under s501 and then with the immigration detention regime.

### A. *Removal of ‘Undesirable’ Non-citizens*

Section 501 contains the so called ‘character’ provisions which enable the Minister for Immigration to refuse or to cancel a visa for a person who does not satisfy the character test as defined in ss(6). Its importance to the central scheme of the *Migration Act* is clear. Section 65 confers an overriding discretion and responsibility upon the Minister in relation to the visa scheme. It provides that the Minister must be ‘satisfied’ that the ‘common entry’ criteria are met before granting a visa. These include the ‘health’ and ‘good character’ requirements. Importantly, s65(1)(iii) specifically refers to the need for the Minister to be ‘satisfied’ that the grant of the visa is not prevented by s501.

There is evidence that s501 is being used as a form of ‘disguised’ deportation to bypass the specific power in s201 of the *Migration Act*<sup>8</sup> — the Criminal Deportation Power (hereafter the CDP) — which authorises the deportation of ‘non-citizens’<sup>9</sup> who have been in Australia for less than 10 years who are convicted of a crime and sentenced to a term of imprisonment of one year or more. The consequence of cancellation of a visa of a person who is a ‘non-citizen’ under s501 is that the non-citizen becomes liable to be removed from Australia under s198 of the Act. The current s501 arises from amendments made to the *Migration*

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4 *Migration Act* 1958 (Cth) s5.

5 *Re Patterson*, above n2.

6 *Migration Act* 1958 (Cth) s14 defines an ‘unlawful non-citizen’ as a person who is not a ‘lawful non-citizen’. The *Migration Act* 1958 (Cth) s13 defines a ‘lawful non-citizen’ as someone who holds a valid visa.

7 *Migration Act* 1958 (Cth) s15.

8 Ray Turner, ‘Ridding the Country of “Bad Aliens” — The Operation of the Character and Conduct Provisions in the Migration Act 1958’ (2002) 6 *Immigration Review* 7.

9 The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) Annual Report for 2001–2002 states that all new cases involving non-citizen criminals were ‘considered for visa cancellation under section 501’. In that period 66 non-citizens were removed following visa cancellation under that power (48 in 2000–2001) and 137 visas were cancelled on character grounds (104 on 2000–2001). No deportation orders were served for 2001–2002 (20 in 2000–2001).

Act in 1998 and 2001. The *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act* substantially enhanced the powers of the Minister. This legislation followed a long battle between the Minister and the Administrative Appeals Tribunal (hereafter AAT) (and the courts) over the application and scope of the CDP.<sup>10</sup> The 1998 amendments applied to Mr Taylor.

There are several important differences between the CDP and the s501 powers:

- The CDP in s201 assumes that a person is ‘integrated’ into the community after a period of 10 years. The s501 power is being used in some instances to remove persons who have extensive ties with Australia and who have resided in Australia for more than 10 years. For example in *Shaw v Minister for Immigration* (hereafter *Shaw*),<sup>11</sup> it was held by a narrow majority of the High Court that a man born in Britain who migrated to Australia in 1974 at the age of two years was an ‘alien’ whose permanent entry visa could be cancelled under s501(2) of the *Migration Act*.
- Decisions under ss201 and 501 are reviewable by the AAT. However the s501 power is subject to personal intervention by the Minister (ss 501A, B, C). The exercise of such discretion is unreviewable and not subject to rules of procedural fairness.
- There are significant differences between the content of the policy directions that govern the exercise of these discretions. For example, the CDP identifies a range of personal considerations relating to family unity whereas the s501 Policy Direction 21 is primarily focused upon consideration of the ‘protection of the Australian community’.<sup>12</sup>

The application of s501 to Mr Taylor’s situation raises the following human rights and legal concerns:

- Whether s501 is being used to remove a person who has substantial ties with Australia, thereby interfering with a right in respect of family life.
- Whether s501 is effectively discriminating against a non-citizen by imposing an extra penalty in the case of a convicted criminal.

As Spigelman CJ pointed out in the New South Wales Court of Appeal, Mr Taylor ‘had served the sentences imposed upon him for the crimes he had committed before he was subjected to immigration detention’.<sup>13</sup>

Overall *Taylor* raises the issue of the scope of tort law to protect the personal liberty of a non-citizen (who, according to the current interpretation of the High Court in *Shaw’s* case may be a constitutional ‘alien’). In theory his status as an ‘alien’ makes no difference to his rights to private law remedies in ‘municipal law’.

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10 *Minister for Immigration v Gunner* (1998) 84 FCR 400; *Minister for Immigration v Jia Le Geng* (2001) 65 ALD 1.

11 (2003) 203 ALR 143.

12 *Madafferi v Minister for Immigration* (2002) 70 ALD 644.

13 *Taylor*, above n1 at 272.

As some members of the High Court have been careful to remind us, for example in *Lim v Minister for Immigration* (hereafter *Lim*),<sup>14</sup> the law has two faces.<sup>15</sup> Even ‘aliens’ are entitled to the protection of Australian law whilst actually within the country.

### **B. The Immigration Detention Regime**

The last point brings me to the detention provisions. The current provisions establishing Australia’s immigration detention regime were introduced by the 1992 *Migration Reform Act* which, was a response to the increasing number of ‘boat people’ arriving in Australia in the late 1980s and early 1990s.<sup>16</sup> However, the immigration detention regime has the aim of facilitating the removal of all unlawful non-citizens from Australia.<sup>17</sup> The critical provisions in this case were ss189 and 196 of the *Migration Act*. These provisions are contained in Division 7 of Part 2 of the Act — ‘Detention of unlawful non-citizens’. Section 189 provides that, if an officer ‘knows or reasonably suspects’ that a person in the migration zone is an unlawful non-citizen, ‘the officer must detain the person’.

At the relevant time, s196, dealing with the period of detention, provided:

- (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
  - (a) removed from Australia under section 198 or 199; or
  - (b) deported under section 200; or
  - (c) granted a visa.
- (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
- (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

The seminal decision of the High Court in *Lim*<sup>18</sup> established that the ‘aliens’ power in s51(xix) of the Constitution provides the constitutional basis for a regime of non-punitive, administrative, immigration detention. However the High Court also made it clear that express authority is required to detain an ‘alien’,<sup>19</sup> and that the constitutional limits of the power are to be determined by what is ‘reasonably necessary’ for the exercise of executive power. It was decided on the facts of that case (in the refugee\boat people context described above) that it was necessary for

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14 (1992) 176 CLR 1 at 29 (Brennan, Deane & Dawson JJ). See also *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 328 (Brennan J), *Secretary, DIMIA v Mastipour* (2004) 207 ALR 83 (hereafter *Mastipour*) at 86 (Lander J).

15 Belinda Wells, ‘Aliens: The Outsiders in the Constitution’ (1996) 19 *UQLJ* 45.

16 Adrienne Millbank, *The Detention of Boat People: Current Issues Brief No 8 2000–01* (Canberra: Department of the Parliamentary Library, 2001): <<http://www.aph.gov.au/library/pubs/cib/200-01/01cob08.htm>> (15 October 2004).

17 *Migration Act* 1958 (Cth) s198.

18 *Lim*, above n14.

19 *Id* at 10 (Mason CJ); at 19 (Brennan, Deane & Dawson JJ); at 55 (Gaudron J); at 63 (McHugh J).

the executive arm of government to have a regime of immigration detention for the purpose of admission and deportation of aliens. To that extent the *Lim* decision is consistent with older authorities, which held that powers of detention and removal are incidental to the two constitutional heads of power which are relevant to migration law.<sup>20</sup>

The High Court in *Lim* made it clear that the limits of the aliens power are based upon the separation of judicial and executive functions. In some recent cases this idea has been used to argue that the limits of the power have been reached. For example, in the Full Court of the Federal Court in *Minister for Immigration v Al Masri* (hereafter *Al Masri*)<sup>21</sup> it was found that s196 of the *Migration Act* contained an ‘ambiguity’ which opened the way for judicial interpretation of the legislation consistent with the rights of an individual. That case was concerned with the limits of the power to detain a Palestinian asylum seeker whose application for a protection visa had been rejected and who had requested that he be returned to the Gaza Strip. In fact his removal was impracticable. In concluding that his continued detention was unlawful, the Federal Court found that there was no clearly manifested legislative intention to curtail the right of personal liberty of a person under the Act where there was no realistic prospect of removal.

Further, the Full Court in *Al Masri* said that the Act should be read subject to an implied limitation, as far as its language permits, in conformity with Australia’s treaty obligations.<sup>22</sup> In this case s196 was read to conform to Australia’s treaty obligations under Art 9 (the right to liberty) of the International Covenant on Civil and Political Rights (ICCPR).<sup>23</sup> Applying this principle the court found that s196 was subject to an implied limitation that the period of mandatory detention does not extend to a time when there is no real likelihood or prospect in the reasonably foreseeable future of a detained person being removed and thus released from detention. In this case Al Masri’s counsel successfully argued that the statutory provisions read together amounted to a failure of the legislature to make an express provision for Mr Al Masri’s situation.

The *Al Masri* decision was overturned recently by a narrow majority of the High Court of 4:3 in *Al-Kateb v Godwin*.<sup>24</sup> In that case McHugh J in the majority found that the words of ss196 and 198 are ‘unambiguous’ and do require the indefinite detention of a stateless person for whom there is no immediate prospect of removal. McHugh J said that the words of s196 are ‘too clear’ to be read as subject to a purposive limitation or an intention not to affect ‘fundamental rights’.<sup>25</sup> McHugh J also considered that the purposive limits of the ‘aliens’ power

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20 *O’Keefe v Calwell* (1949) 77 CLR 261; *Koon Wing Lau v Calwell* (1949) 80 CLR 533. The ‘immigration and emigration’ power contained in s51(xxvii) of the Constitution was used broadly until the date of these decisions.

21 (2003) 197 ALR 241.

22 *Id* at 260 [82].

23 Ratified by Australia on 13 August 1980.

24 (2004) 208 ALR 124 (hereafter *Al-Kateb*).

25 *Id* at 31.

extended to preventing a person from entering the Australian community.<sup>26</sup> By contrast, Gleeson CJ speaking for the minority thought that ‘a principle of legality’ was relevant. By this he meant the presumption against legislative removal of rights relied upon in *Al Masri*.<sup>27</sup> Importantly, he and Gummow J (also in the minority) preferred to apply this presumption rather than (as did the Federal Court in *Al Masri*) the presumption of conformity with international obligations.

The significance of this discussion for present purposes is that the Minister argues that the words of s196 clearly and unambiguously authorised the detentions of Mr Taylor at all times for the purpose of the action in tort, even though subsequently they were held to be unlawful. The Minister’s argument is weakened by the fact that s196 was amended in 2003 to cover the claim in *Taylor*. Subsection (4) of s196 now refers specifically to persons who are ‘detained as a result of the cancellation of his or her visa under s501’ and states that the ‘detention is to continue until a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen’. In the special leave application counsel for the Minister argued that s196 was ‘unambiguous’ even without the amendment. Counsel for Mr Taylor argued to the contrary, that the amendment now declares that a detention in similar circumstances is lawful. In other words, Mr Taylor’s argument would be that s196 was ‘ambiguous’ in its application to him, as it required amending legislation.

The Minister further argues that once a ‘reasonable suspicion’ arises under s189, s196 authorises the detention of an unlawful non-citizen. That is, as counsel for the Minister argued in the special leave application, once s189 is triggered, it imposes a duty to detain under s196. This is another way of arguing that the obligation to detain was unqualified or unambiguous.

## 2. *The High Court Decision in Re Patterson; Ex parte Taylor*<sup>28</sup>

This decision — its basis and reasons — are central to understanding the facts and issues in *Taylor*.<sup>29</sup> It is also essential to evaluating the reasons of the New South Wales Court of Appeal in that case as the Minister argues both that the Court of Appeal misinterpreted or misapplied the decision in *Re Patterson*, and that the High Court decision was itself wrongly decided.<sup>30</sup>

Mr Taylor was born in the United Kingdom and came to Australia as a child with his parents in 1966.<sup>31</sup> He has spent most of his life in a rural town in New South Wales, has never left Australia and has no recollection of life in the United Kingdom. In February 1996 he pleaded guilty to serious offences involving sexual

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26 Hayne, Heydon JJ in the majority agreed with this view as did Gleeson CJ in the minority. Callinan J in the majority expressed reservations, and Gummow and Kirby JJ in the minority strongly rejected this view. Thus there was 4:3 support for this view.

27 *Al-Kateb*, above n24 at 19.

28 *Re Patterson*, above n2.

29 *Taylor*, above n1.

30 High Court, No S421 of 2004, Notice of Appeal 11 December 2003 at [2].

31 The facts are taken from the judgment of McHugh J above n2 at 421 [92].

assaults upon children. He was sentenced to a minimum term of three and a half years with an additional term of two and a half years of parole. In prison he received favourable reports and undertook sex offender diversion courses. He was released from prison in August 1999 and returned to the rural town, which according to the facts as stated by McHugh J in his judgment in *Re Patterson* ‘does not object to his presence in that locality’.<sup>32</sup>

As Mr Taylor had not taken out citizenship under the *Australian Citizenship Act* 1948 (Cth) he was deemed to have held two types of visas: an absorbed person visa<sup>33</sup> and a transitional (permanent) visa.<sup>34</sup> From the age of eighteen he has been on the electoral rolls for the Federal and State parliaments.

The first of the two cancellations took effect on 4 November 1999. Immigration officials and police officers arrested and detained Mr Taylor acting under warrants issued as a result of a decision (dated 4 September 1999) by the then Minister for Immigration, the Honourable Phillip Ruddock, to cancel his visas, acting under s501(2) of the *Migration Act*. At that time (and currently) that provision stated:

Decision of the Minister or delegate — natural justice applies

...

- (2) The Minister may cancel a visa that has been granted to a person if:
  - (a) the Minister *reasonably suspects* that the person does not pass the character test; and
  - (b) the person does not satisfy the Minister that the person passes the character test. (Emphasis added.)

On 12 April 2000 Callinan J made orders absolute for certiorari by consent pursuant to s75(v) of the Constitution on the basis of breach of the rules of natural justice.<sup>35</sup> Thus the first period of detention (161 days from 4 November 1999 to 12 April 2000) ended. A consequence of that decision was to restore the old visas.

The second of the two visa cancellations was made purporting to act under s501(3) of the *Migration Act*. The second decision was made by Senator Kay Patterson as parliamentary secretary for the Minister on 30 June 2000. On this occasion Mr Taylor was held in detention from 6 July 2000 until he was released by order of the High Court made on 7 December 2000 (155 days of detention).

Section 501(3) was added to the Act by the 1998 amendment in the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act* referred to above. It provides:

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32 Id at 422 [93].

33 *Migration Act* 1958 (Cth) s34.

34 Granted as a result of the *Migration Reform (Transitional Provisions) Regulations* 1994 (Cth), reg 4.

35 Described in *Re Patterson*, above n2 at 508 [355] (Callinan J).

## Decision of the Minister — natural justice does not apply

...

- (3) The Minister may:
- (a) refuse to grant a visa to a person; or
  - (b) cancel a visa that has been granted to a person if:
    - (c) the Minister reasonably suspects that the person does not pass the character test; *and*
    - (c) the Minister is satisfied that the refusal or cancellation person is in the national interest. (Emphasis added.)

There are three important differences in the terms of this power in comparison to s501(2). First, the power is only exercisable by the Minister ‘personally’,<sup>36</sup> secondly, the rules of natural justice do not apply,<sup>37</sup> but thirdly and significantly, the exercise of power under s501(3) is conditioned upon the Minister being satisfied that the cancellation ‘is in the national interest’.<sup>38</sup> Like the power in the *Migration Act* s501(2), it is conditioned upon the Minister’s reasonable suspicion<sup>39</sup> that the person does not pass the character test. However, as I explain below, Mr Taylor could never pass the character test.

Section 501C(3) (one of the personal intervention powers) was also relevant. It required the Minister to give Mr Taylor ‘relevant information’ for the decision and to invite him to make representations about the revocation of his visa. Under s501C(4) the Minister then had a discretion to revoke the cancellation if such representations were made, *and* the Minister was satisfied that he passed the character test. Like s501(3), the s501C(4) power is only exercisable by the Minister ‘personally’.<sup>40</sup> The paradox in this case was that Mr Taylor never could satisfy the character test as he had a ‘substantial criminal record’ within the meaning of s501(7) as he had been sentenced to ‘a term of imprisonment of 12 months or more’.<sup>41</sup> Thus s501C(4) had no application to him. This as I will explain was a crucial fact in this case.

It was also crucial that the exercise of power under s501(3) is conditioned upon the Minister being satisfied that the cancellation ‘is in the national interest’. As Kirby J elaborated in his judgment in *Re Patterson*, the Minister in introducing the 1998 ‘national interest’ amendment made it clear that it applied ‘in exceptional or emergency circumstances’ — this was the reason for granting the Minister a personal discretion in relation to this power. Its purpose was to enable persons who are a ‘significant threat to the community’ to be removed.<sup>42</sup>

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<sup>36</sup> *Migration Act* 1958 (Cth) s501(4).

<sup>37</sup> *Id* at s501(5).

<sup>38</sup> *Id* at s501(3)(d).

<sup>39</sup> *Id* at s501(3)(c).

<sup>40</sup> *Id* at s501C(5).

<sup>41</sup> *Id* at s501(7)(c).

<sup>42</sup> *Re Patterson*, above n2 at 500 [326]. Contrast *Madafferi* above n12 at 669 [89] where the Full Court of the Federal Court opined that this was setting the ‘bar’ too high, but that the consideration of ‘national interest’ is an ‘evaluative task’ which must be obtained ‘reasonably’.

In this case Senator Patterson made her decision (the second cancellation decision) on the basis of a departmental minute which gave her misleading advice about the operation of s501(3), and a departmental submission which failed to emphasise the central importance of the ‘national interest’ to the exercise of her powers.<sup>43</sup> As Gaudron J points out in her judgment,<sup>44</sup> the minute mistakenly advised Senator Patterson that if she made a decision under s501(3), then Mr Taylor would have an opportunity to make representations under s501C(4) for revocation of her decision. The departmental submission further compounded the erroneous advice by equating a ‘substantial criminal record’ with the ‘national interest’ in removal of the person. As Gaudron J said,<sup>45</sup> the terms of s501(3) make it clear that the national interest considerations are separate and distinct from the question whether or not a person passes the character test, and require evaluation.

Further, there did not appear to be any evidence suggesting that the cancellation of Mr Taylor’s visa was ‘in the national interest’ in the sense required in s501, or in the Policy Direction. Because of the misleading advice given to Senator Patterson about s501C(4), Mr Taylor was not given an opportunity to make submissions. His visa was simply cancelled under s501(3). Kirby J in his judgment discusses how this exercise of power ‘effectively’ deprived Mr Taylor of the opportunity of presenting the only relevant grounds for revoking the decision, namely:

His very long residence in Australia, his family connections, his maternal dependant, his lack of real connection with his country of birth and his compliance with parole conditions and efforts at rehabilitation.<sup>46</sup>

Spigelman CJ in *Taylor* in the New South Wales Court of Appeal also referred to the fact that the material suggested that he was ‘highly unlikely to re-offend’, or that there was at least only a ‘moderate risk’.<sup>47</sup>

In a unanimous decision, the High Court in *Re Patterson* granted certiorari and prohibition in Mr Taylor’s favour. It is often said that the decision contains no ratio. Spigelman CJ in *Taylor* for example, expresses such a view.<sup>48</sup> In the recent *Shaw* decision,<sup>49</sup> the High Court was prepared to revisit *Re Patterson* on the constitutional issue for that reason. However, the reasoning of the High Court on the exercise of s501 as an administrative power forms part of a ratio and is relevant to the tort liability issue.

As the pleadings set out in Callinan J’s judgment<sup>50</sup> in that case demonstrate, there were three key issues to be considered by the seven judges in the High Court.

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43 See for example, *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24; a Minister cannot hide behind defective advice when there is a personal discretion to be exercised.

44 *Re Patterson*, above n2 at 416–419 [69]–[81].

45 *Id* at 418 [78].

46 *Id* at 503 [333].

47 *Taylor*, above n1 at 280.

48 *Id* at 274.

49 *Shaw*, above n11.

50 *Re Patterson*, above n2 at 509 [358].

There was first the ‘delegation issue’ of whether Senator Patterson could and was validly acting as the Minister ‘personally’ in the exercise of the statutory discretion.<sup>51</sup> All six judges who considered this matter agreed that she could and was.

The next issue or group of issues concerned the exercise of s501 as an administrative power. As pleaded, the issue was whether the Senator had acted unreasonably<sup>52</sup> in failing to take into account the ‘national interest’. Two judges in the High Court, Gaudron and Kirby JJ, decided that there was a jurisdictional error on the basis of failure to properly establish the ‘national interest’ requirement.<sup>53</sup> Gummow and Hayne JJ (with Gleeson CJ, McHugh J and Gaudron J expressly agreeing, that is five of the seven judges) decided that there had been an administrative or jurisdictional error because Senator Patterson was misled about the effect of s501C(3).<sup>54</sup> There is majority support that the reason for the decision in *Re Patterson* was the failure of Senator Patterson to understand the basis of her power or jurisdiction. This is important reasoning as the High Court has recently said that the effect of jurisdictional error is that the decision is regarded in law ‘as no decision at all’.<sup>55</sup> It is the invalid exercise of power in that sense which is, or should be, the focus of the action in tort.

The third issue was the constitutional question of whether Mr Taylor is an ‘alien’. It was decided by a majority of 4:3 that Mr Taylor is not an ‘alien’,<sup>56</sup> although he is a non-citizen. For that reason also s501 was not a valid exercise of power. Arguably this aspect of the reasoning was not necessary to the decision once it had decided the jurisdictional error issue. However, the New South Wales Court of Appeal in *Taylor* relied on the decision for its constitutional basis,<sup>57</sup> although counsel for Mr Taylor suggested otherwise in the special leave application.

### **3. *The Decision of the New South Wales Court of Appeal***

Mr Taylor subsequently commenced proceedings against the Minister and Senator Patterson (who made the decisions to cancel the visas) and the Departmental officers (who effected the detentions), for damages for false imprisonment. At first instance before Murrell DCJ he succeeded and obtained a verdict for \$116,000. The ministers and the Commonwealth appealed against this judgment, and Mr Taylor cross-appealed against the assessment of damages. The Court of Appeal

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51 *Migration Act 1958* (Cth) s501(4).

52 Kirby J alone decided that the decision was unreasonable. *Re Patterson*, above n2 at 505 [339].

53 Callinan J as the seventh justice appeared to agree with Kirby J’s reasoning on the ‘national interest’ issue. (2001) 207 CLR 391 at 519 [381].

54 *Id* at 437 [139].

55 *Minister for Immigration v Bhardwaj* (hereafter *Bhardwaj*) (2002) 209 CLR 597 at 641 [51] (Gaudron & Gummow JJ), 618 [63] (McHugh J) and 646 [152] (Hayne J). See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506 [76]–[78] (Gaudron, McHugh, Gummow, Kirby & Hayne JJ).

56 As noted above, *Shaw’s* case has overturned *Re Patterson* on that ground.

57 *Taylor*, above n1 at 274 (Spigelman CJ), 283 (Meagher J). Ipp J agreed.

unanimously dismissed the appeal and Mr Taylor's cross-appeal. There are however some important differences in the reasoning of the justices as I will explain below.

The tort of false imprisonment has been described as 'any wrongful total restraint on the liberty of the plaintiff which is directly brought about by the defendant'.<sup>58</sup> It is one of the genus of the tort of trespass, and an 'intentional' tort. Its principal concern is to protect against unlawful total restraints on a person's liberty and freedom of movement.<sup>59</sup> The elements of the tort which are in issue on the facts of this case are:

- Whether the element of *directness* is established on the part of the acts of the Minister and Senator Patterson (the 'ministerial acts') (as distinct from the actions of the Departmental officers who effected the detentions);
- Whether the ministerial acts (as distinct from the actions of the Departmental officers who effected the detentions) were *intentional* for these purposes;
- Whether there was an *unlawful* restraint on Mr Taylor's liberty.

Indeed as I will explain, when the liability of a public authority is in question, the latter issue is the primary one. For historically, public authorities have been held liable in trespass as a *prima facie* invasion of liberty unless they can justify their actions with express (usually statutory) authority.<sup>60</sup>

The actions of the Minister and Senator Patterson on the one hand (the 'ministerial acts') and the Departmental officers were argued separately. The leading judgment in the Court of Appeal was given by Spigelman CJ who dealt only with the liability for the ministerial acts. Spigelman CJ relied first upon the Minister's lack of 'lawful authority' to detain Mr Taylor due to his lack of status as an 'alien'.<sup>61</sup> Spigelman CJ<sup>62</sup> agreed with the trial judge that the effect of the High Court's interpretation of the scope of s501 in *Re Patterson* was that s189 could not 'constitutionally' apply to Mr Taylor. Further on this point of whether there was an *unlawful* restraint on Mr Taylor's liberty, Spigelman CJ referred to *Bhardwaj*<sup>63</sup> as authority for the proposition that the effect of the orders for certiorari made by the High Court in relation to each period of detention was 'to wipe the slate clean'. He said: 'There never was such a decision in law'.<sup>64</sup> Spigelman CJ found that in the statutory context (see above), the element of *directness* for the acts of the Minister and Senator Patterson was established as the detention provisions were self-executing and made 'detention an inevitable

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58 Francis A Trindade, 'The Modern Tort of False Imprisonment' in N Mullany (ed), *Torts in the Nineties* (1997) at 229.

59 *Ibid.*

60 *Entick v Carrington* (1765) 19 State Tr 1030; *Coco v R* (1994) 179 CLR 427. See Susan Kneebone, *Tort Liability of Public Authorities* (1998) at 48–49.

61 *Id* at 271.

62 *Id* at 274.

63 *Bhardwaj*, above n55.

64 *Taylor*, above n1 at 275; *id* at 282 (Meagher JA). Ipp JA agreed with both the reasons of Spigelman CJ & Meagher JA.

consequence' of the cancellations.<sup>65</sup> He rejected the Minister's argument that there was a separation between the ministerial acts in cancelling the visas, and the actions of the departmental officers who effected the detentions. Importantly he rejected the argument that the officers in this case exercised an independent discretion.<sup>66</sup> Finally Spigelman CJ found that the acts of the Minister and Senator Patterson in cancelling the visas were intentional for the purpose of the tort.

Meagher JA substantially agreed with Spigelman CJ's reasons for the 'ministers' liability. Meagher JA rejected the argument that liability was dependent upon establishing 'fault'. He found that the 'ministers' were the 'real and proximate cause'<sup>67</sup> for the detention.

In relation to the Departmental officers, the Minister successfully argued that the officers' actions were lawful, not on the basis that Mr Taylor was a person in fact subject to deportation (as an 'alien'), but on the basis of the words 'reasonably suspects' in s189(1) of the *Migration Act* as they did 'the work of an express protective subsection'.<sup>68</sup> Meagher JA found on the basis of that provision, that the officers were not liable, and thus that the Minister was not vicariously liable for their actions. He found that although the officers acted under mistake of law (as Mr Taylor was not an 'alien') they were exonerated by the words of s189(1). Spigelman CJ did not find it necessary to consider this basis of liability.<sup>69</sup>

The third judgment was given by Ipp J who agreed with the reasons of both Spigelman CJ and Meagher JA. Thus it can be assumed that he agreed with both the (broader) reasons of Spigelman CJ on the point of whether there was an *unlawful* restraint on Mr Taylor's liberty by the Ministers, as well as with Meagher JA's reasons on the liability of the officers. Similar to Meagher JA, Ipp J explained his views on the directness issue in terms of causation theory.

In summary then, the New South Wales Court of Appeal decided that there was an unlawful detention of Mr Taylor by the 'ministers' on two bases. First, relying on the decision in *Re Patterson*, as Mr Taylor was not an 'alien', s501 of the *Migration Act* and thus the detention provisions did not apply to him. Importantly, this reasoning is only relevant to the second decision and the second period of detention. The Court of Appeal did not distinguish the two decisions and two periods of detention in its reasoning on this point. Secondly, the detention was unlawful (in the sense of null and void, although their Honours did not use these words) because both decisions were quashed by the writ of certiorari. This reasoning applies to both decisions and periods of detention. The Court of Appeal also found that the ministerial decisions were the direct cause of the detention. Additionally Meagher JA (with Ipp J possibly agreeing) found that the Minister was not vicariously liable for the actions of the officers on the basis of the protection provided by s189(1) of the *Migration Act*.

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65 *Taylor*, above n1 at 277.

66 *Ibid*.

67 *Id* at 284.

68 *Id* at 285 (Meagher J).

69 *Id* at 275. Ipp JA agreed with both the reasons of Spigelman CJ and Meagher JA.

#### 4. *The Basis of the Appeal*

In addition to arguments based upon the effect and correctness of *Re Patterson*, the Minister questions the basis of his liability in tort.

First, he argues that there was no ‘fault’ in the ministerial action, and that he should not be liable unless there is lack of bona fides or fault. He suggests that on grounds of public policy, and by analogy with other torts, that liability should be fault based. The Minister next argues that in the particular circumstances, the actions were protected by the statutory framework, and in particular by s189. The Minister argues that s189 involves an independent discretion by an officer (for which he is not vicariously liable); that the acts of cancellation and detention are clearly delineated. Thus it follows, so the Minister argues, that the cancellations are not causally relevant to the detentions.

The first argument goes to the basis of liability. The Court of Appeal rejected the argument for fault-based liability. It decided the issue on the basis of whether or not there was an unlawful restraint on Mr Taylor’s liberty. As noted above, the Court of Appeal decided that there was an unlawful detention of Mr Taylor by the ‘ministers’ on two bases. First, because s501 did not apply to Mr Taylor, and secondly, because of the consequences of the remedy of certiorari in relation to the decisions. The Minister concedes that the effect of the remedies was to retrospectively ‘wipe the slate clean’. This is consistent with recent jurisprudence of the High Court which avoids the labels of ‘voidness’ and ‘nullity’ and instead concentrates upon the consequences of the remedy.<sup>70</sup> Thus the central issue is whether the detention of Mr Taylor was ‘unlawful’ for the purpose of liability in trespass.

Mr Taylor’s counsel argues that liability in trespass is strict and that no question of fault arises. The argument that the officers were exercising an independent discretion is rejected. Mr Taylor’s counsel further relies upon the decision in *Cowell v Corrective Services Commission of New South Wales* (hereafter *Cowell*).<sup>71</sup> In that case the court found that statutory protection did not apply to a principal who was directly liable in the circumstances. That is, Mr Taylor’s counsel argues that the immunity of the officers does not affect liability for the ministerial acts (for which the Commonwealth has conceded liability, if any).

The remainder of the Minister’s arguments relate to the elements of the tort of false imprisonment, but hinges on the independent discretion argument. The Minister concedes that the two periods of detention were the likely result of the cancellation of the visa, indeed that they were the ‘natural and probable result’ of those decisions. But the Minister argues that there was no legal causal nexus between the ministerial action and the acts of the Departmental officers in detaining Mr Taylor on the basis that the officers exercised an ‘independent discretion’.

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70 See for example, *Bhardwaj*, above n55, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. See Mark Aronson, ‘Nullity’ (2004) 40 *ALJL Forum* 19.

71 (1988) 13 NSWLR 714.

In the Court of Appeal Spigelman CJ said that the ‘inevitability’ of the detention appeared from the documentation.<sup>72</sup> This documentation, which is also cited in the judgment of Gummow and Hayne JJ in *Re Patterson*<sup>73</sup> unequivocally advises Senator Patterson that Mr Taylor’s detention will be the consequence of the cancellation. The Respondent’s Summary of Argument<sup>74</sup> refers to the evidence on this point. It is explained that the briefing notes for each decision-maker expressly advised that upon cancellation Mr Taylor would be detained and subsequently removed from Australia.

The Minister also argues that the ministerial acts were not ‘intentional’ in the relevant sense. In relation to this point, he argues that the separation between the acts of cancellation and detention points to the lack of intention.<sup>75</sup>

I turn now to evaluate these arguments.

### **5. *What is the Basis of the Commonwealth’s Liability in Trespass?***

This case concerns an action in trespass for damages for false imprisonment for which the principles are well established. However the Minister challenges the principles and argues that the tort of trespass should be assimilated with other torts, in relation to which the High Court has made clear in recent decisions<sup>76</sup> that the statutory context is relevant, together with considerations of public policy. The Minister argues that ‘it cannot have been intended by the legislature that a Minister acting bona fide, cancelling a visa, would be treated as having detained the person’.<sup>77</sup> The Minister argues that a bona fide exercise of power under s501 that ‘is unknowingly flawed by jurisdictional error’<sup>78</sup> should not lead to liability. In my view this argument should be rejected.

In this as in other tort contexts, public authorities are not in a special position.<sup>79</sup> As Spigelman CJ said in *Taylor*<sup>80</sup> the executive arm of government, as must any individual, must establish lawful authority for its actions.<sup>81</sup> Typically, public authorities have been held liable in trespass unless they can justify their actions with express (usually statutory) authority.<sup>82</sup> In these cases it was explained that excess of authority or jurisdiction makes the official action void, and removes the

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72 *Taylor*, above n1 at 276.

73 *Re Patterson*, above n2 at 454 [193].

74 High Court, No S542 of 2003, 11 December 2003 at [13].

75 Applicants’ Summary of Argument, High Court No S542 of 2003, dated 13 November 2003 at [21].

76 See for example, *Sullivan v Moody* (2000) 207 CLR 562. That case involved actions in negligence against medical practitioners, social workers and department officers by third parties, in relation to the investigation of allegations of sexual abuse of children.

77 S542, above n75 at [22].

78 *Id* at [24].

79 *Ex parte Evans (no 2)* [2001] 2 AC 19 (hereafter *Ex parte Evans (no 2)*).

80 *Taylor*, above n1 at 269.

81 *Id* at 272.

82 See *Kneebone*, above n60 at 48–49.

protection or defence which such authority or jurisdiction provides. For example, officials executing a warrant under the authority of the Secretary of State were held liable in trespass when the warrant was proved to have been issued without lawful authority.<sup>83</sup> Recently, a conviction based upon evidence obtained by a trespass was held to be unlawful.<sup>84</sup> In this and other trespass actions, the courts apply a general defence of ‘statutory authority’. The onus is upon the defendant to establish lawful justification for its acts. The principal concern of the tort of trespass, as stated above, and as recognised by these principles, is to protect against unlawful total restraints on a person’s liberty and freedom of movement.<sup>85</sup>

Mr Taylor’s counsel (as did Spigelman CJ in *Taylor*) relies upon two decisions from the prison context in support of his argument for retaining these principles, and in support of Mr Taylor’s claim. Both decisions concern prisoners in the criminal justice system who made successful claims for false imprisonment arising from a wrongful calculation of the period of detention.<sup>86</sup> The Minister counters with *Percy v Hall*,<sup>87</sup> a decision of the English Court of Appeal.

*Percy v Hall* was concerned with the liability of police constables who had made arrests acting on the basis of certain by-laws which were later declared invalid. The issue in this case was whether the invalidity (if established) affected the liability of the constables in tort for false imprisonment. It was decided that even if the by-laws had been invalid (for uncertainty), which they were not, this did not affect the liability of the constables who had acted in reliance on the by-laws, provided that they could show that they had been acting in the reasonable belief that offences were being committed.

The issues are first, whether the analogy of prisons and criminal justice system is appropriate in the immigration detention context, and secondly, whether there is a valid distinction to be made between the facts of *Taylor* and the ‘prison-wrongful calculation of period of detention’ cases. That is, should the outcome of *Taylor* depend upon the nature of the jurisdictional error (in relation to which the remedy on the Minister’s own admission, ‘wipes the slate clean’). Finally, what of the arguments for assimilation with other torts?

As Gleeson CJ appeared to recognise in the special leave application, the prison/criminal justice analogy is a difficult one to apply. As the Chief Justice observed, actions in false imprisonment are not brought each time a conviction is overturned. The statutory context for the cancellation of visas under s501 and the immigration detention regime operates in the ‘national interest’. Yet the courts have made it clear that in this context, the Minister for Immigration must act within statutory authority and respect the rights of individuals whatever their status.<sup>88</sup> The seminal decision in *Lim*<sup>89</sup> itself arose in the context of a claim for compensation.

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83 *Entick v Carrington* (1765) 19 State Tr 1030. See also *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 (action in trespass for wrongful demolition of property).

84 *Coco v R* (1994) 179 CLR 427.

85 *Ex parte Evans* (no 2), above n79.

86 The decisions are *Cowell*, above n71 and *Ex parte Evans* (no 2), above n79.

87 [1997] QB 924 (Court of Appeal).

88 See for example, *Goldie v Commonwealth* (2002) 188 ALR 708 (hereafter *Goldie*).

In *Minister for Immigration v Tang Jia Xin*<sup>90</sup> the High Court accepted the decision of the trial judge,<sup>91</sup> in a claim for false imprisonment, that there had been an unlawful detention by exceeding the permissible statutory limit.

The errors in *Taylor* raise the lawfulness of the detention rather than a wrongful calculation of a period of detention. The first cancellation decision in *Taylor* involved a breach of the rules of natural justice in applying s501(2) of the *Migration Act*. The second cancellation decision was ‘infected’ by a failure to evaluate the ‘national interest’ in applying s501(3) of the *Migration Act*. In my view the High Court should determine that as a result of these errors, the Minister’s actions in detaining Mr Taylor were ‘unlawful’ for the purpose of liability in trespass. The High Court has recently said that the effect of jurisdictional error is that the decision is regarded in law ‘as no decision at all’.<sup>92</sup> If the High Court is to move away from the position it has taken in other cases, it will need to provide strong justification for doing so.

In *Ex parte Evans (no 2)*<sup>93</sup> a distinction was suggested between the facts of that case and the situation where an initially lawful decision to detain is subsequently declared ultra vires. However a closer examination of the facts suggests that the distinction is not applicable to *Taylor*. In that case a person was sentenced to concurrent terms of imprisonment and the period was calculated by the governor on the basis of the method approved by the then leading judicial authority. Subsequently, in a separate action, the established method of calculation was successfully challenged. The prisoner was immediately released, but on the basis of the new judicial authority, she had been kept in custody for an additional 59 days. She successfully sued the governor for damages for false imprisonment. The principal reason for the decision was that the fresh judicial authority operated retrospectively and removed the lawful justification for the detention. As Lord Hope pointed out in this case, the responsibility for calculating the release date was committed to the governor by statute.<sup>94</sup> In obiter discussion, with reference to *Percy v Hall*, it was recognised that in a situation where the lawfulness of the detention is subsequently declared invalid, an argument might be made that the governor was not responsible,<sup>95</sup> as he was bound to obey a court order to detain. That observation depends on the nature of the governor’s statutory duties and responsibilities, which bear no analogy to the position of the Minister for Immigration exercising personal, unreviewable, discretionary powers under s501 and who bears ultimate responsibility for the exercise of powers under the *Migration Act*.

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89 *Lim*, above n14.

90 (1994) 125 ALR 203.

91 (1993) 116 ALR 329 (Neaves J). The findings of Neaves J on the ‘unlawfulness’ point were subsequently confirmed in a fresh action in the Federal Court (Unreported, Wilcox J, 18 and 19 March 1996, 11 April 1996).

92 *Bhardwaj*, above n55. In *Plaintiff S157/2002 v Commonwealth*, above n55, it was recognised that breach of natural justice is a jurisdictional error.

93 *Ex parte Evans (no 2)*, above n79.

94 *Id* at 34.

95 *Id* at 34 (Lord Hope).

Moreover, the decision in *Percy v Hall* is not consistent with Australian law. For example in *Spautz v Butterworth*<sup>96</sup> where a magistrate issued an arrest warrant for which he had no authority, and which resulted in an imprisonment, the magistrate was held liable in trespass. That case expressly supports the proposition that liability is strict, and that a plaintiff need not show that the defendant acted maliciously and without reasonable and probable cause.

The decision in *Cowell*,<sup>97</sup> which although it concerns the prison context, is a better analogy for *Taylor*. In that case the court found that a principal (the Corrective Services Commission and the Government of New South Wales) was directly or personally liable (rather than vicariously liable) in trespass where there was an ‘unlawful act’, despite the fact that express statutory protection applied to a subordinate officer.<sup>98</sup> The Commission was responsible for the overall management of prisons in the State of New South Wales. *Taylor* is concerned with ministerial decisions which involve personal discretions, at the highest level of the Department of Immigration, in relation to a system of immigration detention. The errors in that case were jurisdictional errors which according to current Australian jurisprudence, render the original decisions ‘as no decision at all’.<sup>99</sup>

Finally, what of the Minister’s arguments that a bona fide exercise of power under s501 should not lead to liability? The effect of this argument is to assimilate trespass to other torts. To accept such an argument would negate the importance of the intentional torts for preserving the rights of individuals. Recently for example in the case of *Goldie*,<sup>100</sup> the Full Court of the Federal Court found that the elements of the tort of false imprisonment were made out on the facts (which are discussed below), but not those for misfeasance in a public office or negligence. The Minister’s argument may be attempting to draw on the analogy of the principles relating to privative clauses, which protect bona fide exercises of power.<sup>101</sup> But this analogy is inaccurate as the law makes it clear that tort liability is separate from administrative wrong,<sup>102</sup> even though as *Taylor* illustrates, the two contexts are linked. This argument is simply too broad to be sustained. In any event, as recent decisions in the law of negligence illustrate, the statutory context is but part of the factual context.<sup>103</sup> There is no conflict between the Minister’s argument at its broadest, namely that liability depends on the statutory context, and the

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96 (1997) 41 NSWLR 1. Discussed by Margaret Fordham, ‘False Imprisonment in Good Faith’ (2000) *Tort LR* 53 at 66, n53

97 *Cowell*, above n71.

98 The case is fully discussed in Kneebone, above n60 at 321–322.

99 *Bhardwaj*, above n55.

100 *Goldie*, above n88.

101 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 614–617. Alternatively the Minister may be drawing an analogy with the principles re specific statutory protection. See below.

102 Kneebone, above n60 at 3–6.

103 See for example, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 discussed in Susan Kneebone, ‘The Liability of Government as an Occupier of Land’ (2000) 6 *LGLJ* 17.

established principles in trespass. The onus is upon the Minister to show that the actions were lawful in the statutory context.

The Minister does not rely upon the legality of the ministerial acts to support the detentions. Rather he focuses upon the actions of the officers and the overall scheme of immigration detention. The Minister argues that the acts of cancellation and detention are separate. He argues that once a 'reasonable suspicion' arises under s189, then s196 authorises the detention of an unlawful non-citizen. That is, as counsel for the Minister argued in the special leave application, once s189 is triggered, it imposes a duty to detain under s196. This as I will explain in the next section, raises the issue of the relationship between the 'ministers' and the officers on the facts of *Taylor*, and whether the former are responsible in tort for the actions of the latter.

In order to succeed on this point, Mr Taylor will need to establish that *Percy v Hall* is not good law in Australia and that the traditional principles as stated above apply. Alternatively, he will need to argue that having regard to the nature of the jurisdictional errors in *Re Patterson*, the cancellation decisions were not reasonable or bona fide in the circumstances. He will need to persuade the High Court that the 'ministers' had ultimate responsibility for ensuring that their decisions, which on their admission they knew would result in Mr Taylor's detention, were lawful. He will have to persuade the court that the decisions were unlawful for jurisdictional errors (rather than the constitutional errors relied upon by the Court of Appeal in *Taylor*).

I turn now to consider the position of the officers and the Minister's argument that the acts were within statutory authority.

## **6. *Were the Officers Exercising Independent Discretions?: The Effect of s189***

Mr Taylor argues that:

The position in regard to detention of people for deportation is quite different from that of those subject to powers of arrest and detention by police officers. The discretion of a police officer as to whether or not to act on the advice of an informant is not present. There is no process under the [Migration] Act for an individual to be formally charged and no possibility of an application for bail.<sup>104</sup>

The Minister argues to the contrary, that the officers exercised an independent discretion when they acted under s189 of the *Migration Act*. The Minister argues on the basis of the separation of the cancellation and the detention decisions to avoid responsibility for the acts of the officers. This argument calls for some discussion of the so-called 'independent discretion function' principle which is a way of denying the existence of a relationship of vicarious liability.<sup>105</sup> For example, it has been applied to the actions of police officers in exercising powers

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<sup>104</sup> Respondent's Summary of Argument, above n74 at [15].

<sup>105</sup> Kneebone, above n60 at 300–316.

of arrest. As the above quotation suggests, the position of police officers is not necessarily analogous to that of immigration officers. This controversial ‘principle’ expresses a policy about what liability should be sheeted home to public authorities<sup>106</sup> as much as a view about whether the discretion is in fact independent. It has been much criticised and abrogated by statute in some jurisdictions.

Although there are some decisions which suggest that immigration officers may sometimes be exercising independent powers when acting under s189, I argue that those cases involve situations which are distinguishable from the facts of *Taylor*. For example, in *Goldie*<sup>107</sup> the Full Court of the Federal Court found that an officer lacked the ‘reasonable suspicion’ required by s189 in the circumstances of that case. Mr Goldie was taken into immigration detention for a period of three days as the result of a computer error which indicated that he had no current visa. This action followed from the view formed by an officer in charge of the Compliance Section of the Department of Immigration in Perth. The Full Court found an absence of sufficient search or enquiry to make the formation of the suspicion justifiable on objective examination. In this case it was accepted that the officer had to form a reasonable view when acting under s189. The Commonwealth did not deny its responsibility for the acts of its officers, that is, both the officer in charge and the officers who effected the detention.<sup>108</sup>

*Mastipour*<sup>109</sup> is another decision which contains some comments about s189 and the immigration detention context. Mr Mastipour was a putative refugee and detainee at the Baxter Immigration Reception and Processing Centre who claimed damages in negligence against the Secretary of the Department for Immigration, in relation to actions by officers of Australasian Correctional Management (ACM), whilst he was in detention. The Secretary did not deny that a duty of care was owed to the detainee. However, Lander J thought that ‘those who have the responsibility for his detention’ were the persons who owed him a duty.<sup>110</sup> In support of that proposition he cited a case which concerned the liability of a prison authority.<sup>111</sup> By contrast, Selway J thought that having regard to the context of the immigration detention regime, the prison analogy was not necessarily apt.<sup>112</sup> Relevantly, Selway J described the Secretary’s s189 role as ‘a power and a duty to detain’.<sup>113</sup> This comment is consistent with the Secretary being in a position of overall responsibility.

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106 See for example, *NAAV v Minister for Immigration* (2002) 193 ALR 449 at 621 [645]: in relation to s189 the Full Court of the Federal Court said that the detention was ‘a consequence of the provisions of the Act, not an executive decision’.

107 *Goldie*, above n88.

108 The matter was subsequently remitted to French J for assessment of damages: *Goldie v Commonwealth (No 2)* [2004] FCA 156. Damages were assessed at \$22,000. French J took into account the ‘humiliation and indignity’ inflicted on Mr Goldie.

109 *Lim*, above n14.

110 *Id* at 89.

111 *Howard v Jarvis* (1958) 98 CLR 177.

112 *Lim*, above n14 at 86.

113 *Id* at 86.

The effect of s189 was considered in *Ruddock v Vadarlis*<sup>114</sup> in relation to an argument that there was a mandatory duty to detain the ‘rescuees’ from the *MV Tampa* under s189(2) of the *Migration Act*. The Minister in that case successfully argued that the ‘duty’ to detain under s189 was for the purpose of law enforcement only and not for the benefit of individuals. That is, the power was merely ‘facultative’ and could not be relied upon as the source of rights.<sup>115</sup> Thus this short survey suggests that the effect of s189 is relative to the context, and that it is difficult to generalise about its effect.

Mr Taylor’s counsel argues that on the facts of *Taylor*:

When each Minister resolved to cancel the ... visa it was unnecessary for any further document to be produced or signed or any additional decision to be made as to whether or not detention should take place. Communication by the Minister of his or her decision to an officer was sufficient to bring about the detention.<sup>116</sup>

Murrell DCJ at first instance thought that there was ‘no scope for the exercise of a discretion intended to alter the intended outcome of the original and critical administrative decision.’<sup>117</sup> In *Taylor*, Meagher JA said that under s189 the officers had a ‘duty, not merely a power to detain Mr Taylor’.<sup>118</sup> The concept of a duty does not support the conclusion that they were exercising independent discretion. Overall, the facts and legislative context in *Taylor* does not sit well with the concept of an immunity on the basis of an independent discretion. To the contrary, they suggest that the Minister is liable for the acts which led to the detention.<sup>119</sup>

That conclusion however does not dispose of the issue of the relationship between the ministerial acts of cancellation and the actual detentions. In *Taylor*, Meagher JA (with Ipp JA possibly agreeing) construed s189 which refers to the ‘reasonable suspicion’ of the officer as a specific statutory protection clause.<sup>120</sup> He concluded that the officers satisfied the test in *Little v Commonwealth* (hereafter *Little*)<sup>121</sup> on the basis that their mistake of law (that the cancellations were valid) was an honest one, that they did have a ‘reasonable suspicion’ on the facts.

The general approach under Australian law<sup>122</sup> to the application of statutory protection clauses in intentional torts was described by Dixon J in *Little* thus:

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114 (2001) 110 FCR 491.

115 See for example, *Cox v Minister for Immigration* (2004) 143 NTR 10.

116 Respondent’s Summary of Argument, above n74 at [16].

117 *Taylor*, above n1, cited by Spigelman CJ at 276.

118 *Id* at 282.

119 Contrast *Louis v Commonwealth* (1986) 87 FLR 277, where an airline company was held liable in trespass for the forcible deportation of the plaintiff. The Director of Immigration of Hong Kong was able to prove that it was not liable as it had not made the formal direction required by Hong Kong law.

120 *Taylor*, above n1 at 285.

121 (1947) 75 CLR 94.

122 Kneebone, above n60 at Ch 6.

Such enactments have always been construed as giving protection, not where the provisions of the statute have been followed, for then the protection would be unnecessary, but where an *illegality* has been committed by a person *honestly* in the supposed course of the duties or authorities arising from the enactment.<sup>123</sup> (Emphasis added.)

This test requires a defendant to justify positively the act upon which the claim is based (usually an action for false imprisonment or trespass) which is *prima facie* actionable and therefore requires specific statutory authority. The cases concern the exercise of powers of detention and arrest or similar powers by an authorised individual which interfere directly with a person's liberty. Arguably, these situations are the corollary of the exercise of 'independent discretions' by independent officers, which have no analogy to either the officers' or the 'ministers' actions in *Taylor*.

Meagher JA additionally relied upon the decision in *Percy v Hall*<sup>124</sup> which he regarded as being *in consimili casu*.<sup>125</sup> But that case did not contain specific statutory protection. The argument in that case was based upon general statutory authority and there was no reference to the Australian case law.<sup>126</sup>

If Meagher JA's conclusion about the officers' immunity is correct, the question is whether it affects the ministers' liability. That is, of what relevance is the fact that the officers were immune from liability? The decision in *Cowell*<sup>127</sup> suggests that a 'principal' may be directly liable even if there is specific statutory protection directed at a subordinate. It is difficult to extract general principles from the cases as decisions such as *Edgecock v Minister for Child Welfare*<sup>128</sup> and *De Bruyn v South Australia*<sup>129</sup> illustrate.<sup>130</sup> A conclusion on this point must take into account all the circumstances and policy factors in play. It is difficult to predict what the High Court might decide, but I would argue that the context of immigration detention and s501 powers provides a strong argument that ultimate responsibility resides in the Minister.

The final issue to consider in this section is whether s189 could provide a defence for the ministerial acts. There are two reasons why this argument should be rejected. First, the Minister cannot argue that the acts of cancellation and detention are separate and then rely on s189 to support the 'ministers' decisions. Secondly, the ministers cannot argue that their decisions under s501 were 'reasonable' as they have been found to involve serious jurisdictional errors.

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123 *Little*, above n121 at 108.

124 *Percy v Hall*, above n87.

125 (2003) 58 NSWLR 269 at 285.

126 It seems that the Minister may be attempting to argue that the 'general' 'defence of statutory authority' should be merged with the jurisprudence which has developed re specific statutory protection clauses. That argument and Meagher JA's reasoning at this point should be rejected.

127 *Cowell*, above n71.

128 [1970] 1 NSWLR 751.

129 (1990) 54 SASR 231.

130 *Kneebone*, above n60 at 322–323.

## 7. *The Elements of the Tort: Causation and the Statutory Framework*

The questions of independent discretion, directness and ‘fault’ collapse into the issue of causation. The Minister argues that the independent acts of the officers constitute a *novus actus*. If it is found that the officers were not exercising independent discretions, these difficulties disappear.

I take first the element of directness, which has been considered in the context of police officers making arrests on the basis of wrong information. The issue has arisen as to the informant’s liability. This has been expressed as whether the informant was an instigator, promoter, and active inciter of the action that follows. It is accepted that the interposition of independent discretion on the part of police officers will break the causal nexus.<sup>131</sup> As the facts and arguments rehearsed above suggest, the immigration officers in *Taylor* were not in an analogous position to police officers exercising independent discretions. Spigelman CJ in that case referred to the ‘self-executing nature of the relevant provisions of the *Migration Act* which made ‘detention an inevitable consequence’ of the cancellations.<sup>132</sup> His Honour also said:

When the High Court quashed the cancellation decision on the basis that the power to cancel could not constitutionally apply to [Mr Taylor], it necessarily decided that any other direct consequence of the cancellation could not constitutionally apply to him. In the circumstances of this case, and in the context of the specific statute under consideration, detention was such a direct consequence.<sup>133</sup>

The Minister’s argument that the acts of cancellation under s501 were separate and distinct from the acts of detention under s189 should be rejected, on the basis that the officers were not acting independently in detaining Mr Taylor. The ‘ministers’ were effectively the persons ‘directing’ or ‘instigating’ the detentions as a result of the cancellations.<sup>134</sup> The facts of *Taylor* can be distinguished from, for example, those of *Goldie*<sup>135</sup> where a regional officer independently made the decision to detain Mr Goldie.

The Minister relies upon the decision in *Myer Stores Ltd v Soo* (hereafter *Soo*)<sup>136</sup> in support of its argument that the ministers in *Taylor* were not active in promoting and causing the detention.<sup>137</sup> In *Soo* it was found that an employee of Myer Stores who instigated the false charges against the plaintiff was a joint tortfeasor with the police officers who arrested him. The court relied upon the fact that the employee security guard was active in promoting and causing the detention. It was found as a matter of fact that the employee not only complained

131 *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597.

132 *Taylor*, above n1 at 277.

133 *Id* at 275.

134 See for example, *Louis*, above n119.

135 *Goldie*, above n88.

136 [1991] 2 VR 597.

137 High Court, S542 of 2003, Applicants’ Summary of Argument at [18].

to the police but formed part of the escort for the plaintiff to the security room.<sup>138</sup> My comment is that this does not seem an appropriate analogy in the context of the regime of immigration detention, where the officers are employees of the Commonwealth answerable to the Minister. Rather the Minister should be directly and vicariously liable for the acts of persons who are carrying out the objects of the *Migration Act*.

The Minister further argues that the ministers did not have the relevant intention to detain. This means that the act must be ‘deliberate or wilful’,<sup>139</sup> rather than involuntary, in the sense that the consequences of the action were intended or substantially certain to result in deprivation of the liberty of the plaintiff.<sup>140</sup> On that point Spigelman CJ in *Taylor* said:

There can be no doubt that each Minister had an intention that [Mr Taylor] be removed from Australia. That was the very point of the decision to cancel the visa ...<sup>141</sup>

He referred to the documentation which as noted above supports the view that the ministers did indeed intend Mr Taylor to be detained for the purpose of removal from Australia. On that basis, the onus is upon the Minister to establish absence of intention.<sup>142</sup>

## 8. Conclusions

In my view the decision of the New South Wales Court of Appeal in *Taylor* should be upheld on appeal, on the basis that there were unlawful exercises of power by the ‘ministers’ which led to the plaintiff’s detention. The High Court should rely on *Re Patterson* as establishing that both cancellation decisions involved jurisdictional errors. On that basis, there was no lawful justification for the exercise of the s501 power on either occasion. The High Court should be faithful to its own recent pronouncements about the effect of certiorari and jurisdictional error in the migration law context, and find that the decisions were not legally effective in the circumstances.

The High Court should reject the argument that the officers who carried out the detentions were exercising independent discretions as the clear purpose of the ministerial cancellations was to direct that Mr Taylor be detained and removed from Australia. The officers were bound by those directions.

Neither should it be found that the Minister is protected by the statutory context which involves the exercise of the personal, ‘disguised deportation’ powers in s501. The High Court should accept Mr Taylor’s argument that s196 did not authorise his detention in the circumstances, particularly as the statute now makes unambiguously clear that what was clearly unlawful is now lawful.<sup>143</sup>

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138 *Soo*, above n136 at 617 (O’Byrne J).

139 *Trindade*, above n58 at 235.

140 *Ibid*.

141 *Taylor*, above n1 at 277.

142 *Trindade*, above n58 at 237.

143 Contrast *Al-Kateb*, above n24.

The High Court should be very wary of accepting the Minister's call to unsettle the established principles in this area of law, because of the far-reaching ramifications of such a move. Mr Taylor puts his case on the basis of administrative efficiency versus liberty. This is the gist of the action in trespass for false imprisonment in this context.<sup>144</sup> Arguably it exists to protect persons in the position of Mr Taylor who otherwise may have little protection from the legal system. This argument is even stronger in the s501 context, which attempts to make the Minister's decisions unreviewable. Further, as Kirby J's comments in the special leave application indicate, its decision in *Taylor* will have limited 'floodgates' effect, as a result of the 2003 amendments to the Act. Moreover, the Court of Appeal's assessment of damages at \$116,000 seems modest and reasonable in the circumstances.<sup>145</sup>

One question that remains however is whether a decision in these proceedings in Mr Taylor's favour will be merely pyrrhic, on the basis that it does not determine his status in the citizen-alien dichotomy. However the High Court must uphold the principle that non-citizens, and those who have served their sentences for past crimes, have legal and human rights. This will ensure that any further attempt to remove Mr Taylor under s501 will be considered very carefully by the Minister.<sup>146</sup>

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144 *Ex parte Evans (no 2)*, above n79.

145 I have not delved into this issue but see the discussion of French J in *Goldie*, above n108 and in Fordham, above n96.

146 Whether under s501(2), pursuant to which Mr Taylor must be accorded natural justice, or pursuant to s501(3) (the 'national interest' criteria).

# Cases and Comments

## Foreign Act of State and Public Policy Exceptions: *Peer International Corpn v Termidor Music Publishers Ltd*<sup>†</sup>

KAREN MOK\*

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### 1. Introduction

The question of whether forum public policy can be used in choice of law matters extends across many areas of private international law.<sup>1</sup> The particular context in which public policy is discussed in this paper is with regard to its role in the foreign act of state doctrine, specifically that concerning foreign governmental expropriating decrees. The foreign act of state doctrine gives effect to the sovereignty of each jurisdiction by ensuring that any court will not question any foreign governmental decree that purports to affect property situated within its own territory.<sup>2</sup> Conversely, any foreign decree that purports to have an extraterritorial effect, will not be recognised. Traditionally, public policy can be and has been used to exclude a foreign decree from recognition, despite it having effect within its own territory. But although it has been accepted as an escape device, it is generally only applied in cases with exceptional factual circumstances.<sup>3</sup> The other function of public policy is that it can theoretically be used in a positive sense to allow the recognition of a foreign decree which has an extraterritorial effect.<sup>4</sup> The application of public policy in this context is more uncertain. The recent English case of *Peer International Corpn v Termidor Music Publishers Ltd*<sup>5</sup> is an example of where the application of public policy as a sword was rejected by the court. This paper discusses the implications of the future role of public policy in the context of the foreign act of state doctrine and queries whether one can conclude that *Peer* is the final authority on this matter.

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<sup>†</sup> (2004) 2 WLR 849.

\* LLB, final year student, Faculty of Law, University of Sydney. The author would like to thank Ross Anderson for his valuable insights. Any errors remain the author's.

1 The ambit of public policy in private international law is very broad. For example, public policy has played a role in the context of Renvoi, the recognition of foreign marriage dissolutions and annulments, and the recognition of foreign judgments.

2 *Princess Paley Olga v Weisz* [1929] 1 KB 718.

3 See, for example, *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 (hereafter *Kuwait*); *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249 (hereafter *Oppenheimer*).

4 See, for example, *Lorentzen v Lydden & Co Ltd* [1942] 2 KB 202.

5 (2004) 2 WLR 849 (hereafter *Peer*).

## 2. *The Facts*

The claimants in this case, Peer International Corpn, Southern Music Publishing Inc and Peer Music Ltd (UK) were a part of an American owned group of independent music publishing companies. The defendants were Termidor Music Publishers Ltd and Termidor Musikverlag GmbH & Co KG. Before the Revolution in Cuba in 1960, Peer had acquired thousands of musical works from Cuban authors. The alleged ownership in copyright of these musical works by Peer was based on agreements that were signed in Cuba between the period of 1930–1950. These agreements were supplemented by confirmatory agreements that were later signed in 1989.

The defendants argued that they continued to own the exclusive licenses of the Cuban works within the United Kingdom. Termidor claimed their rights as licensees through the Editora Musical de Cuba (EMC), a Cuban entity which claimed to own the English copyright in the works under Cuban Law 860, and which was also a defendant in this case. Cuban Law 860 came into effect in August 1960 and sought to protect the rights of Cuban authors and composers and to approve agreements made between them and publishers. Under the provisions of Law 860, where any agreements were not presented for approval, or where the approval was not granted, the rights of the publishers were forfeited and the authors and composers were free to sign other agreements.

The defendants argued that during the 1930s and 1940s, the musicians made very little money through their musical works. It was alleged that Peer had sought to exploit these musicians by contracting with them for the copyright in the Cuban music for very little consideration. After the revolution in 1959, the government sought to prevent further exploitation of these works by creating organisations to administer and control music copyright and publishing. In the 1950s, Musicabana was established as the effective representative of the Cuban musicians and composers and it later evolved into EGREM in the 1960s. In 1993, the publishing department of EGREM separated and became the independent company of EMC, which took complete control of EGREM's publishing rights. EMC argued that, in large part due to the activities of Peer, Law 860 was implemented to re-exert Cuban control over intellectual property rights owned by Cuban nationals and to prevent further exploitation by foreign companies.

Cuban Law 860 gave the governing board the power to approve any agreements that were signed between authors and publishers. Without such approval, the agreements would be null for all legal purposes. The law further provided that any contracts that had been signed between authors and publishers prior to the commencement of Cuban Law 860 must be presented to the board for approval. Any agreements that had not been presented or did not warrant approval would be considered to result in the forfeiture of all the rights of the publishers and thus the authors would be free to sign other contracts. The defendants argued that Peer had failed to seek approval from the board for its agreements between the Cuban composers, as required by Law 860, and as a result, no copyright in the Cuban works vested in them.

The proceedings in this case were essentially a dispute about the ownership of the United Kingdom copyright in the Cuban works. Peer's claim to the works depended upon the agreements made between Peer and the Cuban composers between the 1930s and the 1950s. The defendants argued that they had ownership in the works pursuant to Cuban Law 860.

### ***3. At Trial***

Three preliminary issues were involved at trial. First, whether the assignments of copyright relied upon by the claimants were initially valid under the relevant applicable law (without prejudicing what such law was); second, the effect of Cuban Law 860 on the assignments (assuming initial validity), and whether that provision was to be given effect in English law; and third, whether the 'confirmation of rights' documents obtained by the claimants were valid assignments or exclusive licences of the 1911 reversionary copyright under the relevant applicable law (without prejudicing what such law was).

In his judgment delivered on 11 December 2002, Neuberger J made three findings. First, that the initial agreements were effective to transfer the title to the English copyright in the Cuban works; second, that Cuban Law 860 was ineffective to deprive Peer of any copyright vested in them; and third, that although the confirmations were not effective to transfer title to the reversionary copyright vested in the heirs to the composers, they did have that effect when read together with the addenda. Consequently, Neuberger J found in favour of the claimants.

The defendant appealed on the ground that the judge had erred in holding that Cuban Law 860 did not affect the copyright in the United Kingdom. Neuberger's decision was allowed to be appealed on the basis that the second issue raised a point of general importance that only had first instance authority.

### ***4. On Appeal***

The judgment of Neuberger J was upheld by the Court of Appeal on 1 July 2003. On the second point of appeal, the Court held that Cuban Law 860 governed the exploitation of intellectual property rights, divested the claimants of their copyright in Cuban musical compositions without compensation, and was confiscatory in nature. The Court also found that since the law purported to have an extra-territorial effect on intellectual property that was situated within the United Kingdom it could not be given effect. Moreover, no public policy exceptions were found, in this case, to affect the application of the *lex situs* rule that an English court would not give effect to the legislation of a foreign state if it affected property rights in the United Kingdom. Accordingly, Cuban Law 860 was held to be ineffective in divesting the claimants of the disputed copyright. Aldous LJ delivered the primary judgment, with which Latham LJ agreed. Mance LJ also concurred with the judgment, but delivered additional comments.

## 5. *Reasons for the English Court of Appeal's Decision*

The defendants' claim to ownership in the Cuban works was based on the transitional provisions in Chapter VIII, Decree 10 under Cuban Law 860. Decree 10 provided that:

10. Contracts signed between authors and composers of music or musical dramas and publishers, prior to this Act's coming into force, should be presented within 60 days to the Cuban Musical Right Institute for the approval required. Those agreements that have not been presented or that do not warrant approval will be considered as having forfeited all rights of the publishers, and the authors and composers will be free to sign other contracts to cover the works previously covered by such (former) contracts.<sup>6</sup>

The defendants argued that Peer had not sought approval under this decree and that under the Cuban Law, Peer had been divested of all ownership in the works. Aldous LJ found that this decree was confiscatory in nature and since it purported to have an extra-territorial effect on copyright situated in the United Kingdom, Cuban Law 860 would not be given effect.<sup>7</sup> This was based on rule 120 of *Dicey & Morris* which states:

A governmental act affecting any private proprietary right in any moveable or immovable thing will be recognised as valid and effective in England if the act was valid and effective by the law of the country where the thing was situated (*lex situs*) at the moment when the act takes effect, and not otherwise.<sup>8</sup>

There was some discussion as to whether or not Decree 10 was an expropriation law. The defendants argued that the law was not confiscatory, but rather existed to regulate contractual relationships between Cuban music composers and publishing companies in order to ensure the protection of the musicians.<sup>9</sup> Aldous LJ rejected this submission and found that Law 860 was not an instrument 'solely for the purposes of contractual regulation': it was a law that was enacted to 'control the exploitation of intellectual property rights', with the particular effect of 'divesting Peer of their copyright in certain Cuban works'. Aldous J therefore concluded that Law 860 had and intended to have extraterritorial effect within the United Kingdom.<sup>10</sup>

The defendants also submitted that by reason of public policy, an exception should be made to rule 120. It was argued that rule 120 should be split into two facets. First, a court of the forum would recognise as valid and effective governmental acts relating to property situated in its territory. Second, a court of the forum would not recognise a foreign governmental act that purported to affect property extra-territorially.<sup>11</sup> However, the defendants submitted that these limbs

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6 *Id* at 854–855.

7 *Id* at 855.

8 *Ibid*.

9 *Ibid*.

10 *Id* at 856.

11 *Ibid*.

of rule 120 should be subjected to qualifications, such as the consideration of comity and public policy.<sup>12</sup>

The defendants used *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*<sup>13</sup> as an illustration of how these qualifications were applied to the first facet of rule 120. In that case, the House of Lords argued that an English court could have regard to international law in determining whether or not a foreign expropriating decree should be recognised. On the facts of that case, the English court had to determine whether or not effect should be given to a governmental expropriation law of Iraq that divested Kuwait of a number of aircrafts and which was enacted *after* Iraq had invaded Kuwait and stolen the property. The court, in *Kuwait*, held that giving effect to the foreign law would be wholly alien to fundamental requirements of justice as administered by an English court and would be contrary to public policy.<sup>14</sup>

It was submitted that since the courts had refused to give effect to the foreign decree by using considerations of public policy in the *Kuwait* case, it was also possible for qualifications to be applied to the second facet of rule 120. That is, under considerations of comity and public policy, it was argued that a court of the forum should recognise a foreign law that had extra-territorial effect. As noted above, the defendants argued that Law 860 was an enactment that redressed contractual imbalances. It was argued that the assignments between Peer and the Cuban musicians during 1930–1950 were inequitable and oppressive for three reasons. First, the agreements contained no obligation on Peer to exploit the copyright despite the complete transfer of rights; second, no power was given to the composers to assign their rights or recover their copyright despite that fact that minimal consideration was paid; and third, the assignments were not limited in term. The defendants argued that such agreements would have been found void under the grounds of English public policy and cited the case of *Instone v A Schroder Music Publishing Co Ltd* as authority.<sup>15</sup> Since Law 860 was implemented specifically to address such situations of contractual imbalance and since its policy was in line with English public policy, the defendants argued that the court should recognise the effectiveness of Law 860, despite it having an extraterritorial effect.

As noted above, Aldous LJ found that Law 860 was not purely an instrument of contractual regulation, but rather, was a law that was confiscatory in nature. While he accepted that *Kuwait* was an exception to the first facet of the rule, and acknowledged that *Dicey & Morris* had made it clear that these exceptions existed,<sup>16</sup> he held that it could not be deduced from this that exceptions also existed for the second facet of rule 120.

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12 Ibid.

13 *Kuwait*, above n3.

14 *Peer*, above n5 at 856.

15 (1974) 1 WLR 1308.

16 *Peer*, above n5 at 857.

The defendant relied primarily on the judgment of Atkinson J in *Lorentzen v Lydden & Co Ltd*.<sup>17</sup> In that case, the defendants were a firm carrying on business in London which had agreed to charter a Norwegian vessel for the carriage of pulp. The Norwegian Government in Norway enacted a decree that requisitioned all ships registered in Norway. The curator sued the defendants for damages, arguing that they had repudiated the contract. However, the defendants argued that the site of the debt was England and under English law, the Norwegian decree was ineffective and did not pass ownership of the debt. Atkinson J held that the decree was not confiscatory in nature. He found that England and Norway were engaged together in a 'desperate war for their existence' and that 'in accordance with the comity of nations' and 'the interests of public policy', the decree should be given effect.<sup>18</sup>

Aldous LJ disagreed with the statements of Atkinson J, stating that the judgment was contrary to public policy and to the numerous cases (of which will be discussed below) that had been decided on this matter.<sup>19</sup> He also found that there was 'no internationally accepted view on public policy as to assignments of copyright'.<sup>20</sup> He agreed with the submissions of the claimants that any exception based upon public policy was:

wrong in principle because

- (1) it would subordinate English property law to that of a foreign state;
- (2) the rule would be founded and would operate by reference to public policy which could change from time to time and could be uncertain;
- (3) it would require the English courts to assess the merits of foreign legislations;
- (4) it would lead to intractable problems when the property was situated in a third state;
- (5) it would require the court to balance one public policy against the public policy that states do not interfere with property situated abroad, and
- (6) it would lead to great uncertainty.<sup>21</sup>

Mance LJ agreed with this judgment and further emphasised that allowing public policy to be used in a positive sense as an exception to the *lex situs* rule would create instability and uncertainty.

## 6. *Analysis*

### A. *Intellectual Property and Choice of Law*

One important issue that was not given sufficient attention in the judgments was the fact that the subject matter of concern in this case involved intellectual property rights. In the vast majority of situations, intellectual property rights are a creation

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17 (1942) 2 KB 202 (hereafter *Lorentzen*).

18 *Peer*, above n5 at 858.

19 *Ibid*.

20 *Id* at 865.

21 *Ibid*.

by statute<sup>22</sup> and are essentially the right of an owner to take action against others to prevent them from engaging in conduct without the permission of the owner.<sup>23</sup> Patents, trade marks and copyright have all been classified as movable property. However, they differ from other movables in the sense that they have many of the characteristics of immovable property, the most important one being that the rights which are conferred by an intellectual property right must be territorially confined.<sup>24</sup> From this argument, the situs of a copyright, trade mark or patent must be in the country whose statute governs its existence.<sup>25</sup> Thus, an Australian patent governed by Australian statute must be situated in Australia.<sup>26</sup> Similarly, the situs of a Community trade mark, which is granted under European law, must also be the European Community.<sup>27</sup> Under private international law, it is not normally necessary to determine where a Community trade mark is situated because the relevant European legislation will contain express choice of law provisions.<sup>28</sup>

Given that the situs of an intellectual property right is situated in the country under whose law it has come into being, it is in many respects immovable property, and thus, raises jurisdictional matters. It is long established that under the *Moçambique* rule of the common law, superior courts do not have the power to entertain proceedings where the subject matter concerns title to foreign land, the right to possession of foreign land, and trespass to foreign land.<sup>29</sup> Thus, for example, in *Hesperides Hotels v Muftizade*,<sup>30</sup> the plaintiffs were precluded from bringing proceedings in an English court for an action in trespass concerning foreign land. Note, however, that the plaintiffs were successful on their claim in relation to trespass to the goods of the hotel, as these were classified as movable property which is not limited by the *Moçambique* rule.

The *Moçambique* rule governs all immovable property, subject to a number of exceptions, which include the situation where the court has personal jurisdiction in equity or contract,<sup>31</sup> or cases involving admiralty actions<sup>32</sup> and succession.<sup>33</sup> It may also be necessary to note that in NSW, the *Moçambique* rule has been abolished. Section 3 of the *Jurisdiction of Courts (Foreign Land) Act*<sup>34</sup> specifically provides that an action in NSW is not precluded merely because it involves foreign land or foreign immovable property. However, courts still reserve the power to apply the rule and will do so if the court thinks that NSW is not an

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22 Martin Davies, Sam Ricketson & Geoffrey Lindell, *Conflict of Laws: Commentary and Materials* (1997) at 596.

23 Lawrence Collins (ed), *Dicey & Morris on The Conflict of Laws* (13<sup>th</sup> ed, 2000) at 935.

24 *Ibid.*

25 *Id* at n23 at 934.

26 *Ibid* citing *Re Usine de Melle's Patent* (1954) 91 CLR 42 at 48.

27 *Id* at 935.

28 *Ibid.*

29 Tilbury et al, below n39 at 916 citing *British South Africa Co v Companhia de Moçambique* [1893] AC 602.

30 [1979] AC 508.

31 Nygh et al, below n46 at 141, 146 citing *Tritech Technology v Gordon* (2000) 48 IPR 52.

32 Tilbury et al, below n39 at 917 citing *The Tolten* [1946] P 135.

33 *Re Duke of Wellington* (1947) Ch 506; affd (1948) Ch 118.

34 1989 (NSW) ss3,4,5.

appropriate forum in which to entertain the proceedings.<sup>35</sup> A similar provision has been implemented in the ACT as well, though its application remains unclear, as the content of the provisions seem to reaffirm the *Moçambique* rule.<sup>36</sup> However, outside NSW and the ACT, the rule continues to survive.<sup>37</sup>

So far as intellectual property rights are concerned, as mentioned above, these rights share many of the characteristics of immovable property because they must be confined within the jurisdiction in which those rights arise. It follows that jurisdictional restrictions that apply to immovable property also apply to intellectual property rights. A leading case on this matter is *Potter v The Broken Hill Proprietary Co.*<sup>38</sup> Paradoxically, this was not a case which concerned foreign land, as it involved an infringement of a patent which was situated within Australia.<sup>39</sup> However, at the time, patent registration was still a state matter and had not been superseded by the Commonwealth *Patents Act 1903*.<sup>40</sup> It was held that the validity of a patent that was granted in NSW was not justiciable in the courts of Victoria. The very existence of and title to the patent was dependent upon State legislation that was territorially limited and this distinguished it from other movable property.<sup>41</sup> If this is true, then the *Moçambique* rule precludes jurisdiction over questions of title to, and validity of foreign patents as it does so for other immovables.<sup>42</sup>

The principle in this case was extended by English law to matters involving international copyright in the case of *Tyburn Productions Ltd v Conan Doyle*.<sup>43</sup> The court in this case approved and applied *Potter v BHP*. This case concerned whether an English court had the power to entertain proceedings, the subject matter of which was copyright situated in the United States. The English court found that it was a local action of the United States which was not justiciable in English courts. The English have also applied this principle to statute based trademarks.<sup>44</sup>

In relation to *Peer*, the court seems to have overlooked the principle applied in *Tyburn*. Perhaps this was done because the subject matter of the case concerned a UK copyright arising from a UK statute that was being litigated in an English court. Had the copyright been situated in Cuba or in another foreign jurisdiction, the English would have had no jurisdiction to entertain the matter as they would have been precluded from doing so under the *Moçambique* rule, unless one of its exceptions applied.

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35 *Id* at s4.

36 *Civil Law (Wrongs) Act 2002 (ACT)* s220.

37 *Re Doyle; Exp Brien v Doyle* (1993) 41 FCR 40.

38 (1906) 3 CLR 479 (hereafter *Potter v BHP*).

39 Michael Tilbury, Gary Davis & Brian Opeskin, *Conflict of Laws in Australia* (2002) at 917.

40 *Ibid*.

41 *Ibid*.

42 *Id* at 918.

43 [1991] Ch 75 (hereafter *Tyburn*).

44 See, for example, *LA Gear Inc v Gerald Whelan & Sons Ltd* [1991] FSR 670 at 674.

### **B. Public Policy and its Implications**

The defendants' submissions were in large part based on the argument that public policy should be used as an exception under facet two of Dicey and Morris' rule 120, to give an extraterritorial effect to Cuban Law 860. As correctly raised by the defendant, public policy has been used in some instances as an exception to facet one of rule 120 in order to exclude a foreign expropriating law on the grounds that it would offend forum public policy.<sup>45</sup> However, the circumstances in which an application of public policy be invoked can be far from certain. The court can only define the exact exclusion rule as each situation arises.<sup>46</sup> Conversely, because of its uncertainty and 'open-textured nature'<sup>47</sup> there is considerable scope for its application.<sup>48</sup> From the cases which have been decided on the matter, the instances in which public policy grounds are invoked to exclude foreign laws can loosely be identified as those laws 'which offend defined social, moral or political interests of the forum'.<sup>49</sup>

As each political system reserves the power to apply this doctrine when they see fit, cases in the past have sometimes applied forum public policy in an extreme manner.<sup>50</sup> For example, at one stage it was believed that 'any foreign legal solution which was unknown to the forum must for that reason be contrary to public policy'.<sup>51</sup> However, today courts generally take the view that solutions in other jurisdictions are not wrong simply because they are inconsistent with those that are applied in the forum.<sup>52</sup>

Despite the uncertainty of its application, it is safe to say that the power to invoke forum public policy 'should be exercised rarely and with abundant caution'.<sup>53</sup> It is always important that, so far as it is possible, any act of a foreign state which governs property within its own territory should not be questioned by another forum. Indeed, Peter Nygh and Martin Davies have argued that: 'the basic question [is] whether the law [of the forum] has an interest in applying its policy to a particular situation in order to defeat the transaction even though it may be valid according to the [foreign] law that ... applied [to the transaction]'.<sup>54</sup>

Nygh et al have identified three situations in which public policy arguments may be invoked by a court of the forum to exclude a foreign law: first, the protection of the domestic interests of Australia; second, the protection of the external interests of Australia; and third, the protection of moral interests of universal application.

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45 *Kuwait*, above n4.

46 Peter Nygh & Martin Davies, *Conflict of Laws in Australia* (7<sup>th</sup> ed, 2002) at 345.

47 Tilbury et al, above n39 at 375.

48 *Ibid*.

49 Nygh et al, above n46 at 345.

50 *Ibid*.

51 See, for example, *Re Macartney* [1921] 1 Ch 522.

52 *Loucks v Standard Oil Co of New York* (1918) 120 NE 198 at 201.

53 Tilbury et al, above n39 at 375.

54 Nygh et al, above n46 at 346.

A clear example of the third category is the case of *Oppenheimer v Cattermole (Inspector of Taxes)*,<sup>55</sup> where a German law existed to deprive German Jews of their nationality and expropriated their property. On the question of whether the seizure by the German government of this property situated within its territory should be recognized in England, the court held that a foreign law which purported to take away property on the grounds of race was a gross violation of human rights and such a seizure was not to be recognized. The other case, which was also raised by the defendant, was the case of *Kuwait*, where it was held that the use of armed forces by Iraq to invade a country and its expropriation of Kuwaiti property was a violation of fundamental prohibitions of public international law and should therefore not be recognised.

The defendants in *Peer* sought to rely on *Kuwait* to support their argument that public policy should be extended so that it could be used in a positive sense to allow the recognition of Cuban Law 860 extraterritorially. In particular, the defendants turned to the judgment of Atkinson J in *Lorentzen* where a decree which did not satisfy the *lex situs* or foreign act of state doctrine because it was outside the territory, was given recognition by the court on the grounds that it was a situation of national emergency. This case received criticism in subsequent cases<sup>56</sup> and was held by Aldous LJ in *Peer* to have been ‘wrongly decided’.<sup>57</sup>

In his decision, Aldous LJ referred to a number of other cases to support his finding. A judgment on which Aldous LJ heavily relied is the case of *Bank voor Handel en Scheepvaart NV v Slatford*.<sup>58</sup> In that case, a Dutch bank deposited a quantity of gold in London before the start of the 1939–1945 war. In May 1940 the Netherlands were invaded by the Germans and the Royal Netherlands Government established itself in the UK. With the approval of the UK Government, the Royal Netherlands Government exercised their powers from London and issued a decree which had the effect of transferring property, such as the gold bars, to the Netherlands Government. The purpose of the decree was to protect the people in the Netherlands who were then under German authority. On the question of whether the Netherlands’ decree was effective in transferring the gold bars to the Dutch state, it was held that it was only effective for property that was situated within the taking state (the Netherlands) and did not apply to property that was situated in England. The court rejected any public policy arguments and the judgment of Atkinson J in *Lorentzen*. Devlin J held that if the judgment of Atkinson J was to be upheld, there would be three significant implications. First, lead to the formulation of a new head of public policy which was not a matter to be taken lightly. Second, it would effectively use public policy in a manner that was not in accordance with precedent. That is, on the one hand, public policy would be used to restrict acts thought to be harmful to the community; and on the other, public policy would be used in a novel way and in a true sense to validate

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55 *Oppenheimer*, above n3.

56 *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 (hereafter *Bank voor*).

57 *Peer*, above n5 at 858.

58 *Bank voor*, above n56.

acts which would otherwise be invalid. Third, it would require the court to consider the political merits of the decree itself.<sup>59</sup>

To the extent that Aldous LJ's judgment is in support of the principle in *Bank voor*, one could conclude that it stands for a 'black-letter rule' that public policy can never be used in a positive sense to allow the recognition of a foreign decree which purported to have extraterritorial effect. Both cases seem to clearly indicate that the judgment of Atkinson J in *Lorentzen* was wrongly decided. However, what seems to be ignored is that the factual circumstances between the *Peer* case and those that existed during the time of *Lorentzen* and *Bank voor* are qualitatively very different. This point was briefly mentioned in the judgment of Mance LJ.<sup>60</sup> It seems that the stark difference in the factual circumstances of these cases could be a reason why public policy was or was not invoked. The *Lorentzen* case took place in a time of war in which the countries in question were found by Atkinson J to be in a 'desperate war for their existence'.<sup>61</sup> In such a situation, in the opinion of Atkinson J, public policy should be able to be used in a positive manner to recognize the extraterritorial effect of the decree. Arguably, since *Bank voor* also took place in a similar wartime context, the same reasoning should have applied, yet Devlin J refused to allow public policy to be used in such a manner. However, it is important to note that the *Bank voor* case had the benefit of hindsight. Devlin J's judgment was based on post-war reasoning and it is not unlikely that in times of peace, it would be much easier to reject public policy considerations in favour of applying the foreign act of state doctrine.

On a qualitative level, the factual circumstances in the case of *Peer* are even more different than those between *Lorentzen* and *Bank voor*. Here, we are simply looking at a Cuban law purporting to have an extraterritorial effect on copyright property situated in the UK. This is far removed from those situations in times of war, such as those in *Lorentzen* and to some extent *Bank voor*, where arguably a sense of urgency may justify an application of the public policy argument. Thus, in so far as a rule of thumb is concerned, perhaps it is premature to state with certainty that as a result of *Peer*, public policy should never be used in a positive sense or as a sword to allow the recognition of a foreign decree purporting to govern property outside of its territory. In the other respect however, traditionally, public policy has only been used as an exclusionary method in all areas of private international law and perhaps *Peer* is further support for that principle.

## 7. *Conclusions*

From these cases, we can see that the application of the use of public policy as an exception to the foreign act of state doctrine lacks certainty and predictability. However, it is generally agreed that the doctrine should be limited to exceptional circumstances such as those that existed in cases such as *Lorentzen* or *Kuwait*. The issue surrounding the question of whether the doctrine can be used in a positive

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<sup>59</sup> *Peer*, above n5 at 866.

<sup>60</sup> *Id* at 869.

<sup>61</sup> *Ibid*.

sense to allow an extraterritorial effect of a foreign decree seems to have been settled in *Peer*; but as argued above, perhaps the circumstances of the case were not exceptional enough to invoke the doctrine and it is questionable whether this is the final authority on the issue.

The law on the question of whether public policy exceptions can be applied to exclude foreign decrees is less uncertain. Courts have accepted that the doctrine can be used as an exception, but again, seemingly only in cases of exceptionality. Dicey and Morris have argued that ‘In the conflict of laws it is ... necessary that the doctrine should be kept within proper limits, otherwise the whole basis of the system is liable to be frustrated’.<sup>62</sup> The message that public policy should be applied with caution is illustrated by Cardozo J:

We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. ... The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their door unless it would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.<sup>63</sup>

A number of other American authorities have continued to apply this strict application such as *Banco Nacional de Cuba v Sabbatino*<sup>64</sup> where it was held that the validity and effectiveness of what the Cubans did could not be called into question in a court of NSW because of the foreign act of state doctrine *even if* the Cubans violated forum public policy. This is an example of an extreme application of the foreign act of state doctrine. This narrow approach has continued to be applied as illustrated by the recent case of *Worldwide Minerals Ltd v Republic of Kazakhstan*<sup>65</sup> which upheld the principle in *Banco Nacional*.

Much of Australia’s authority on this issue is based on English law as the matter has not really ‘arisen within a court of Australia’.<sup>66</sup> English law has taken a narrow approach, for which it has often been criticised. Specifically, it has been suggested that such an approach has been caused by a willingness of the English to sacrifice their own politics in order to favour international comity.<sup>67</sup> It is possible that the decision to refuse recognition of Iraq’s decree in *Kuwait* indicates a change in the attitude of English law. However, given the state of relations between the United Kingdom and Iraqi governments, international comity, in all likelihood, could hardly have been a major concern for the English judges.<sup>68</sup>

To conclude, it has been suggested that the doctrine of public policy used as an exception to the foreign act of state doctrine may indicate that the conventional choice of law rules in Anglo-Australian conflict of laws may need to be

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62 Collins, above n23 at 81.

63 *Loucks v Standard Oil Co* (1918) 120 NE 198 at 201–202.

64 (1964) 376 US 398 (hereafter *Banco Nacional*).

65 (2002) 296 F 3d 1154.

66 Tilbury et al, above n39 at 394.

67 *Ibid.*

68 *Ibid.*

reconsidered.<sup>69</sup> Indeed, Carter argues that the need for an exception highlights the shortcomings of the existing rules.<sup>70</sup> He has also argued that the current choice of law rules, beyond those which only relate to foreign act of state, are ‘too rigid and broad in scope’.<sup>71</sup> Alternatively, it has also been suggested that the nature of the conflict of laws process should be altered from the present approach based on the selection of the jurisdiction which supplies the governing law, to a process where the appropriate governing rules themselves are selected.<sup>72</sup> Reform aside, the application of public policy as an exception to the foreign act of state doctrine has and should continue to apply, at least on an exclusionary basis, though very cautiously. So far as using it positively is concerned, the principle in *Peer* indicates that an exception can not be made to this rule, although it should be kept in mind that perhaps this was decided in the particular circumstances of that case.

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69 Id at 395.

70 PB Carter, ‘The Role of Public Policy in English Private International Law’ (1993) 42 *ICLQ* 1 at 1.

71 Id at 10.

72 Tilbury et al, above n39 at 395.



# *Books*

LAW AND JUSTICE IN AUSTRALIA:  
FOUNDATIONS OF THE LEGAL SYSTEM by  
Prue Vines, Oxford University Press, Melbourne,  
2004, 374pp, ISBN 0195516400

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*Law and Justice in Australia*, the textbook, has been several years in the making. As the author states in the preface, the text ‘grew out of the first year legal systems course at the University of New South Wales, and previous teachers in that course have contributed much to the final shaping of this book’ (p. xvi). As such, it reflects the longstanding concern of that law school to teach law and legal doctrine in a social context with an overriding commitment to social justice and to teaching its students how the law impacts upon disadvantaged and marginalised communities. *Law and Justice in Australia*, designed as an introductory text for first year law students, both reflects and continues this fine tradition. It is lucidly written and pitched at a linguistic and conceptual level appropriate for first year students. The present reviewer can attest first hand (having used the manuscript in an earlier incarnation as a teaching text whilst a member of staff at the University of New South Wales) to its utility both as a textbook and as a ‘springboard’ for wider class discussion of central issues about law and justice.

The text is organised into four parts. Roughly speaking, the first three parts are historical and the final part methodological. Part One deals with the legal institutions of mediaeval and early modern England (‘The English Heritage’); Part Two mainly addresses the legal, social and political effect of colonisation upon the Indigenous people and the early attempts of the colonisers to establish and assert the rule of law (‘The Impact of the English Heritage’); and, Part Three traces the evolution of the Australian legal system from colonial times to Federation (‘Moving Towards Independence’). The final section of the book, Part Four (‘Drawing on the Heritage: Legal Institutions in Action’), introduces students to topics such as statutory construction and the doctrine of precedent.

There are two main achievements of this textbook. The first is its thoughtful and engaging presentation of legal history. It is a difficult task to generalise accurately about Australian undergraduate law students, who as a group are quite diverse. One general observation it is possible to make, however, is that they largely view legal history (particularly of the English variety) as at best a charming irrelevance and at worst a painful imposition upon their time, as something to be endured whilst waiting for the teaching of ‘real law’ to begin. As a group, they seem generally impervious to the delights of the old mediaeval forms of action; they are unmoved by the drama of the confrontations between Sir Edward Coke and King James I; and the birth of equity in the Courts of Chancery routinely engenders within their ranks the kind of vacant stare normally reserved for suggestions of extra-curricular reading. It is a credit to the author that the

presentation of this historical material — essential to a proper understanding of many contemporary legal debates — elicits none of these responses. The chapters dealing with legal history do so in a lively and interesting fashion. Students are better able to relate to the legal history presented in these chapters for the clever use of stories (presented as separate case studies within differently shaded text-boxes) which personalise the legal historical events. Abbot Henry's story (pp. 21–3) encapsulates the vagaries of the royal justice system, Henry and Susannah Kable's story (a recurring theme — pp. 2, 132) illustrates the centrality of the rule of law in the nascent penal colony, and the story of Barangaroo and Governor Phillip (p. 93) points to the huge cultural differences between the invading British and the Indigenous inhabitants of Australia.

The textbook's second major achievement, and in this reviewer's opinion the more important of the two, is its location of the law within a social, cultural, historical and political context. Vines's text demonstrates how the central concepts of the contemporary Australian legal system — the rule of law, responsible and representative government, and the separation of powers — arose from, and were developed within, specific historical and cultural conditions. For example, the doctrine of the separation of powers is given meaning through a discussion of the turbulent events of the Civil War and the Glorious Revolution. Similarly, the concept of the rule of law is discussed in the light of both early modern English history and the ideological work which the concept performed in the new colony, as various segments of New South Wales society sought to deploy rule of law-based ideas to further their political goals. However, this contextualisation of the law is not solely a historical exercise, for in reflecting on the way in which our current legal systems and doctrines were developed in a specific historical setting, students come to an understanding of the contingency of the law, how it could have been formed and developed differently and (most importantly) which groups were excluded from its formation and development. Obviously, race and gender are central themes here. The disastrous impact of colonisation, legalised discrimination and persistent racism in the wider Australian community upon Indigenous Australians is a recurring theme of the book (see especially chapters 5 and 9), as is the historical and ongoing exclusion of women from legal and political institutions (see especially chapters 3 and 7). Importantly, this emphasis on the social and political exclusion of women, Indigenous Australians, and other historically marginalised groups from the control and direction of the Australian legal system is sensitively and subtly managed. Vines often uses the 'Notes and Questions' section at the conclusion of extracts to prompt students into questioning the law and its operation, rather than simply asserting that the law is discriminatory and oppressive. This technique encourages critical reflection and class discussion while ensuring that students are not simply 'preached' to and can draw their own, ultimately stronger, conclusions.

The concluding material on the theory and practice of the doctrine of precedent is another strength of the book. In chapter 12 the author presents various judicial statements on what exactly it is that judges do when they (purport to) apply precedent (for example, Diplock LJ's famous judgment in *Dorset Yacht Company*

*v Home Office* [1970] AC 1004, extracted on pp. 303–4, and Heydon and Kirby JJ's recent extra-judicial sparring in the pages of *Quadrant* and beyond, discussed and extracted on pp. 309–10). In chapter 13, the author then extracts a number of cases on the tort of nuisance in order to demonstrate as a practical matter how case law develops. If one criticism can be made of the book it is that the theoretical material is not more extensive, but then again, *Law and Justice in Australia* does not pretend to a complete treatment of jurisprudence and legal philosophy.

Finally, as in all good teaching texts, there are some well-chosen extracts from case law and secondary materials. Some of these gems are recent, such as the English Court of Appeal decision in *R v Wacker* [2003] QB 1207 (extracted to demonstrate the distinction between civil and criminal law); some of them are old teaching favourites, such as the appendix to James Boyle, 'Anatomy of a Torts Class' (1985) 34 *American University Law Review* 1003 (still the best primer on legal argumentation); and, some of them are actually quite funny, such as Blue J's wilfully perverse decision in *Rejina v Ojibway* (1965) 8 *Criminal Law Quarterly* 137 on what constitutes a 'small bird' for the purposes of s2 of the *Small Birds Act*, RSO, 1960, c 724. These illuminating extracts are embedded within a text which is clearly written and which is able to capture and stimulate the imagination of first year law students. *Law and Justice in Australia* spurs first year law students to analyse critically the philosophical, historical and political foundations of the Australian legal system. For this reason alone, the book will hopefully become a recommended first year text in many Australian law schools.

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