

Pandora's Box 2012

Law, people and politics



A publication of the Justice and the Law Society
THE UNIVERSITY OF QUEENSLAND

Pandora's Box 2012

Law, people and politics



Editors

William Isdale & Samuel Walpole

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William Isdale and Samuel Walpole

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*We are practised in what is,
in very truth,
an ancient mystery.*

*The common man
who thinks the law is commonsense
might be right if he watched the consummate lawyer
at work in all his deep simplicity,
and with that ease which conceals
the great learning
behind the apparent simplicity.*

*But none the less the law is a mystery;
and those who have mastered its intricacy
have indeed great power in their hands
and great responsibility.*

BARWICK

A NOTE FROM THE EDITORS

The late American jurist Oliver Wendell Holmes, in his magisterial work ‘The Common Law’, wrote that:

The very considerations which judges most rarely mention, and always with an apology, *are the secret root from which the law draws all the juices of life* ... Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy?¹

Whether we admit it or not, the law is, at heart, a very public institution. The law is not some set of abstract, axiomatic or God-given principles, but a messy web of second-best solutions; evolved to remedy problems we face in a world in which we live together.

In many areas of legal study, it’s easy to lose sight of this bigger picture. But at least in one area, we face the public nature of our undertaking with open eyes and steady focus. We call that area of law, somewhat unimaginatively, *public law*.

And in this year’s edition, *Pandora’s Box* is getting *political*!

In the pages herein you’ll find articles, interviews and book reviews about the history and future of the referendum; about political finance law and potential reforms; about the High Court’s *Mabo* judgment and the native title system; about Australia’s first female High Court Justice and how she viewed the law as a tool for achieving social justice; about deliberative democracy and the *rule of law*; and much, much more.

The law may be a messy web, but it forms the very foundations of our society. And the people and methods by whom/which it is developed, can be awfully interesting (as our contributors demonstrate!).

We’d like to thank everyone who has helped make this year’s edition possible; particularly the *Queensland Law Society* for their continued and generous support, Greg at WorldWide printing for his attention to detail and enthusiasm for the project, Professor Graeme Orr for his guidance and Joyce Meiring for her enticing artwork. Most importantly, we’d like to thank the *Justice and the Law Society* for giving us the opportunity to edit the volume, and, of course, all of our contributors, for adding succulent flesh to the bones of this edition!

¹ Oliver Wendell Holmes, *The Common Law* (Little Brown, 1903) 35.

We certainly enjoyed editing *Pandora's Box 2012*. We sincerely hope that you enjoy reading it.

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ABOUT PANDORA'S BOX

Pandora's Box is the annual academic journal published by the Justice and the Law Society (JATL) of the University of Queensland. It has been published since 1994 and aims to bring academic discussion of legal, social justice and political issues to a wider audience.

Pandora's Box is not so named because of the classical interpretation of the story: of a woman's weakness and disobedience unleashing evils on the world. Rather, we regard Pandora as the heroine of the story – the inquiring mind - as that is what the legal mind should be.

Pandora's Box journal is registered with Ulrich's International Periodical Directory and can be accessed online through *Informit*.

Pandora's Box is launched each year at the Justice and the Law Society's *Annual Professional Breakfast*.

Additional copies of the journal, including previous editions, are available. Please contact jatl@law.uq.edu.au for more information

ABOUT THE CONTRIBUTORS

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Andrew Fraser is a former member of the Queensland Legislative Assembly, in which he served as the State Member for Mount Cootha. He was the Treasurer and Deputy Premier of Queensland before leaving Parliament in March 2012. He holds First Class Honours degrees in Law and Commerce from Griffith University and was also the recipient of a University Medal.

Laura Hilly is currently a Rhodes and Clarendon Scholar at Magdalen College, Oxford, where she is undertaking a DPhil in law. Her thesis considers the contribution that gender diversity brings to appellate courts in common law countries. She completed her BA/LLB at the Australian National University, graduating with First Class Honours and the University Medal in Law. She has worked as an Associate to the Honourable Chief Justice Black AC of the Federal Court of Australia.

Bryan Keon-Cohen has degrees in Law and Arts from the University of Melbourne and is currently a Queens's Counsel practising at the Victorian Bar, focusing particularly on native title and immigration matters in the Federal Court. He has appeared in several important High Court cases, including as counsel in both *Mabo* cases and *Wik*. He has been a member of the Victorian Council for Civil Liberties for over 15 years and in 2012 was made a Member in the General Division of the Order of Australia (AM) for his services to the legal profession. He recently graduated with a PhD from Monash University and published his thesis/book: *'Mabo in the Courts: Islander Tradition to Native Title: A Memoir'* (Australian Scholarly Press, 2011).

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George Williams is the Anthony Mason Professor of Law at the University of New South Wales, and Foundation Director of the Gilbert + Tobin Centre of Public Law. He has written and edited 28 books, and appeared in the High Court in a number of important constitutional law cases, including *Lange v Australian Broadcasting Corporation* and the *Hindmarsh Island Bridge Case*. He has held visiting position at Osgoode Hall Law School, Columbia University Law School and University College London. In 2011 he was made an Officer of the Order of Australia for distinguished service to the law.



Professor George Williams

An Interview with Professor George Williams* on *'People Power: The History and Future of the Referendum in Australia'*

PB: Professor Williams, thank you very much for joining us. Today we are going to talk about the history and future of the referendum in Australia, a topic on which you've co-authored a book with David Hume. Under the Commonwealth Constitution, section 128 requires that, in order to change the Constitution, any proposal must not only be passed by both Houses of Parliament, but must also receive the support of a majority of voters in a majority of states. How hard is that in practice?

GW: Well, it is a very difficult hurdle to surmount. It can be hard enough getting an Act through both houses of parliament, but when you add in the popular vote as well it increases the order of magnitude several times. People are often distrustful of their politicians, meaning that something stimulated by the political process may be very difficult to secure popular support for. And of course, all of this is drawn out in the record because this process has only been invoked 44 times at the ballot box and the public has passed only eight of those proposals.

PB: Eight out of 44 is a pretty poor success rate. It is said by one political scientist in the United States that Australia has the fifth most difficult Constitution to change in the world. How does our method of constitutional change compare with that of other developed Western countries?

GW: It is common in some nations to find that the Constitution can be changed just by a special vote of Parliament, perhaps a two-thirds majority. That type of change is often much easier to secure. So long as you have support across major parties you can bring about any change that you like. There are many things the major parties would agree on. This might be giving the Federal Parliament more power. It might be fixing aspects relating to the political process. But when we add the people into the mix it is very different again. We do have a difficult system but I will say, though, that it is a system I support. The

* Professor Williams is the Anthony Mason Professor and the Foundation Director of the Gilbert + Tobin Centre for Public Law at the Faculty of Law, University of New South Wales. This interview was conducted on the 26th of April 2012 by Will Isdale and Sam Walpole. Questions for the interview were based on issues canvassed in George Williams and David Hume's book *'People Power: The History and Future of the Referendum in Australia'* (UNSW Press, 2010).

big problem in Australia is not the difficulty of the system but the failure to navigate it.

PB: Let's talk about some the proposals specifically that have both succeeded and failed. In 1967, Australians made what is arguably the only very significant change to our Constitution that has been made since Federation. Could you tell us a little about that?

GW: In 1967, Australians voted to delete discrimination against Aboriginal people from the Constitution. That was discrimination that had been put in in 1901 and reflected the fact that Aboriginal people were not seen as being full Australians. Indeed, it was thought for a while too that they might actually, as a race, die out. When the Constitution was drafted it contained a clause that said that they were not to be counted in calculating the number of people in Australia. Also, where the Commonwealth had power for races, that power did not extend to Aboriginal people. Both of those problems were fixed and the referendum passed overwhelmingly when Australians viewed that it was time to deal with these negative parts of our Constitution. The problem, though, was that even though the explicit negative references to Aboriginal people were removed, problems of race in the Constitution still remain and that possibility still enables discrimination against them today.

PB: The proposal attracted a yes vote of over 90%, which is phenomenal. Do you think that this was just a proposal that's time had come? Or were there things that were done particularly well, in the way the proposal was executed and campaigned for, that we could learn from for future referenda?

GW: There is a lot we can learn from that referendum. One is that you certainly need persistence. That referendum proceeded over a very long time. In fact, there had been a call for change for decades. It wasn't just something that emerged at the end of the process. What happened was that Australians, in particular Aboriginal people, having seen a problem, campaigned for it until it was finally realised in 1967. There was grass roots involvement, and they also had a long-term vision for these types of changes. I think it also shows you can't just run these things through the political process. It does need a level of community involvement. All of those things came together in 1967 more so than on any other occasion and, indeed, it achieved a far higher 'yes' vote than any other referendum.

PB: I guess in stark contrast to that success was when, in 1988, Bob Hawke's government put four proposals to the people, all of which failed spectacularly. Could you just tell us briefly what they were and why you think they were defeated so decisively?

GW: In 1988 the government botched the process badly. It took proposals from its Constitutional Commission that hadn't even been finalised. It thrust them on the Australian public without any consultation. It did so in a way that left people confused and uncertain about the proposals and this was able to be exploited by the 'no' case. The whole process was rushed for an artificial timetable of the bicentenary of white settlement in 1988 and it was no surprise that the four proposals all failed dismally. Pretty much everything that could be done wrong in a referendum was done wrong in 1988.

PB: The opposition was also very effective in some of the arguments they ran. For example, arguing that this was just a move to give more power to Canberra. Are there certain arguments or phrases that tend to reappear in no campaigns?

GW: There are some perennial stalwarts in no campaigns and certainly 'vote no to more power to Canberra' is a successful one. It plays especially well in places like Queensland. Even where a proposal wouldn't give more power to Canberra, the argument is often put anyway because people aren't sure about what they are voting on. You also see 'vote no to the politicians' proposal'. That worked in the 1999 Republican Referendum with 'vote no to the politicians' republic' on that occasion. And you also see the common one of 'don't know vote no' working on the fact people might not know much about the proposal and don't want to know much more if they can help it, suggesting if you are unsure it is best just to reject the idea.

PB: Do you have a favourite successful or failed proposed referendum proposal story?

GW: The one that I keep coming back to is the '67 referendum. That was a referendum that wasn't just about a change to the Constitution but was about an important moment in our nation. It showed that when referendums change things about our constitution, they're not just changing laws on a page but also the social and policy reality in our country.

PB: We've had a Constitutional ice age for some time now. The last time we successfully changed our Constitution was in 1977, which was 35 years ago, and we haven't been to the polls for a referendum since 1999 when we decided not to become a republic. Do you think that's a problem? Is our Constitution too hard to change?

GW: I don't think that it is too hard to change, just that not enough effort is put into doing so. We do have major problems in Australia that require constitutional amendment. People are now out of practice with voting in referenda, particularly voting 'yes' to a referendum, and our politicians are not used to developing these proposals and doing so successfully. For almost a third of a century we haven't had a change to the document. I think these are very large problems of public policy that in the end mean that our system of government will be weaker for the fact that we haven't successfully navigated this test in such a long period of time.

PB: Professor Graeme Orr has argued that we ought to have compulsory voting for general elections but not for referenda.¹ These are often, after all, complex legal questions that people may not have a view on, and when people don't understand they tend to vote no. Do you have any sympathy for the idea that voting in referenda should not be compulsory?

GW: I disagree with that. I think it neglects the fact that there are very good reasons for people to vote in referendums and, in fact, when it comes to the Constitution of the nation, the arguments for compulsory voting are actually stronger when it comes to referenda. I think the argument against compulsory voting is borne out of a frustration given the number of failed referendums. Certainly, the research I've done suggests there is good reason for that failure. In fact, people keep making the same mistakes over and over again, particularly the Labor Party, which has an especially poor record at national referenda. The answer is not to fiddle with how the process runs, in terms of compulsory or voluntary voting, but to actually run a referendum in an effective way that involves people properly and maximises the chances of success.

PB: You just mentioned that the Labor Party has been very unsuccessful in the referendum proposals it has put up. I believe that only 1 out of

¹ Graeme Orr, 'Compulsory Voting: Elections, Not Referendums' (2011) 18 *Pandora's Box* 19-30.

25 referendums it has proposed have succeeded. Is there anything in particular that the Labor Party has been doing wrong?

GW: Labor has tended to make the same mistakes again and again and the most obvious of those is failing to get bipartisan support for their proposals. Of those 25 referendums, Labor only succeeded in getting bipartisan support once and that was in 1946 when Menzies agreed to back Labor's referendum. That was the only referendum of the 25 that passed. You think from that Labor would learn the lesson that you either get that support or you don't put the referendum up, but the fact is that hasn't been the case. We can only hope that in any future referendums Labor learns that lesson and recognises that, in effect, the Opposition has a veto on its constitutional change proposals.

PB: There are currently some proposals being discussed that relate to recognition of Indigenous people in the Constitution and recognition of local government. Could you tell us a bit about what those proposals are and what they would mean in practice if we were to make changes along those lines?

GW: I think those proposals have merit, and when it comes to the recognition of Aboriginal people it is really dealing with the unfinished business of 1967. It deals with removing the final clauses that permit racial discrimination in Australia. One, section 25, recognises that the States could still disenfranchise people on the basis of their race; something that surely has no place in modern Australia. And then there is the races power, which still enables the possibility of discrimination on the basis of race in federal laws.

The local government referendum is about fixing the historic omission of local government from the national Constitution. This made sense a long time ago, given that local government was a creature of the states, but today local government has evolved into more than that into a third tier of our system of government. That's a reason to recognise local government, but there is a particular problem that needs to be dealt with which relates to funding of local government by the Commonwealth. As a result of the recent High Court decision in *Pape*,² direct federal funding of local government has been called into question and it would be wise to fix that problem before it gets worse.

² *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

PB: Could you tell us a bit about what you would like to see change before we go to another referendum? You talk about possibly amending the *Referendum Act* 1984 (Cth) and abolishing expenditure restrictions on the Commonwealth. What other changes would you like to see before we go to the next referendum?

GW: The starting point is to update the machinery of how we conduct referendums. It hasn't been significantly changed since 1912 and it still, for example, recognises that the way people should get information is via a posted pamphlet with 'yes' or 'no' cases that they receive a few days before the election. That just makes no sense today and there is no provision for providing information by the internet and a range of other sources. Also, I think it's been long recognised that people are not effectively educated when it's simply two partisan cases playing against each other. They also want credible independent information that allows them to assess those partisan cases. There was an inquiry³ of the federal Parliament that looked at this and recognised many sensible changes and I can only hope those changes might be made before a future referendum is held.

PB: One final question for you, Professor Williams. Besides the proposals that are already being considered, are there any other issues that you'd like to see on the agenda for change?

GW: There are a lot of things I'd like to see. I'm a republican, for example, so I'd like to see that change. But, I think process really matters and I'd like to start, after these referendums if they occur, with a better process for looking at these proposals. I've put forward the idea of an ongoing commission that assesses proposals put by Australians. I also like the idea of a constitutional convention being held every half-generation, every 10 years, to look at the proposals to determine if they have popular support and whether it makes sense for them to go forward. It costs a lot of money to hold a referendum and I'd like to see money invested to better develop proposals that have broader political and popular support. I think if we did that we'd have a much better sense of what needs to be changed and a much better chance of developing proposals that have a more likely chance of being passed.

PB: Professor George Williams, thank you very much for speaking to *Pandora's Box!*

³ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *A Time for Change: Yes/No? Inquiry Into the Machinery of Referendums* (2009).



Sally Robinson, 'Mary at Home' (2006), courtesy of Justice Anna Katzmann

Mary Gaudron: Shaped by Values

Pamela Burton*

Mary Gaudron was Australia's first and, for a century, only female High Court justice. But she does not want to be remembered for her gender. Nor should she, when her substantive achievements already guarantee her a place in Australia's legal pantheon.

Throughout her legal career the media seemed obsessed with her being a wife and mother, using headlines such as 'the law and the laundry' for stories about her; and 'pregnant pause' when she appeared in the High Court just before her son Patrick was born. It angered her. She wanted to be noted for the substance of her argument, not her form!

A more insightful perspective on Gaudron's life is that, from childhood onwards, she developed a set of guiding values that remained with her throughout her professional life, strongly influencing her decisions as both lawyer and judge, and serendipitously, shaping the opportunities which came her way.

While it was a driving motivation throughout her legal career to prove she was intellectually equal to the best of the men who had made it, there was more. She wanted to achieve social change, and recognised the law as a tool for achieving social justice. Her complex personality and her strong views on how people should treat each other have their roots in a colourful and extraordinary life story.

Gaudron was born into a working class railway community in Moree in northern New South Wales adjacent to a camp of recently dispossessed Aboriginal Australians. Both communities held the status of battlers, somewhat alienated from the rich white business community on the other side of the Mehi River. It was an unlikely start for a child destined to become a Justice of the High Court of Australia. Giving symmetry to her story, she was one of the justices who decided Eddie Mabo's landmark case on indigenous land rights, participated in the related Wik decision, and gave a separate majority decision in favour of the waterside workers in the Patrick Stevedores case. Her biography title *From Moree to Mabo*, succinctly summarises her story – but a lot happened in between.

* BA LL.M. Author, *From Moree to Mabo: The Mary Gaudron Story* (UWAP, 2010).

It was a tough ride, cushioned by a lot of help and elements of luck. Her brilliance was consistently appreciated at the right time and place. She achieved both because of and in spite of her gender and working class background. Intellect, talent, guts and determination are all essential to success, but, in themselves, are rarely enough. This we know, because many brilliant and talented people remain unrecognized despite excelling in their fields. There are usually other factors in play. Life is full of complexities, random events and uncertainties that can determine a person's success or failure. And so it was for Gaudron. Michael Kirby in his foreword to *From Moree to Mabo* said, '[Her] early years demonstrate how life hangs by a thread, depending upon strange events that appear to happen by chance'.

One of the several interesting things about Mary Gaudron's story is that although she had a disadvantaged start in life, she did not see it that way. Apart from some impish boasting that she had slept on dirt floors as a child, Gaudron was always aware of the privileges she and her family enjoyed as white Australians when compared to the nearby neglected and significantly poorer Indigenous community. Despite her family's relative poverty they enjoyed a good quality of life. Mary and her siblings were well-fed, always neatly attired and provided with the best education their parents and the church could afford. Childhood in the railway community was happy, safe and carefree. She and her friends played in the family's large back yard where chickens freely pecked through the grass. Mary's father developed a garden full of vegetables and flowers on a vacant strip of public land that abutted their yard. Unlike her excluded Aboriginal neighbours, Mary and her non-Indigenous friends spent many happy hours playing in the local spa baths, after which, on hot summer days, they would buy ice-creams or cold drinks from the local café. Clydesdales pulled carts of milk, and brought fresh bread to the cottage doors. The railway station across the road housed a community centre for union meetings and social gatherings and the Railway Institute library was open to the workers' children.

Even as a child Gaudron was aware of the large divide between white country society and Aboriginal Australians. We know this because, speaking in 1999, she observed that, while forty years ago an Australian woman had fewer rights than a man, 'her legal status was infinitely superior to that of Aboriginal Australians.'¹ She said, they were 'very considerably less than equal. They were not even counted in the census.' She summed up its impact on her:

¹ Mary Gaudron (on conferral of an honorary Doctorate of Laws), 'Occasional Address, University of Sydney, Conferral of Degrees, 29 October 1999' (2000) 22 *Sydney Law Review* 151, 152.

It was impossible—absolutely impossible—not to be aware that, in the phrase made famous by George Orwell, some people were more equal than others—indeed significantly so.²

Nor did she forget. It shaped her legal philosophy. She later did some deep thinking about the meaning of equality, and how it differed from ‘sameness’. She used the concept of discrimination to develop the notion that people with differences that mattered should not be dealt with in the same manner if equality was to be achieved – and that differences that did not matter should, for justice to be equal, be disregarded. Put simply, she said, “‘Equal justice’ is justice that is blind to differences that don’t matter but is appropriately adapted to those that do.”³

It can be argued that, for Mary Gaudron, a ‘disadvantaged’ working class environment aided her success; it gave her cause to think; to question things she observed around her. Both her family and her Catholic education encouraged that. From a young age she was curious about the way the world worked and how people behaved.

It also helped that Gaudron as a child had the benefit of being immersed in a sub-community that was welded together by union solidarity; something she no doubt recalled when resolving workers’ wage disputes as a Deputy President of the Commonwealth Conciliation and Arbitration Commission.

A further help was that her parents were highly intelligent, and thought about social and political matters. As a child, Mary had thrust upon her every aspect of social justice and injustice that her father associated with Australian society’s class and racial prejudices. Her father wanted a better deal for workers and for Aborigines. Unfortunately, he sat around the kitchen table with his workmates and thumped it passionately while expressing his views. He sometimes frightened his children when alcohol and anger got the better of him. Home life both confused and toughened her. Her father’s political values and union support were a strong influence. But his sometimes violent moods disrupted the household. Because of this mix of sound values and a tendency to erupt, Mary admired, loved and hated him.

Books and scholarships came Mary’s way, feeding her thirst for knowledge. The seed of curiosity was fertilized by her intellect and rich life experience. She expected to *do something* and *be someone* when she grew up.

² Mary Gaudron, (Speech delivered at the UNIFEM Breakfast, Adelaide, 8 March 2005).

³ Mary Gaudron, ‘Foreword’ in Regina Graycar and Jenny Morgan (eds), *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002) vii.

There were fortuitous events and circumstances that fostered that ambition to do *something*. Doc (H.V.) Evatt's visit to Moree in 1951 was an impetus. He was campaigning from the back of a blue Holden ute for the 'no' votes which would block a Constitutional amendment to outlaw the Communist Party. This curious kid wanted to know what a Constitution was. From the crowd, she put her hand up and asked him. The exchange between the driven man and the young girl resulted in Evatt sending her a copy of the Constitution. She waved it around at school telling the kids that she 'knew' what she was going to be when she grew up – a lawyer. Not just a lawyer, but a barrister. When she was later told by a local solicitor that she was aiming too high – girls don't do law and she should consider a job in the telephone exchange – she wanted to prove him wrong.

At eleven Gaudron earned a Catholic Diocese bursary that plucked her out of her Moree world and into St Ursula's College, Armidale. The Ursuline nuns encouraged independent thinking. Ironically, while instilling some sound values, they also gave her the tools to question Catholic dogma. She accepted some of their social values, and rejected others.

All in all, Mary Gaudron's childhood in Moree gave her a rich education from a young age. It exposed her to issues of social and racial inequality and to the political and industrial realities of the times. It provided much for her to chew on when formulating the beliefs and values she would come to live by. Later, having chosen a career in law, she believed that using the law was the best way to address the discriminatory attitudes and injustices that troubled her. Her faith in the law is likely to have had its roots in the University of Sydney Law School, a place where students marvel at the power of the law with its legislative and common law components, its use of language and logic and the divergent ways in which a body of law evolves depending on the philosophic approach and style of reasoning of its judicial handlers. But finding discriminatory attitudes against women came as a shock. On first arriving at the Law School she discovered that it was a boys' domain:

The first indication that things might be amiss was when I was taken to the Women's Common Room and could not fail to observe that it had in the previous year served as a men's urinal. The next thing that indicated things weren't entirely as they should be was when I attended lectures, all of which commenced with the salutation, 'Gentlemen'. Just that – 'Gentlemen'.

She was barely conscious of women's inferior role during her childhood in Moree. In working-class families, she later said, women were often the mainstay, handling the finances and organising the children's education, and

that 'It was not until I got to university that the idea of special problems for women began to percolate through the old grey cells'.

Nevertheless, exposed to big intellects like Julius Stone and Frank Hutley, rivals of a sort, she was selectively influenced by both, picking and taking what she saw as needed to make up her legal tool box – Stone's progressive social values and Hutley's regard for the existing law. She excelled, developing an independent mind and using her photographic memory in examinations where detail was required. When she won the Sydney University medal in law it was not a matter of luck. It was a reward that came through hard work and superior intellect.

Although Gaudron emerged from university academically victorious, it was not enough. At the Sydney bar she confronted more prejudice. Brains alone could not overcome the conservatism of her bar colleagues that made progress difficult for women. She has many anecdotes of absurd discrimination, and her gutsy reaction to it. Her witty and sharp retorts to offensive or nasty comments were exquisite, causing bystanders to laugh, and her victims to wince. Some called her 'Mary the Merciless'. Nevertheless, she excelled as an advocate and earned the respect of her colleagues, despite her temperamental behaviour and use of 'colourful' language. Her personal experience kept shaping her thinking on discrimination and strengthened her resolve to do her bit to fix it.

She was also the beneficiary of good timing, people who were good to her, and sheer luck. At the Bar Gaudron soon 'hooked' into the circle of Labor lawyers, including Clive Evatt (senior) QC, who then had a roaring practice in defamation and negligence cases – the 'defo' and 'nello' factory that arose out of 'no win no fee' practices. Gaudron embraced the opportunity.

Evatt's habit of 'flicking' briefs when he was jammed saw Gaudron pick up a brief in which Clyde Cameron MP had a deep interest, one involving Mount Isa mine worker, Pat Mackie. Jim Staples had taken the case over, and Gaudron became his 'junior'. Gaudron saw Mackie as a fighter for workers' justice and was impressed by his passion. Through Staples and that case, Gaudron met Cameron. It was important to her career.

Gough Whitlam became Labor Prime Minister in December 1972. He asked Cameron, who was not yet sworn into the Ministry, to seek the reopening of the 1972 Conciliation and Arbitration Commission's Equal Pay case just a few hours before the Commission's decision was due to be given. Cameron remembered Gaudron from the Pat Mackie case. He arranged for Whitlam to give her the Equal Pay case brief. It was a lucky break. She was the first

woman to appear for the Federal Government in a national pay case. The publicity put her on the legal map.

In 1974, aged 31, she was appointed a Deputy President to the Commission itself; the youngest Federal Judge – and second woman. Her colleague Jim Staples followed soon after. Two cases in particular were important to her. Both concerned equity for working women. One was the Municipal Officers Association of Australia's successful claim that a clause be inserted into their award to prevent Queensland local governments from sacking women who married.⁴ The other was the national *Maternity Leave* case.⁵

She was effective in her work and won Bob Hawke's praise in particular for the strong role she played in the resolution of the Telecom dispute in 1978. Hawke was then President of the ACTU and led the union representatives in the conference of the warring parties chaired by Gaudron. It was more good fortune that Hawke witnessed her ability in action for it was his government that later appointed Gaudron to the High Court.

But in May 1980, Gaudron stormed out of the Commission over an incident concerning the Government's treatment of Jim Staples, an outspoken judge who was embarrassing the government and the Commission about his views on wage indexation guidelines. She did the unthinkable and resigned, forgoing her judgeship over a matter of principle. As it transpired, her shock resignation proved to be a good career move. The travel involved in the Commission's work was taking a toll on her personal life, and it was not where she wanted to be for the coming decades of her legal career. A Liberal government was in power federally, and Labor was in power in NSW, and she had reason to sense that there were better career prospects for her with the State government.

Six months later, at the end of 1980, she was appointed NSW Solicitor-General, the first female State solicitor-general. It was a job she enjoyed, despite some rocky moments. She was attracted to the Wran government's agenda of social reform but was sidetracked by the crime and corruption issues that plagued it. This was the time when the so-called 'Age tapes' revealed dicey dealings of magistrates, police and politicians with crime bosses, gamblers and drug dealers. Gaudron became a controversial figure. Yet an analysis of her opinions confirms that she was 'frank and fearless' in the advice she gave. Those who worked with her marvelled at the speed with which she could carefully study and absorb mountains of briefing material, arrive at the essence of a problem, and provide firm and correct opinions. Premier Neville Wran

⁴ *Re Municipal Officers (Qld) Consolidated Award 1975* (1978) 203 CAR 584.

⁵ (1979) 218 CAR 120.

always followed her advice. ‘Gaudron’s law’ was a powerful force behind the scenes.

As Solicitor-General she displayed a high level of understanding and expertise in Australian federalism and the interaction of State and Commonwealth powers – a capacity that became one of the reasons why she was later recognised as suitable for appointment to the High Court. She appeared before the High Court in several significant constitutional cases. In 1982 in the *Commonwealth v Hospital Contribution Fund*,⁶ a case concerning the arrangements within the State courts for the exercise of federal jurisdiction, she persuaded the court to overrule the two previous High Court decisions on the point.⁷ Other significant constitutional cases in which she appeared before the High Court included *Hematite Petroleum v Victoria* and *Stack v Coast Securities (No 9)* in 1983 and *Gosford Meats Pty Ltd v New South Wales in 1985*.⁸ She also appeared in *Miller v TCN Channel Nine* in 1985,⁹ a case concerning the constitutional guarantee of free trade and commerce between the states (section 92). Importantly, she appeared in the *Tasmanian Dam* case in 1983,¹⁰ a landmark in Australia’s constitutional history over the use of the Commonwealth’s external affairs power.

When her good friend, Lionel Murphy, became the first High Court judge to be tried for criminal offences by a judge and jury, she was criticised for her open support for him. He was acquitted, but died soon after, ironically leaving the Hawke Government with two vacancies to fill. Before Murphy died he made it known to Prime Minister Hawke that it was time to appoint a woman to the High Court. Hawke understood that Murphy had Gaudron in mind. He had first-hand evidence of her capability and saw in her two important attributes: a keen mind and a good heart.¹¹

Appointed to the High Court in 1987, Gaudron did not need luck to prove her worth. Her intellect, clear thinking, logical reasoning and her ability to see issues from different angles, was much admired by her judicial colleagues. The Court she joined was led by Chief Justice (now Sir) Anthony Mason. The ‘Mason Court’ as it became known, is said to have changed the Court’s whole approach to interpreting and applying the law and the Constitution. It gave rise

⁶ (1982) 150 CLR 49.

⁷ See *Kotsis v Kotsis* (1970) 122 CLR 69 and *Knight v Knight* (1971) 122 CLR 114 in which it was held that in federal cases the judicial power of a State court could only be exercised by its judges, not by its administrative officers.

⁸ (1983) 151 CLR 599; (1983) 154 CLR 261; (1985) 155 CLR 368 respectively.

⁹ (1985) CLR 556.

¹⁰ *Commonwealth v Tasmania* (1983) 158 CLR 1.

¹¹ See Pamela Burton, *From Moree to Mabo: the Mary Gaudron Story*, UWAP 2010, p. 251.

to extensive debate on the Court's role. As history tells, interesting questions arose about Gaudron's approach to her role in her sixteen years on the Court. Subsequently, the Court under Chief Justice Murray Gleeson was seen to have retreated from the social justice 'activism' of the Mason Court, to a more legalistic approach. Some jurists suggest that Gaudron retreated, too, or was swayed in her views by other members of the Court. Was she influenced by other judges, or was she in fact a significant influence? The questions are asked, because she is a difficult judge to characterise or slot into conveniently labelled jurisprudential boxes (e.g. activist or black letter) as some legal academics are wont to do. It seems accepted now that such boxes are past their use-by date and should be thrown out.

While Gaudron was legalistic in her approach, not liking to strain the language of enactments, and obedient to precedent, she was seen to have reached many decisions that represented shifts in the law that accorded with contemporary social expectations. It was through intricate legalistic reasoning and rigorous application of logic that she managed to bring basic principles which reflected her own value system to some decisions.



Above: The Brennan High Court on the occasion of the induction of Justice Michael Kirby, February 1996. Sitting (from left to right), Justice John Toohey, Chief Justice Gerard Brennan, Justice Mary Gaudron; standing (from left to right), Justices Michael Kirby, Daryl Dawson, Michael McHugh and William Gummow. Photograph: David Coward, permission courtesy of the High Court of Australia

By way of example here, her joint majority judgement with Justice Deane in the case of *Banovic* provided a legal analysis of indirect discrimination which demonstrated that equal treatment did not equate with non-discrimination.¹² The case concerned the employer's practice of 'last on, first off' for retrenching workers. On the surface it was not discriminatory, as more men than women were retrenched. However, a group of eight retrenched female workers successfully claimed they were discriminated against because of the employer's preference for recruiting men. They waited longer to be employed and lacked employment seniority, and were therefore more vulnerable to retrenchment. The majority of the court agreed that the 'last on, first off' formula was flawed in a workforce that was predominately male.

Gaudron was also attuned to discrimination against women in domestic situations, and in the case of *Van Gervan v Fenton* she added persuasion to her reasoning.¹³ In that case the Court considered the method of assessing the notional value of the time spent by a wife who provided attendant care services to her injured husband. The majority held that compensation should be measured by reference to the market value of the services provided rather than to the family member's forgone earnings. Gaudron agreed, but took the opportunity of exposing the erroneous assumption behind the argument that deduction from the market value should be made for the domestic services previously provided by the injured man's wife. She said that the argument that services given by his wife before the accident were 'needed' by her husband, rather than being part of a normal domestic relationship was an assumption that implies 'incompetence and selfishness of a very high order'. The argument was that the injured man already had the services of a wife and, therefore, to the extent that the accident gave rise to a need for those services, no requirement for compensation for those services arose. 'At best', she said, 'that equates a wife to an indentured domestic servant – which she is certainly not'.

During the Mason years she joined the majority in some notable cases that interpreted the law to reflect contemporary values and for which she has frequently been cast as an activist. Perhaps the most publicised case of this time is *Mabo v Queensland (No 2)*¹⁴ about which so much has been written. The case provides another example whereby the Court rejected a common notion that had been incorporated into the law through an erroneous assumption, error of fact or lack of understanding – Australia being *terra nullius*, unoccupied when settled by the British.

¹² *Australian Iron and Steel Pty. Ltd. v Banovic* (1989) 168 CLR 165.

¹³ (1992) 175 CLR 327, 350.

¹⁴ (1992) 175 CLR 1.

Justices Deane and Gaudron came under particular criticism for what has been described as a 'moralising tone' in their joint judgement in describing the dispossession of the Aboriginal peoples of most of their traditional lands as a 'national legacy of unutterable shame', and 'the darkest aspect' of Australian history. After Mason's retirement, the Aboriginal land rights case of *Wik* followed, and was perhaps more important in practical effect. Gaudron, like Justice Gummow, utilised her special knowledge of equity principles in their application to real property rights and entitlements, and in her separate majority judgement demonstrated her analytic textual approach and application of logic to reach what might be described as a social justice-oriented outcome.

Mabo was not the only reason that the Mason Court was labelled 'activist'. A line of cases which explored and developed implied rights in the Constitution also gave rise to controversy. One such of importance to Gaudron was the implied right to a measure of procedural fairness in the exercise of the judicial power dealt with in Chapter 111 of the Constitution. It provides an example of the way she combined the two different approaches to the judge's role, using the existing law in an original way as a tool for social justice, and displaying the influences on her thinking of both Frank Hutley and Julius Stone. She was not always as sweeping in her approach as some other judges, but was as strong in result. In *Dietrich v The Queen*, a case concerning fair trials, she argued that the judicial function had to be exercised in accordance with the judicial process or it was not an exercise of judicial power under section 71, and could not be exercised by a federal court. She did not join in with suggestions that rights could be implied from the democratic system of government recognised by the Constitution as a whole. Yet, her more legalistic approach permitted an effective block to various attempts by the Federal Government to restrict the right of review of administrative decisions concerning immigration. She was influential on later courts in developing reasoning to the effect that, if an administrative decision ignored principles of procedural fairness, it was not a 'decision' from which a review could be prohibited under Commonwealth law.

Helpful here was what she called the 'genius' of the Constitution – subsection 75(v). This gives to everyone in Australia the right to approach the High Court to compel Commonwealth authorities to perform their constitutional and statutory duties, and to prevent them from acting in excess of their powers. Understanding its intricacies is not easy, she conceded, as this 'small subsection ... has been known to reduce grown men to tears'.¹⁵ In its application it 'guarantees the rule of law' in Australia, because it operates to ensure that the right to a hearing is not thwarted by arbitrary decisions. She has enshrined section 75(v) by having her few words about it stencilled into the portrait

¹⁵ Gaudron, above n 2.

commissioned from artist Sally Robinson by the Bar Association of New South Wales.

Gaudron's decisions on citizenship, immigration and refugees are amongst many where applications of her principles have effected increased protection for the vulnerable. Her analysis and development of concepts of 'equal justice' and the intertwining notion of 'discrimination', decisions concerning implied rights in the Constitution, and her concern for fair trials and procedural fairness are part of her legacy to Australia's legal history.

As early as 1998, Gaudron was tired and possibly a little disillusioned. She had faced ill-health and serious surgery. She resolved to retire at age sixty in 2003, the centenary of the High Court. Having become a well-regarded jurist, she might have stayed on the Bench and kept open the chance of becoming Chief Justice of the Court. But her motivation had waned. She wanted to enjoy a more normal family life.

On her retirement, she was surprised that a woman had not replaced her, and the bench again consisted of a bunch of men. Disappointed, she said to an audience of women lawyers: 'We muffed it'. But by then she had made her mark on the development of Australian law, and it does seem she now believed that the law, the tool she had been employing, was blunt in its effect. Precedent still plagued the High Court, as it does in our common law system. She would have preferred greater freedom to apply underlying principles rather than precedents that no longer reflected contemporary values.

On her retirement from the Court in 2003, ten years before she was required to do so, she started to speak out about human rights, discrimination and injustices, Australia's treatment of asylum seekers, and other matters. She accepted a position on the United Nations International Labour Organisation's Administrative Tribunal, spending some months of each year in Geneva. The tribunal operated with a blend of continental code law and common law style practices, and she enjoyed the work.

Mary Gaudron has many personalities – all of them lively. She has a barbed wit which she used with calculated persuasive intent. Throughout her legal career she conformed sufficiently to be listened to. She also swore enough to be taken notice of. With the right mix of conformity and rebellion, she highlighted both in and out of court, the injustice, unfairness, irrationality and illogicality of so many social attitudes.

“What happened to the Party?” Native Title 20 Years On Bryan Keon-Cohen AM QC*

In May 1982 five Murray Islanders issued a writ in the original jurisdiction of the High Court. They were Eddie Mabo, Celuia Mapo Salee¹, Revd Dave Passi,² his elder brother Sam Passi³ and James Rice.⁴ They sued on their own behalf, and “on behalf of their respective family groups” – ie, a representative action from day one. Their litigation – *Mabo* – was, in one sense, unremarkable: an action at common-law about interests in property that sought declarations, injunctions and damages. *Mabo* visited the High Court twice during a decade of forensic trench warfare and resulted, however, in a profound declaration that established native title.⁵ After all this effort, the High Court announced a new principle: that the common law of Australia, in appropriate circumstances, recognised as legally enforceable rights, the traditional rights and interests of indigenous people to their country.

When the High Court handed down *Mabo (No 2)* on 3rd June 1992, I appeared for just two remaining plaintiffs - Dave Passi and James Rice – to take judgment. Over the decade, of the original five, two had died (Celuia Mapo Salee and Eddie Mabo) and a third had withdrawn and thereafter became unwell (Sam Passi). But in another sense, the plaintiffs had expanded dramatically. Following discussion with the Bench (especially Justice William Deane) on day three of the final hearing in May 1991, the representative action was re-cast and enlarged, to become an action by the then three remaining plaintiffs⁶ on their own behalf, and on behalf of the entire “Meriam

* PhD, Member of the Victorian Bar; junior counsel in *Mabo (No 1)* & *(No 2)* 1982 – 92. My thanks to Alexandra Galanti and Erik Dober, law students at La Trobe University, for their research assistance. Any errors remain my own.

¹ Eddie Mabo’s aunt, an elderly lady in 1982 who died, prior to the trial commencing, in 1985.

² Anglican Minister serving on Murray Island and member of an influential Meriam family. He discontinued in October 1986, one week prior to the trial commencing. He was re-admitted as a plaintiff, by order of the trial judge, after opposition from Queensland and legal argument, in 1989, with the trial still part-heard.

³ Dave’s elder brother, former Council Chairman. He too discontinued with Dave in October 1986, suffered a mild heart attack, gave limited evidence for the plaintiffs in 1989, but did not re-join as a plaintiff.

⁴ School teacher, ex Council Chairman.

⁵ See *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (“*Mabo (No 2)*”)

⁶ Eddie Mabo died of cancer on 21/1/1992 in the Royal Brisbane Hospital.



L to R: Greg McIntyre (solicitor) Ron Castan QC, Eddie Mabo and Bryan Keon-Cohen (junior counsel) outside Court No 1, High Court of Australia, May 1991 waiting to commence final argument in *Mabo (No 2)*. Picture courtesy of Dr Bryan Keon-Cohen AM QC, as featured in B A Keon-Cohen, *Mabo in the Courts: Islander Tradition to Native Title: A Memoir* (ASP, 2011).

Community” – whoever they might be.¹ This very late amendment to the pleadings was reflected in the High Court’s final order:

“... declare that ... the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the Murray Islands ...”²

After the Court adjourned I returned to the 6th floor of the building and rang Murray Island on the community’s only available phone at that time – a public phone booth located outside the Council Chambers – to break the news. A lady answered, screamed with delight, and headed off down the beach-side road yelling - “We won! We won!” - leaving the receiver, and me, dangling in the tropical breezes. I’m told the Murray Islanders partied long and hard that night.

I WHAT RIGHTS? – OR – SO WHERE’S THE PARTY?

That was 3rd June 1992. Twenty years on, how’s the party going? What is the state of play concerning native title processes across the nation? What, if anything, has the past twenty years revealed about the ability of Australia’s social, political and legal systems to accommodate radical change, especially the notion that our indigenous citizens may enjoy legally enforceable property rights to areas of lands and seas, not by the largesse of governments and parliaments, but for more profound reasons, ie, that that title is founded, whether the community and its politicians like it or not, in a sometimes poorly understood and complex amalgam of prior occupation and possession of the continent (and adjacent islands); indigenous custom and tradition; and Australian common and statutory law?³

The short answer is a very mixed bag: some euphoria but also many headaches, hangovers, and considerable heartache. We have seen both significant gains

¹ See B A Keon-Cohen, *Mabo in the Courts: Islander Tradition to Native Title: A Memoir* (ASP, 2011, 2 Vols) for these and other propositions. A new edition is being prepared with new publishers, entitled *Bryan Keon-Cohen’s Mabo in the Courts: A Memoir*. Orders can be made to the author only at bkcchambers@optusnet.com.au. The total number of people comprising the “Meriam Community” is unknown. At any one time, 200 – 300 live on the island, with many more living on the mainland.

² *Mabo (No 2)* 217. Damages and restraining orders were not sought before the High Court. The plaintiffs had led no relevant evidence, and counsel had enough to contend with, focusing on the issues of principle.

³ See further below; and see, as to prioritizing prior possession as the proper and sole foundation, Shireen Morris, ‘Re-evaluating *Mabo*: the Case for Native Title Reform to Remove Discrimination and Promote Economic Opportunity’ 5 (3) *Land, Rights, Laws: Issues of Native Title*, (June 2012) AIATSIS, Canberra, 1 – 13 (“S. Morris 2012”).

and many losses along the way. On the positive side *we do have* a national legislative scheme supposedly intended to recognize and protect native title, and “to establish a mechanism for the just and proper ascertainment of native title rights and interests”.⁴ However, as is well known, the *Native Title Act 1993* (Cwth) (“NTA”) was significantly amended, delivering “bucketloads of extinguishment” in 1998 following the High Court’s *Wike* decision, i.e., the Howard Government’s “ten point plan”.⁵ The NTA has been further amended, in minor ways, since then;⁶ Victoria has brokered an entirely new settlement scheme by-passing the NTA altogether;⁷ and, as at September 2012, more amendments have been proposed by the Greens, and very recently by Attorney-General Nicola Roxon. I have described these as “welcome fiddling around the edges, but fiddling none the less”.⁸ These are discussed below.

During these twenty years, still on the positive side, as at 3 June 2012, 475 unresolved claims for a determination of native title had been filed. 185 had been determined. Of these, 141 succeeded, in whole or in part (covering about 16% of the continent) while 44 failed.⁹ Of more significance, perhaps, is that of the 141 successful claims, 70% were determined by agreement.

In addition, eight claims for compensation had been filed but none had succeeded.¹⁰ In Social Justice Commissioner Tom Calma’s words: “The compensation provisions [of the NTA] have ... failed dismally.”¹¹ He cited *Jango*¹² as the leading example:

“In 2006, applicants who primarily represented the Yankunytjatjara and Pitjantjatjara people, claimed compensation for extinguishment [of native title] ... in [and around] Yulara. Yulara ... is a town which sits in the shadows of Uluru. Their claim for compensation was denied. If the

⁴ *Native Title Act 1993* (Cth) (“NTA”) s 3 (objects) and preamble.

⁵ See *Wike Peoples v Queensland* (1996) 187 CLR 1; and comments of the then Deputy Prime-Minister, Tim Fischer.

⁶ See especially *Native Title Amendment Act 2009* (Cth) which, inter alia, empowered the Federal Court to manage native title claims, especially mediation: see NTA s 86B(1); *Native Title Amendment Act (No 1) 2010* (Cth) which creates a new future act process for construction of public housing for communities on indigenous held land: see Australian Human Rights Commission *Native Title Report* (“AHRC”) 2011, p 36.

⁷ See *Traditional Owner Settlement Act 2010* (Vic).

⁸ Author’s letter, *The Australian*, 7/6/2012.

⁹ See NNTT *Annual Report 2010-2011*, pp 23-24; Marcus Priest, “Mabo’s Legacy: Joy and Sorrow: *Weekend Australian Financial Review*, 2-3/6/2012, p 50.

¹⁰ See, for one such failure and the most substantial judicial discussion to date of this complex area, *Jango v Northern Territory* (2006) 152 CLR 150.

¹¹ T Calma, ‘Native Title in Australia: Good Intentions, a Failing Framework?’ *ALRC Reform: Native Title 2009* (Issue 93, 2009) p 7.

¹² *Jango v Northern Territory* (2006) 152 CLR 150; [2006] FCA 318.

traditional owners of the red centre of this country, an area which most Australians see as the heart of Indigenous Australia, cannot gain native title – let alone compensation – then where will Indigenous people be able to succeed?”¹³

Indeed, when it comes to “just terms” compensation mandated by the *Constitution*, s 51(xxi) and the NTA, after 20 years, nobody knows, even in terms of guiding principle, how extinguishment or impairment translates into dollar numbers, or any other form of compensation.¹⁴

Unquestionably the scheme’s most successful aspect is its focus on agreement-making as an alternative to litigation when processing native title claims and in regard to third parties seeking to access and use claimed land. As to claims, amendments to the NTA in 2009¹⁵ require the Federal Court to refer all claims to the National Native Title Tribunal (“Tribunal”) for mediation. However, these mediations are no walk in the park. The Tribunal reports that the average time for claims determined by consent was 71 months (almost six years) whereas for litigated determinations, the average was 84 months (seven years).¹⁶ Clearly, reaching agreement can be as time-consuming, costly and exhausting as litigation. Further, this process, experience now shows, can all too often trigger significant disputes both within a claimant community and between it and its traditional neighbours – dubbed “lateral violence” by Commissioner Mick Gooda in his latest report.¹⁷ Issues concerning the precise location of boundaries (requiring a level of precision demanded, not by traditional owners, but by respondents); who should claim what country; and who enjoys what traditional rights and interests in what areas, are frequent candidates for trashing the party.

II VICTORIA PARTIES NEXT DOOR

One of the most successful agreement-making exercises – albeit outside of, and as an alternative to the NTA – has arisen in Victoria under its new Traditional Owner Settlement legislation – “the first state to achieve the sort of true land justice that was intended by the NTA”.¹⁸ Announcing the Victorian Native Title Settlement Framework in June 2009, the then Attorney General, Rob Hulls, following four years of negotiations, spoke of:

¹³ Calma, above n 17.

¹⁴ See B A Keon-Cohen, ‘Compensation and Compulsory Acquisition under the Native Title Act 1993’ (2002) 28 *Monash Law Review* 17 – 58.

¹⁵ See *Native Title Amendment Act 2009* (Cth).

¹⁶ NNTT *Annual Report 2010 – 2011*, p 25.

¹⁷ AHRC 2011 Ch 2 pp 74 – 115.

¹⁸ See AHRC, *Native Title Report 2009*, p 47.

“... a partnership between the state and traditional owners [that] has produced an out of court alternative to the conventional [ie, NTA] process, the Victorian Native Title Settlement Framework.”¹⁹

Amongst the Framework's objectives, it intends to:

“... establish a streamlined, expedited, and cost-effective approach to settling native title claims by negotiation, resulting in equitable outcomes consistent with the aspirations of traditional owners and the state.”²⁰

In 2010 the facilitating legislation was enacted – the *Traditional Owner Settlement Act 2010* (Vic) – reviving ‘the party’ in that state. Thus, on 22 October 2010 the first settlement package was finalized when the Federal Court issued a consent determination arising from the Gunaikurnai people's claim, accompanied by the signing of a *Recognition and Settlement Agreement*, enabled by the new legislation. In the result, traditional ownership to some 22,000 sq km of East Gippsland was recognised.²¹ The package included:

“... a determination that native title exists over land and water ... and a Recognition and Settlement Agreement (an ILUA) the first under the Victorian ... Framework. That agreement includes provision for the grant of Aboriginal title [a Victorian title created by the Settlement legislation] to 10 parks and reserves ... to be jointly managed by the Gunaikurnai people and the State Government under a joint management plan.”²²

Similar settlements of native title claims under this alternative scheme have been achieved in Victoria including for the Yorta Yorta people who, famously, failed to satisfy the Federal and High Courts that their claimed native title rights to large areas of northern Victoria and the Riverina had not been “washed away by the tide of history.”²³

Another realm of agreement making where much has been achieved across the nation lies in the NTA's future act regime and the abovementioned “rights to

¹⁹ R Hulls, Speech to AIATSIS Native Title Conference, Melbourne, 4/6/2009.

²⁰ Victorian Department of Justice, *Objectives of the Native Title Settlement Framework*, (June 2009) cited at AHRC 2011, p 48.

²¹ See *Mullett on behalf of the Gunai/Kurnai People v Victoria* [2010] FCA 1144 (22/10/2010, North J). After much backsliding by Canberra, the Victorian and Federal governments each contributed \$6 million towards the \$12 million settlement package.

²² NNTT *Annual Report 2010 – 2011*, p 27; AHRC 2011, pp 38-40.

²³ See B A Keon-Cohen & P Seidel, ‘The Yorta Yorta Native Title Claim: Litigation, Negotiation and Partial Settlement, 1994 – 2012 and Continuing’ in T Bauman & L Glick (eds) *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 242 – 262 (“*Limits of Change 2012*”).

negotiate.” To 3 June 2012, according to media reports, “almost 600” Indigenous Land Use Agreements (“ILUAs”) and “thousands more private deals with companies” have been finalized.²⁴

III HEADACHES, HANGOVERS AND HEARTACHE

But amongst all these achievements is a serious down side: for most, the party is over. Indeed, many communities complain that it never started. Twenty years on we can say, without any doubt, that native title rights are unattainable for many indigenous communities, such that the former regime of denial and injustice remains securely in place. This applies, especially unjustifiably, to those communities most impacted by colonization along the eastern seaboard of the continent. The destructive impact upon traditional culture and connection to country since 1788 of policies and legislation that enabled dispossession and settlement (not to mention the removal of children from their communities) coupled with the extensive validation of Crown grants – especially “intermediate period acts” – achieved by the NTA and compounded by the 1998 *Wik* amendments, means that through no fault of their own, such claimants are entirely shut out of the promised benefits of *Mabo*. The well-known historical dispossession and many injustices perpetrated upon the original occupiers – the “darkest aspect of the history of the nation” spoken of by Gaudron and Deane JJ in *Mabo (No 2)*²⁵ – now compounded by a second wave of dispossession constituted by the failings of the native title scheme, give impetus for calls for both radical change, and claims in the conservative press the *Mabo* has produced nothing but “collective misery”.²⁶ Indeed, in its submissions to a Senate Committee concerned with reversing the onus of proof in claims, the Tribunal considered that requiring a government party to argue that “continuity had effectively been broken because of actions that in our modern human rights climate would be considered abhorrent, e.g., genocide or other breaches of international human rights law” might achieve “positive behavioral changes” in government parties”, i.e., might encourage state respondents to accept a lower standard of proof.²⁷

²⁴ Marcus Priest, “Mabo’s Legacy: Joy and Sorrow,” *Weekend Australian Financial Review*, 2-3/6/2012, p 50. As at 30/6/2011 the figure was 497 registered ILUA’s: see NNTT *Annual Report 2010-2011*, p 23. An ILUA is an Indigenous Land Use Agreement negotiated under the NTA by claimants and those seeking to access and use traditional land. See, for further statistics, G Neate, “It’s the Constitution, it’s *Mabo*, it’s justice, it’s the vibe”: Reflections on developments in native title since *Mabo v Queensland (No 2)* in *Limits of Change*, 188 – 225.

²⁵ *Mabo (No 2)*, 109.

²⁶ Gary Johns, ‘Mabo’s lofty dreams of native title dissolve into collective misery’, *The Australian*, 7/6/2012, p 16.

²⁷ Senate Constitutional and Legal Affairs Committee, Report *Native Title Amendment (Reform) Bill 2011* (Department of Senate, November 2011), p 33.

Almost without exception²⁸ all stakeholders – governments, third-party users, judges of the High Court and Federal Court, and most importantly, indigenous applicants and their support organisations – are, for various reasons, critical, disappointed, and frustrated with the legislative scheme and their experience under it. All of these players, for a decade or more, have urged the federal government to amend the NTA to overcome numerous log-jams in the system. To date, save for tinkering around the edges, and despite Attorney-General Roxan's announcements in Townsville on 6th June (discussed below), no government since the Howard Government, with its Wik amendments of 1998, has done so. As is well known, those amendments and their accompanying "Ten Point Plan" promised, and achieved, "Bucket-loads of Extinguishment" in the infamous words of the then Deputy Prime Minister, Tim Fischer.²⁹ In 2010, the Australian Human Rights Commission complained:

"The Australian government has introduced some welcome reforms to the native title system in recent years. ... However, [it] has failed to address the most significant obstacles ... to the full realization of [indigenous] rights. These ... include the onerous burden of proving native title; the injustices of extinguishment; and other impediments to negotiating just and equitable outcomes."³⁰

Thus, especially since 1998, the NTA's principle objectives – to recognize and protect native title and to provide an efficient and fair system of processing claims – have been progressively abandoned and distorted into a system notable mainly for its ability to frustrate, rather than facilitate, claimants. How has the party imploded? And can it be revived? More particularly, in regard to achieving substantial reform, should major stakeholders rely only on the current invited guests, or should we open the doors and invite the Australian community at large – and thereby, hopefully, party on?

IV WHO'S RESPONSIBLE? WHO STOPPED THE MUSIC?

Several factors are at play. The first is what many commentators perceive, variously, to be failings in,³¹ or misunderstanding of,³² the rationale of the lead

²⁸ The Greens in the Australian Senate are one: see below.

²⁹ That same politician, in a burst of gross irresponsibility, proceeded to insult the High Court judges who delivered the *Wik Decision* (holding that in Queensland, native title could co-exist with pastoral leases) as a "bunch of pissants." Fisher was subsequently forced to apologise to the Chief Justice.

³⁰ AHRC 2010 *Native Title Report*, p 13.

³¹ Morris, above n 9, 2-9.

³² Kent McNeal, 'Mabo Misinterpreted: The Unfortunate legacy of legislative distortion of Justice Brennan's judgment' in *The Limits of Change*, 226-35.

judgment by Brennan J in *Mabo (No 2)*³³ which failings, in turn, flowed through to the crucial definition of native title formulated in the NTA, s 223. These criticisms focus mainly on (1) discriminatory treatment accorded to native title since it is not-alienable and not indefeasible, as compared to equivalent common laws titles e.g., fee simple; (2) native title is generally, in practice, held to be a communal landholding, a feature that, coupled with inalienability, impedes traditional owners’ ability to utilize this land to bridge the economic and social gap; and (3) that (contra Toohey J in *Mabo (No 2)*)³⁴ native title is not founded on the relatively simple facts of prior occupation and possession, rather, on the much more problematical, fact-specific proof of connection by reason of custom and tradition.³⁵ There is much force in this analysis which has been repeatedly raised by leading academics and policy activists over the years.³⁶

A second series of headaches lies in High Court decisions which have interpreted key provisions of the NTA, especially s 223 (1), in a manner never contemplated by the Parliament, placing *additional* significant evidentiary and legal obstacles in the path of claimants. Thus, the evidential burden upon claimants to demonstrate continuing traditional connection founded not on the simple fact of occupation and possession prior to sovereignty (eg 1788) but custom and tradition – always formidable – got even higher. Further, in *Yorta Yorta*³⁷ the Court introduced notions of an ancestral community being required to exhibit a “normative society” governed by “normative rules” of custom and tradition, as also must the *current claimant community* itself. In addition, the requirement of demonstrating “continuing connection”, founded on customs and traditions, to claimed land, being a connection that has not been “substantially interrupted” since settlement has proven, in practice, an impossible and oppressive hurdle, amounting to simply another round of post-colonial oppression.

The result, as mentioned, is that in closely settled regions – e.g., the Eastern Seaboard – where dispossession and cultural destruction since 1788 has been greatest, those very same communities now have the least chance of successfully ‘proving’ their native title to the satisfaction of the courts or

³³ See *Mabo (No 2)* 16-76 (Brennan J).

³⁴ See *Mabo (No 2)* 175-217, especially 207-214 (Toohey J).

³⁵ See S Morris, at 6-7. As to possessory title in this context, see Kent McNeal, *Common Law Aboriginal Title* (OUP, 1989) a seminal work relied upon by the plaintiffs in *Mabo (No 2)*.

³⁶ See e.g., R H Bartlett, *Native Title in Australia* (2nd ed., Butterworths, 2004) 24-32 (“Bartlett 2004”); Noel Pearson, ‘Land is Susceptible of Ownership’ in *Up From the Mission* (Black Inc, 2009) 100 – 132; Simon Young, *The Trouble with Tradition* (Federation Press, 2008) 233 – 288. .

³⁷ *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

governments. This remains a glaring problem productive of much heartache and injustice. Truly, for these groups, the party never started.

Third is the Howard government's Wik amendments of 1998 which, again, damaged the interests of claimants and benefited those who oppose the very notion of native title – and there remain many still lurking, alive and vocal, in the Australian community.³⁸ These amendments (amongst one useful reform which established ILUAs), coupled with state complimentary legislation, 'validated' many extinguishment acts by governments; watered-down the right to negotiate provisions by allowing states to introduce exemptions; and introduced a tougher 'registration test' which claimants must meet in order to achieve 'rights to negotiate'. None of this has been wound back by subsequent governments. All of it was unnecessary, fueled by exaggerated fears of "uncertainty", and was contrary to the spirit of the original NTA. As Social Justice Commissioner Tom Calma said, these 1998 amendments:

"... seriously undermined any benefits the Act could offer [to] Indigenous Australians. The amendments provided the "bucket loads of extinguishment" that the then government promised, and shifted the fragile balance of power and possible benefits from [Indigenous] people to the already powerful non-indigenous interests."³⁹

These amendments virtually doubled the size of the NTA; produced Kafkaesque complexity, and appeared to be motivated then, and now, by a peculiar meanness of spirit when it comes to acknowledging injustice and sharing this country with its original occupiers. It is this obsession to identify and detail every possible extinguishing event in the now voluminous and complex complimentary legislative scheme enacted by federal, state and territory governments that is so disappointing.

The fourth major headache, in my view, is that governments of whatever color or persuasion, at state and federal levels, despite their high-sounding rhetoric, have, in the main, continued to oppose native title when in litigation mode, contesting them at every point. Government lawyers (and those of other respondents) raise, as lawyers do, technical objections; requests for more and more "connection" evidence as a pre-requisite to entering mediation; refuse to accept traditional evidence save after vigorous cross-examination; and so forth. These are all proper tactics by lawyers in litigation, but, in the case of governments, especially the Commonwealth, are often violently inconsistent with their clients' – i.e. the responsible Ministers' – publicly stated policies and may also fall well short of standards expected of the Crown as a 'model

³⁸ See, for example, the continuing anti-land rights campaign conducted by the magazine *Quadrant*.

³⁹ Calma, above n 17, 6.

litigant’. These cynical practices at the coal-face, exacerbated tenfold by various bureaucracies also apparently deaf to their masters’ political rhetoric (doubtless devised by the same said bureaucrats), have contributed significantly to the current quagmire where much of the claims system has degenerated into complexity and grid-lock. Claims typically last 5-10 years; may be denied for technical legal reasons (see for example the Wangatha saga to the WA goldfields⁴⁰ and the *Jango* compensation claim to Uluru country⁴¹); and even when a claim succeeds, the lengthy drawn out process means some or many of the claiming elders – like Eddie Mabo – die prior to seeing final success. All of this makes a mockery of the stated objectives of the NTA – to facilitate, not frustrate, the lawful recognition of native title for indigenous owners.

V REFORMS: LET’S PARTY AGAIN: LIKE, FOR REAL

A society that claims to be ‘civilized’ is judged by how it treats its most vulnerable. On any view, this native title injustice is a national (and international) embarrassment, and cannot be allowed to continue. Perhaps mindful of the High Court’s reference to “unutterable shame”, Federal Court Judges have recognized the nation’s continuing moral bankruptcy. The Full Court has observed:

“The [NTA] preamble declares the moral foundation upon which the NTA rests. It makes explicit the legislative intention to recognize, support and protect native title. That moral foundation and that intention stand despite the inclusion in the NTA of substantive provisions, which are adverse to native title rights and interests and provide for their extinguishment, permanent and temporary, for the validation of past acts, and for the authorization of future acts affecting native title.”⁴²

In my view, nothing less than a wholesale re-think and re-structuring of the current flawed system is needed. But as usual, governments faced with such a challenge are the last to deliver.

For several years, many players have called for substantial reforms, including the Australian Human Rights Commission, Indigenous leaders, former Prime Minister Paul Keating⁴³, the current Chief Justice of the High Court, Robert

⁴⁰ *Harrington Smith v WA (No 9)* [2007] FCA 31 (5/2/2007, Lindgren J).

⁴¹ *Jango v Northern Territory* (2006) 152 CLR 150; [2006] FCA 318; T Jowett & K Williams, ‘Jango: Payment of Compensation for the Extinguishment of Native Title’ (2007) *Land, Right, Laws, Issue of Native Title*, Vol 3, Issues paper No 8.

⁴² *N T v Alyawarr* (2005) 145 FCR 442, at [63] (Wilcox, French, Weinberg JJ).

⁴³ Paul Keating, ‘Time to Revisit Native Title Laws’ in *The Limits of Change*, 406-422; *The Australian*, 1/6/2011.

French, and the Australian Greens. Perhaps the most important suggestion was Justice Robert French's call, made in June 2007, to reverse the onus of proof now required by the NTA.⁴⁴ This, in effect, re-introduces prior occupation and possession as the initial, threshold requirement for establishing native title. The second would be that that title (or elements of it) had not been, to date, extinguished.⁴⁵

To their credit, in 2011 the Greens responded to this idea, and others, and introduced a Bill into the Senate proposing a range of reforms: e.g., allowing prior extinguishment of native title rights to be ignored; strengthening the 'good faith' negotiation requirements; and clarifying that native title rights can include commercial rights.⁴⁶ On 12 May 2011, this Bill was referred to the Senate Legal and Constitutional Affairs Committee.

The central proposal – to reverse the burden of proof in claims – was both supported (by claimant groups) and rejected (mostly by governments). I would suggest that Governments (and those that elect them) need not worry about such a reform: after all, they are skilled and very experienced at discharging the onus of demonstrating a “substantial” break in continuity, i.e., of extinguishment since sovereignty. Land Departments hold extensive land-tenure records detailing tens of thousands of extinguishing grants made by the Crown to colonisers since 1788 (e.g. a commercial lease); governments have successfully amended the NTA to enable reliance on such grants to achieve extinguishment; and, as the last 20 years amply demonstrates, they happily use this material with devastating effect upon claimants.

The Senate Committee reported back in November 2011 recommending, for a variety of reasons largely concerned with substantial “architectural” changes to the NTA with what the majority called “inadequate” consultation, that “it was not persuaded that the Bill would achieve its stated objectives” (para 3.82) and that the Senate would “not pass the Bill” (para 3.92).⁴⁷ In a minority report, the Greens disagreed. What the Senate will do with this evidential “hot potato” in

⁴⁴ See address to NTRB conference, Cairns, 8/6/2007, reprinted as “Plus ca change, plus c'est la meme chose? – the 2007 Amendments to the Native Title Act” in (2008) *Land, Rights Laws: Issues of Native Title* (Vol 3, Issues paper No 12). His Honor was then a Judge of the Federal Court.

⁴⁵ Extinguishment may be achieved in a variety of ways, but usually by acts of the Crown (e.g., the passage of legislation or executive acts) inconsistent with the contemporaneous existence of native title; or by the relevant community abandoning (e.g. by dying out) or failing to maintain (e.g. by being forcibly removed from its traditional country) their customs and traditions and thus, their connection to country. See generally Bartlett 2004, 261-408.

⁴⁶ See the private Senators Bill, introduced by Senator Siewert on 21/3/2011, *Native Title Amendment (Reform) Bill 2011* (Cth).

⁴⁷ Senate Constitutional and Legal Affairs Committee, Report *Native Title Amendment (Reform) Bill 2011* (Department of Senate, November 2011).

the current fractious Canberra climate, is obvious: nothing. Back to square one.

Such onus-of-proof amendments and a reliance upon prior occupation as the foundation of title, if introduced, would align the Australian scheme with that now operating in New Zealand. There, the existence of a Maori community’s land rights, following the Treaty of Waitangi (1840), are assumed. The only question for the Waitangi Tribunal is: what historical acts of the Crown have extinguished or impaired that title since 1840; and how much compensation should now be paid to Maori traditional owners?⁴⁸ Australia clearly has much to learn from its cousins across the ditch.

In her recent announcement in Townsville on 6 June 2012, the Federal Attorney-General, Nicola Roxon, to her credit, announced that her government had decided to pursue several “incremental” reforms designed to “improve the system’s efficiency.” In the Attorney-General’s words, the federal government would:

- “seek to legislate criteria to outline the requirements for a good faith negotiation”;
- “plan legislative change to reform ILUAs. These voluntary agreements will be made more flexible. A wider range of topics will be able to be negotiated ...”
- “work with stakeholders to allow parties to agree to put aside issues of historical extinguishment in parks and reserves. Our discussions may even identify a wider application of this concept.”
- “clarify the tax treatment of payments from native title agreements – income tax and capital gains tax will not apply”.⁴⁹

The Attorney-General also announced that she would commission an inquiry into Native Title Representative Bodies (the statutory agencies established to, essentially, assist claimants through the claims and associated processes set up by the NTA⁵⁰; and Prescribed Bodies Corporate (i.e., entities required to be established by the NTA following a successful claim, which hold and administer, in trust or as an agent, the native title determined to exist, for the benefit of traditional owners (“PBCs”)).⁵¹

⁴⁸ See, for discussion, Tom Bennion, ‘New Zealand: Indigenous Land Claims and Settlements’ in B A Keon-Cohen (ed) *Native Title in the New Millennium* (AIATSIS 2001) 367-376.

⁴⁹ The Hon Nicola Roxon, “Echoes of Mabo”, paper delivered at AIATSIS Native Title Conference, Townsville, 6/6/2012.

⁵⁰ As to their powers and functions, see NTA Part 11, Div 3, ss 203B – 203BK.

⁵¹ See, as to PBCs, NTA ss 55 – 60AA.

As already indicated these proposals, while welcome, in my view and in the view of many indigenous leaders, do nothing to resolve the critical systemic failings identified above. The most interesting, I think, is the intriguing suggestion of a “wider application” of parties agreeing to ignore extinguishment. This segues into the constitutional reform suggestion, mentioned below. Meanwhile, the Attorney-General’s announcement expressly ruled out reversing the onus of proof. It seems, then, that along with asylum laws and policies,⁵² the Chief Justice and the federal Attorney-General don’t agree. This in itself is of no consequence: the crucial doctrine of separation of powers remains robust in our democracy and, ultimately, respected on all sides. But the party is over for now.

VI A MODEST PROPOSAL: PARTY WITH THE PEOPLE

This time round, the courts, clearly, controlled as they are by the NTA and their own decisions, are not the avenue most likely to achieve the radical reforms that, I suggest, are required. Nor, it seems (save perhaps for Victoria, though criticisms are emerging of the current liberal Victorian government deliberately dragging its heels on negotiations) are the governments or parliaments of this country. Nor can indigenous claimants struggling for land-justice expect anything better should the current federal opposition achieve government. This time, I think, we need to party with the people: ie, engage in some constitutional reform.

At the moment, amongst all the political and *Mabo* 20th anniversary noise, a proposal to reform the Australian Constitution by recognizing indigenous people in our foundation document, is quietly circulating.⁵³ A panel of experts has recommended, in short, that the *Constitution* be amended as follows:

- s 25 be repealed;
- s 51(xxvi) be repealed;
- A new s 51A be inserted along the following lines:
- “Section 51A Recognition of Aboriginal and Torres Strait Islander Peoples
Recognising etc. etc. ...
The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the

⁵² See the High Court decision striking down the government’s Malaysian solution for asylum seekers, *M 47 v Commonwealth*, decision announced 26/6/2012. See Michael Gordon, “Caught in the Undertow of Politics”, *The Age*, 16/6/2012; Michael Pelly, “High Court re-visits Asylum Cases”, *The Australian*, 17/8/2012.

⁵³ See Report of Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, (January, 2012) p xviii (“*Constitutional Recognition Report*”).

Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.”

- A new s 116A be inserted, along the following lines:
 “Section 116A: Prohibition of Racial Discrimination
 - (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds on race, colour or ethnic or national origin.
 - (2) Subs-section (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.”

- A new s 127A be inserted, along the following lines:
 “Section 127A: Recognition of Languages
 - (1) The national language of the Commonwealth of Australia is English;
 - (2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.”⁵⁴

These proposals are important, and worthy of discussion and bi-partisan support. For current purposes, the solution in relation to establishing a new foundation for the recognition and protection of native title over the next century, seems to me obvious: adding a clause to the above proposals to entrench such rights. In effect, this takes the Attorney’s foreshadowed extension of “agreeing to ignore extinguishment” to its logical, if most radical, conclusion.

Many technical and political issues are raised by such a proposal: here, I confine myself to the following justification. As has often been said, we cannot rely on parliaments, state or federal, to fix the native title imbroglio. They fear this electoral “hot potato”; don’t want to: and in any event, governments are elected; they and their policies come and go. There can be no security in this contentious area as the years roll by. Tom Calma has commented:

“... ‘attitudes’ to policy are discretionary and depend on the elected government for each jurisdiction. It does not create certainty, predictability or equity in native title outcomes across Australia. If a government changes then there is no guarantee that [its] approach [to native title issues] will be maintained. The different outcomes that

⁵⁴ *Constitutional Recognition Report*, above n 9, xviii.

result after a change in government or a change in a government's approach have been seen many times.”⁵⁵

This observation, though perhaps obvious, is nevertheless important. It applies across governments and across jurisdictions. For example, the Northern Territory Land Rights Bill – introduced by the Whitlam government in 1975, continued, amended, and finally legislated by the Fraser government in 1976 – included a right vested in traditional owners to veto mining developments on their lands.⁵⁶ One cannot imagine such a right being included by any shade of government, state or federal, today. Clearly, the right to negotiate regime established by the NTA – including the sad history of decisions on review by the Tribunal, where only one mining development in 20 years has been “vetoed” – delivers, very deliberately, not only no “veto”, but encouragement to miners to procrastinate and play hard-ball in mediation.⁵⁷

This abandonment by politicians (and the electorate) of the veto-power since 1976 indicates how far the debate has slipped – backwards – in this country over the past 40 years. I would add one corollary to Calma's observation: hard experience tells us that in this arena at least, government policy changes, with rare exceptions, generally against Indigenous interests: vide Prime Minister Howard's *Wike* amendments of 1998. The exceptions in relation to Indigenous 'land rights' are worth noting: the abovementioned 1976 Territory *Land Rights Act*; and the pioneering legislation of the SA Dunstan Labor government in the 1960s.⁵⁸

The only solution, therefore, I suggest, is to abandon the politicians and the courts and invite the Australian electorate to revive the party: ie, pursue, by way of constitutional amendment, the entrenchment of native title rights, in appropriate form, in the Australian Constitution. This requires a different level of thinking. One must see the larger picture. For example:

“... the recognition of the existence of native title has meant that the Australian legal system has acknowledged a strong degree of legal pluralism in Australia. Aboriginal law can be the foundation of mainstream legal rights. Despite the many limits that have been placed

⁵⁵ Calma, above n 17.

⁵⁶ See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 40, 43. The veto is subject to a Ministerial review “in the national interest”. It has rarely been used.

⁵⁷ The only decision is *Holocene* [2009] NNTTA 49 (27/5/2009); see discussion at AHRC 2009 *Native Title Report* 35-42.

⁵⁸ See *Aboriginal Land Trust Act 1966-1975* (SA); and see also *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

on the practical expression of this recognition, it has profound implications for who we are as a community in Australia.”⁵⁹

Such notions were actively discussed in the Australian Law Reform Commission’s landmark report on the recognition of Aboriginal Customary Law, tabled in Federal Parliament in 1986.⁶⁰ They also approach, but are very distinct from, the question of continuing Indigenous “sovereignty” in Australia – an issue still agitated – including on the recent *Mabo* day celebrations – but clearly rejected, at least as a matter of law, by Chief Justice Mason in 1993 in *Coe*.⁶¹

When we consider entrenching native title rights in the Constitution, numerous new and serious problems arise: the need for political cross-party support; the high level of community support required (a majority of states plus a majority of electors); the unhappy track-record of failed referenda since 1901; the need to keep it simple, and so on.⁶² However, one should also recognize advantages: the stunning success of the 1967 referendum where 90.8% voted “Yes” in favour of vesting a concurrent legislative power over Indigenous affairs in the federal parliament; and readily transferable precedents worthy, at least, of examination, from equivalent common-law countries, notably Canada and New Zealand. The underlying principles and rationales however, are similar: i.e., we are dealing here, unquestionably, with the original occupiers; they are already recognized in the nation’s legal and political structures; outstanding issues of justice, equity and social and economic development require urgent attention; and the constitutional entrenchment path has not shattered equivalent overseas economies nor societies: indeed, they have remained economically prosperous and culturally and socially enriched. I refer, of course, to Canada since 1982; and New Zealand, since 1840. Further, in all such countries, a central proposition should be embraced: that it is a privilege, not solely a problem, to still have within our society a vibrant Indigenous population that is both connected to the distant past, and a unique identifying feature of our national community into the future.

Much has already been written on the question of constitutional entrenchment, the hazards and poor track record of referendums in Australia, and the merits of such an initiative. Likewise, the utility and impact of s 35 of the Canadian

⁵⁹ Alex Reilly, ‘Native Title as a cultural phenomenon’, *ALRC Reform: Native Title 2009* (Issue 93, 2009) p 41.

⁶⁰ See ALRC, *The Recognition of Aboriginal Customary Law* (AGPS, 2 Vols, 1986).

⁶¹ See *Coe v Commonwealth* (1993) 68 ALJR 110; [1993] HCA 42. Mason CJ said at [27]: “*Mabo* (No 2) is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia”.

⁶² See, for a brief account, *Constitutional Recognition Report* pp 31-32.

Constitution has been much discussed over the years - a useful precedent, in my view, to adapt to Australian conditions. Section 35 states, relevantly:

- “(1) The existing aboriginal and treaty rights of Aboriginal people of Canada are hereby recognized and affirmed; ...
 (3) ... treaty rights includes rights that now exist by way of land claims agreements or may be so acquired.”⁶³

An equivalent of s 35, coupled with the primacy of Commonwealth over state law, would entrench native title rights, requiring a further constitutional amendment to eliminate them. This sort of amendment, coupled with the simple proposition that the entire country was, at the dates of extension of sovereignty to various parts of the country,⁶⁴ occupied and the subject of native title rights and interests held by the relevant ancestral communities, would settle the problem of fluctuating government policies, and communities' loss of connection to country due to colonization. The only questions then, as in New Zealand, would be: (1) who is entitled to what country? (2) In relation to country where native title has been extinguished (e.g., the area now covered by the city of Melbourne) how should that loss of native title property rights be compensated? (3) to whom should those benefits be provided? (4) if benefits took the form of cash payments, how much is extinguished native title worth?

When we think at this level, a further issue arises. The Keating government's policy by way of response to *Mabo (No 2)* entailed three programs: they are, indeed, set out in the NTA preamble. It states that the NTA was one only of a three-pronged policy response: i.e.,

- (1) create, via the NTA, a system that would recognize a form of native title “that reflects the entitlement of Indigenous inhabitants of Australia, in accordance with their traditional laws and customs, to their traditional lands’;
- (2) establish a land fund that would assist Indigenous peoples to acquire land;
- (3) implement a broader social justice package that would complement these two land-specific policies.

⁶³ See also s 25 contained in Part 1 of the new (1982) Constitution entitled “The Canadian Charter of Rights and Freedoms” which contains several anti-discrimination and civil-liberties provisions. s 25 declares that none of the rights or freedoms contained therein shall be “construed so as to abrogate or derogate from any Aboriginal treaty or other rights or freedoms that pertain to the Aboriginal peoples” including any that may be acquired “by way of land claims settlement.” Section 25 does not confer rights: it merely exempts certain Aboriginal rights from the effect of the Charter's provisions.

⁶⁴ I.e., 1788 (eastern seaboard), 1829 (WA), 1835 (SA and NT).

As to the land fund, it emerged as the Indigenous Land Corporation (“ILC”), established in 1995. It administers the Aboriginal and Torres Strait Islanders Land Account which now holds substantial funds.⁶⁵ Utilizing this fund, the ILC has purchased more than 6 million hectares around Australia on the open market. However, Commissioner Calma comments:

“it is questionable whether, in its administration, the ILC meets the original intent of the fund and provides an accessible and alternative form of land justice when native title is not available. The [ILC’s constituting] Act, the Aboriginal and Torres Strait Islander Act, 2005 (Cth) acknowledges its role in reparation for dispossession in its preamble, but does not draw any connection to native title and the complimentary role the ILC was created to play. Many [Indigenous] people have voiced confusion and frustration to me about the ILC’s role, activities, and the outcomes it is achieving.”⁶⁶

Meanwhile, the third policy response, the Social Justice package, disappeared without trace after the enactment of the NTA in December 1993, and has not been seen since. Prior to the 2007 election, the Labor Party’s National Policy Platform recorded that that Party “recognizes that a commitment was made to implement a package of social justice measures in response to ... *Mabo* and [it] will honour this commitment.”⁶⁷ Those fine words were removed following the Rudd government’s election in 2007 and remain absent today.⁶⁸ The current federal coalition opposition’s policies on native title are similarly silent on this issue.⁶⁹

Perhaps the “compensation” package mandated by the constitutional reform suggested above might revive this lost “social justice package” initiative. Whether returning this policy to the Labor Party’s platform will revive the current federal Labor government is another matter: but while that government languishes at 26% in the polls,⁷⁰ party apparatchiks might think that anything is worth trying once. Otherwise, more than one “party” is surely “over.”

⁶⁵ The Land Account was funded by a fixed annual allocation of \$121 million from the federal budget over ten years, ceasing at 30/6/2004. Over \$1 billion has been deposited in the account over time. Around 2/3 of this sum is invested with the balance available to fund the ILC’s activities. See *ILC Annual Report 2010 – 11*.

⁶⁶ Calma, above n 17, 8.

⁶⁷ Australian Labor Party, *Australian Labor Party National Platform and Constitution* (2007) at www.alp.org.au/platform/>, Ch 13.

⁶⁸ Australian Labor Party 2012 *Agenda*, www.alp.org.au/Agenda/policies accessed 8/6/2012

⁶⁹ See *Coalition Election Policy 2010* at www.liberal.org.au/media/media/Files/Policies/Community/Indigenous.

⁷⁰ *The Age*, 14/6/2012, p 1.

Changing Constitutions through ‘Deliberative Voting’: A New Approach

Ron Levy*

‘Deliberative Voting’ describes a new kind of constitutional referendum. It is a ‘deliberative democratic’ innovation, which means that it aims to solve one of the oldest tensions of democratic lawmaking - between robust citizen involvement and careful deliberation. While citizen participation in lawmaking is desirable, it is also usually problematic. Few people outside of government have the time or expertise for well-informed, rigorous and reflective deliberation over the making of new laws. Normally we therefore delegate lawmaking to parliaments, whose members we expect will be suitably informed. Yet the solution of delegation is increasingly untenable – and undesirable – in the unique case of constitutional lawmaking. Leaving voters out of a process of reform now attracts convincing charges that both the process and the constitution it yields are illegitimate. Back in 1901, Australia thus became the second country, after Switzerland, to make constitutional referendums mandatory. Since then, referendums on key constitutional amendments in Europe and elsewhere have become commonplace.

But the emerging expectations of direct public involvement in constitutional reform raise a dilemma. While referendums arguably improve legitimacy, they also frequently thwart reform in practice. Constitutional referendums ask citizens to express opinions on matters both arcane and unintuitive, such as electoral systems, municipal powers and federal taxation structures. Asked to consent to constitutional changes they may not understand, by a political class they generally do not trust, citizens tend to favour the status quo. Jurisdictions such as Australia, Canada and the UK have therefore struggled, often in vain, to win public consent for reforms. It is now three-and-a-half decades since the last successful attempt to amend the Australian federal Constitution.

In response, a number of countries have experimented with a relatively promising new set of deliberative democratic procedures for reform. These unorthodox models get citizens involved in a reform process while also attempting to structure citizen engagement to be rigorously deliberative. A prominent example is the Citizens’ Assembly (‘CA’) model introduced in British Columbia in 2004. CAs comprise 100+ citizens randomly-selected from the public voter rolls. CA members undertake several months of intensive learning, discussion and wide public consultation before recommending a discrete reform. Many empirical political scientists – not generally known as an

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optimistic group – have sung the CAs' praises. As a CA's small and demographically diverse collection of citizens learn from an array of experts and exchange views, they deliberate carefully, collaboratively and without the partisan divisions typical of elected elites. CAs also attract far greater public trust than traditional models directed by parliamentarians.

While promising, however, deliberative democratic reform still faces significant hurdles at the final, most important stage of constitutional reform: the referendum vote. Once a CA deliberates, a referendum must still be called in order to allow *all* voters to consent to (or reject) the CA's reform recommendations. At this stage the challenge is to encourage robust deliberation not merely in a small and carefully-structured assembly, but in the far larger population that will cast ballots in the referendum. For deliberative constitutional reform, then, the most formidable challenge is achieving robust deliberation during the 'purely private act of voting', as each citizen stands alone in a polling booth.

In a forthcoming article, I label efforts to design deliberative democracy into the referendum stage of reform 'Deliberative Voting', or 'DV'.¹ Such efforts pursue at least three deliberative goals. First, DV can help voters become *well-informed* by providing background information on constitutional basics or on the specifics of a given reform. Second, DV encourages *purposive* voter reasoning, illustrating values or aims pursued by each reform option and by the status quo. Third, DV encourages voters to reason about constitutional *trade-offs* by providing a fuller picture of costs, benefits and values associated with reform and status quo options; thus voters' referendum selections can be more realistic and grounded, rather than free of either cost or context. To be sure, it remains difficult to achieve any of these deliberative goals in practice. One particular constraint is that DV methods must give no preference to a particular referendum outcome, and must only give the background necessary for voters to reason through options themselves. Yet despite such challenges, at least four distinct DV models have been suggested or can be imagined, and a handful of jurisdictions have begun to propose or trial these models in rudimentary forms.

I MANDATORY PRELIMINARY INSTRUCTION

A first option is mandatory instruction before voting. For example, in a non-constitutional context the New South Wales Electoral Commission recently proposed an online voting system that would require voters to 'acknowledge

¹ I coin the term in Ron Levy, "'Deliberative Voting': Realising Constitutional Referendum Democracy' [2013] *Public Law* (forthcoming).

that they have read the cases for and against' a matter up for consideration. Voters who declined all formal opportunities to become thus minimally informed could not cast ballots. Such mandates might be justified if the basic meaning and implications of a constitutional vote are otherwise unknown to the voter. Mandatory preliminary instruction can rely on traditional approaches, such as distributing information booklets prepared by both advocates and opponents of reform. But with the rise of electronic voting, a host of authors have also suggested ways of using computers to illustrate complex policy issues clearly, and often interactively. Applied to constitutional referendum practice, interactive online tutorials might facilitate voters' introduction to constitutional basics concerning referendum options (eg, symbolic Indigenous recognition, new Indigenous rights or powers, or the status quo) and their potential costs and benefits. Of course, in practice voters still may give no more than superficial attention to the instructional materials. We can therefore question the depth of learning that even a mandatory text or interactive tutorial would provide.

II SCALED REFERENDUMS

An additional technique aims to help voters consider legal and policy trade-offs. Scaled referendums ask voters to indicate support for reform options on a sliding quantitative scale, with the values, costs and benefits associated with each option clearly listed. This approach has not been attempted in constitutional referendums. But in a non-constitutional example in the 1990s, a paper ballot asked voters in Victoria, British Columbia, to choose among options for treating municipal waste, with each option clearly listing likely costs to taxpayers. This somewhat crude method aimed to encourage voters to view policy options not in isolation, but as products of the interaction of complex factors. Computerised ballots would likely enable more sophisticated approaches on similar lines, though few authors yet have specifically addressed electronic approaches to scaled constitutional balloting.

III PRELIMINARY VALUES QUESTIONING.

Without a CA's expert facilitation, sophisticated preliminary tutorials and scaled ballots may still struggle to encourage purposive reasoning. A third DV model therefore modifies the process of referendum voting to add initial questions turning voters' attention to the values underlying assorted constitutional reform options. For example, in a referendum on Indigenous constitutional recognition, voters could be asked to rank a number of values, determined by citizen focus groups (possibilities might include, eg, 'fairness', 'cultural identity', 'self-sufficiency', 'majority rule', etc.). Final questions would then ask voters to choose specific institutional options (eg, an 'anti-

discrimination right', 'symbolic recognition', or certain new governmental or Indigenous powers).² Notably, the preliminary results on values could ultimately help to guide elected representatives to implement the main referendum result. Thus preliminary values questions are important and 'binding', and likely to inspire serious consideration from voters. Voters' own initial choices at the values questioning stage may therefore at least partly inform their ultimate choices among institutional options.

IV INTEGRATED REFERENDUMS

A final DV model builds on models like CAs by expanding them to include far larger numbers – or perhaps even the majority – of voting citizens. As noted, a small deliberative body engages a discrete group of citizens in several months' learning, discussion and reflection, during which successive constitutional options are considered and rejected. At a CA's conclusion, members vote on a handful of remaining options; the broader public becomes involved only at the final, referendum voting stage. By contrast, to encourage wider public participation in a deliberative drafting process itself, 'integrated referendums' would see CA-style drafting overlap with referendum voting. This would allow the public directly to view or hear deliberative proceedings by television, radio and web, and to interact with the proceedings through comments, questions and readings. While such 'crowd-sourced' public participation in constitutional reform are growing more common internationally, they tend to be loosely structured and non-deliberative. But integrated referendums would run a deliberative drafting process along the lines of a CA, while inviting all eligible voters to participate in binding public votes on options considered by the CA. Citizens would therefore eliminate constitutional options progressively from an initial set.

A critical question raised by DV voting innovations is whether they are appropriate ways of conducting democracy. They may benignly enhance the deliberative quality of public involvement in constitutional decision-making, or they might be inappropriate interventions in the formation of public opinion. There are several reasons to prefer the former interpretation. I will highlight just two reasons why DV is potentially more democratic than standard referendums.

First, DV models help solve the problem of *intergenerational consent* in constitutional law. While a written constitution may have its drafters' consent, later generations are bound by the constitution though they never consented to it. Once formed, constitutions tend to defy easy reform. Options are therefore

² The ballot may also incorporate procedures for preferential (instant-runoff) voting.

limited if we want to reshape the constitution according to our own, modern preferences, rather than those of a long dead Founders' Generation. Part of the problem, as noted, is the public disengagement and lack of knowledge of constitutional basics, which frustrates constitutional change. In my work I have used nationwide opinion polling to show that deliberative reform procedures could allow for more frequently successful constitutional amendment. That is because voters themselves prefer a more deliberative approach to constitutional change, rather than the simple majority-rule approach that we currently have. With more trust in deliberative bodies such as CAs, and being better versed in constitutional basics due to DV, deliberative reform may see constitutional revision happen far more often.

The second democratic argument for DV analogises consent in the constitutional context to consent in other legal contexts. Consent (literally, 'feel together') implies wilful agreement to go along with a planned course of conduct known to the consenter. Thus the legal maxim is that 'you cannot consent to a thing unless you have knowledge of it'. For medical negligence, contracts, and other legal instruments, consent is therefore interpreted as *informed* consent. Yet it is anomalous that constitutions – our most important legal documents – still make no requirement for informed consent. Consent is a fiction if voters do not understand the constitutional issues in question. Thus referendum voters should consent to passing new constitutional laws on terms of equality and full information.

In sum, the increasingly well-established expectation of direct public voting imposes an onerous double-requirement: constitutional reform has to be at once robustly deliberative and widely democratically inclusive. DV models suggest potentially workable ways of marrying deliberation and democracy where deliberation is hardest: in the referendum vote itself. Australia and other countries will need to keep inventing, experimenting with and refining DV models to ensure that future constitutional referendums can be both successful and effectively democratic.

Reflections on Public Life

Andrew Fraser*

Robert Hughes' eponymous epic on Rome was sitting dog-eared upon a pile of books, including *Night Letters* (which always rewards a re-reading) and the ghostly decorated *Arguably*, when I heard Fran Kelly announce his passing. All of a sudden there were books penned by two recently departed public intellectuals sitting on the same table. Hitchens had pre-deceased Hughes by less than a year.

It was the first time I'd embarked on reading Hughes, and I was spellbound. I knew him not, and only recently was introduced to his writing. Already I was anxious for more. Still I can't help but guess that whatever peace he may have latterly found, the great man wasn't quite done yet. Surely such a prolifically curious intellect never reaches its natural resting point.

"Unique!" "Irreplaceable!" began the dedications. I decided to privately honour his passing by foregoing most of what was planned that day and spending some time inside his *Rome*.

While wading through the chapter on the late 18th century in Hughes' tour de force on one of the world's greatest civilisations, I snuck back to re-read the epilogue. I had previously stolen a glance through the last parts of the book when I fixated on just how Hughes might sum up the breadth of his endeavour.

Perhaps I had been all too eager for a concluding note of hope or affirmation: Rome remains a beacon of a civil life, redemption is there to be gained, if you haven't yet been, go! Instead there is a lament, melancholic and even angry. Salvation for Rome might yet be attained, but it's doubtful. Go there now, before it gets worse, is the author's final atheistic invocation; glimpse the remaining, diminishing greatness.

Rome's enduring nature is declared to have been "interrupted ... broken by the foul, corrosive breath of our own century." Against the notion that a sense of contemporary decay has always been true, Hughes fingers "the colossal, steamrolling, mind-obliterating power of TV." He adduces a decline peculiar to our time.

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I THE WORLD IS NO LONGER FLAT, BUT TILTING...

When I first indulged prematurely in the epilogue I was stung with that particularly modern guilt. The sort that arises when a reality television show is accidentally watched for longer than a moment, when a ferry-ride passes flicking through the Tweet-deck or when an evening passes on the internet lost amongst ephemera. Time turned to ash. And all the while great and enduring efforts remain unknown, unread, unstudied, unseen. I had suffered the impulsive urge of my generation, rushing directly to the end-point destination. The lost art of travel reprised in my lack of patience.

One shouldn't rush to mistake the concluding despair I found in Hughes' epilogue for the dyspeptic grumblings of an old man raging against the dying of the light. There is a serious question about our modern world's capacity for civility, and its antecedents: contemplation and erudition. I was prompted to reflect on the quality of our civic life: in the drumbeat of progress, what might we be drowning out?

Our modern, peculiarly post-modern, malaise gets raked over regularly. To be sure, each generation seems, in turn, to fret about loss. Generation-next proclaims one man's nostalgia is another woman's progress. However in dismissing this as relativism we may fail to notice the incrementalism of a decline. We may be like the pilots missing the imperceptible tilt that will pitch us into a graveyard spiral.

The world is no longer flat. Veritable human progress saw to that. But many previous structures are flattening out. In the sweep, or perhaps quick swish, of a brief century of history, we see women and indigenous peoples enjoined in the franchise, and now see unfolding before our eyes the economic liberation of billions of human beings in the most populous nations on earth. The march of equality continues apace, levelling out the field. This, surely, is a good thing.

Consumerism has democratised travel, art and our media. Nearly everyone can go on a plane these days, movies for segmented and categorised emotional cravings are available on demand, and current affairs programs prefer miracle diets to policy debate. This is society by the people for the people, giving people what they want: of and for the consuming public.

It is difficult, and somewhat objectionable, to attempt to mount the case against this popularisation of our world. Why shouldn't working class people be able to go on a plane in boardies for \$49 bucks? It's show *business*: movies are made to order, to mine a known seam in the market to enable the next one to be made. If people wanted to watch Cabinet Ministers proffer policy

prescriptions at prime-time then the *7:30 Report* would be a ratings winner. It's about what the people want!

What we are witnessing is demand driven. A law wasn't passed to lower the price of air travel, nor a sovereign edict given that commercial television at 6:30pm must be pap, pulp and prejudice. We, collectively, willed it this way, through the aggregation of our choices. Alas, the market in full exposition. This is the expression of our freedom! And unlike the majority of the human race through the millennia of recorded history, might we rejoice: free at last!

II THE RISE AND RISE OF THE INDIVIDUAL

Of course, it doesn't quite feel like we have won. There is more than one nagging question. As we bear witness to the liberating force of the empowered consumer's economic participation in the modern market, we might wonder what price for the externality. What might be lost, or missing, here? What capital are we trading upon?

For the most rigid adherents of neo-liberalism, this question doesn't arise. Life is simply a linear equation. That the sum total of preferences of individuals dictates it so is enough. This life is readily tallied up, and thus proven: Q.E.D. The aggregated actions of the rational individual provides a perfect explanation every time, irrespective of the question. But surely, there must be more. That can't be it.

Away from our "participation" as consumers, and as economic actors, beyond individual rational sentient beings – what is it that defines the breadth of this, our uniquely human, endeavour? My view is on the record:

It is our human relationships that give meaning to our existence. They make the joys of life joyous and the sadness in life sad. The sharing of experiences provides our context, the reference point for our hopes, our travails, our daily endeavours.

Our interrelationships define our society and inspire our creativity. Democracy and art are both functions of the truth that we do not live alone.¹

I was politicised on the intellectual cogeny of communitarianism. We derive our meaningful existence from our relationship with others. We are not just individuals, but citizens. For me politics isn't merely tribalism, it is the high art of humanity. It is the fullest expression of what I hold to be true: without the

¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 October 2011 (Andrew Fraser).

other, there is no self. Public service, then, should not be a pejorative term, but the worthiest of vocations. It is the sphere which gives shape to the world.

The space between individuals – the public realm in which we are citizens of the whole – is the most precious real estate of all.

And it is not just present day Rome which is under siege; I fear the locus of our politics – the public realm in which we interact – is not just being corroded by a foul breath, but bombarded.

Our civic life, that which meshes the contributions of individuals into the shared experience, is not just being deconstructed, but demolished. Engrossed in our home media rooms, indulging in our immediate whims, we are potentially blind to the havoc being wreaked on the institutions which fortify our common existence.

The rise and rise of a rampant individualism, a “me” fetishism, is atomising the public domain. Consider the following:

III AN ALL-CONSUMING NEWS STORY: THE NEW WORTH V OLD NEWSWORTHINESS

There is no such thing anymore as “watching *the* news”. A short decade ago a water cooler conversation might have casually started with reference to “I saw on *the* news last night...” Today such a preface is, at the least, ‘old-school’, and tending towards redundancy. While many people do watch the free to air television bulletins of an early evening, most do not. The nation does not sit down for *the* news, before the evening meal. There is a news smorgasbord now, full of bite size chunks it must compete with as the boring high-fibre in a poorly lit corner of the most incredible 24-hour entertainment buffet in human history. News is picked at, consumed on the go, digested in readily made packages delivered into the hands of individuals.

So too “I read in *the* paper” is heading towards meaninglessness. The printed newspaper is now but one snapshot of a news service that rolls along in the electronic ether. It is not uncommon for a particular matter to be covered online between printed editions without publication in the traditionally delivered concept of ‘*the* paper’. News is compartmentalised, iterated, distributed through a multitude of media. It has been pluralised.

A news story – which in its essence is a narrative of worth to more than one person – is no longer a collectivised notion, tending toward a public good, but

a consumer good. In this transformation of information, there are consequences.

The upshot is a gnawing away at the ties that bind. A lack of shared experience reduces the coherency of the public domain. As we sign up to the 'news you want, when you want' we are in a retreat to the self, shucking the sustaining pod of our meaningful existence. We reduce our capacity for shared grief, shared joy, collective action and outrage. In short, we are atomising our existence. Story telling has bound together societies since time immemorial. Without a common story we invite isolation. The fragmentation of the collective narrative is reducing our ability to nourish a sustaining, shared and common realm.

We are in fact in a hasty retreat from the public domain. Into the shell of our own homes we go, with our own on-demand content. Might it soon be that heading off to meet up with friends to see a movie is just a memory reserved for quaint grandmotherly reminiscences? There must be doubt that the cinema can survive the seemingly equally doomed existence of the local video/DVD store.

Even when we are in public, we are retreating to ourselves. A couple of years ago I remember marvelling on a crowded suburban train in Tokyo that the entire carriage was fixated on their own hand held device. Whereas I then saw the product of human advancement, now I see humanity in visceral retreat. I see people unwilling to risk interaction with another and unable to comprehend contemplative idleness. It seems we are afraid of each other, and of our own thoughts. This retreat from human interaction creates a fertile environment for the diseases of isolation. *What's he building in there*, I hear Tom Waits growl.

Our retreat from the public realm, leaving it to ruin, is not just a matter of function and form. It is not just that news content is being delivered in ever-more individualised media formats, but the transformation is changing the content of the news itself. This is, more disconcertingly, a matter of substance. The crafting of news as a targeted commodity detracts from its aspiration (acknowledging unattainability) towards universality as a public good. When news is dictated by the primacy of consumer choice, rather than conceived against a set of durable values, you get more cats in a tree and celebrity gossip displacing what might be traditionally regarded as more worthy of being communicated as the news.

If there is to be any doubt, click through any of the major news websites and review the lists of "most read stories". The lists hold a mirror up to our face,

and places in full glare the basic feebleness of aggregated individualism. Sex sells. So do celebrities and quirkiness. Scandal befalling anyone of even passing infamy is a sure fire winner. Prince Harry in the nick will win the day every time. Were the content of the public realm to be determined by consumer choice alone, the agglomeration of our individual picks would likely be just a morass of boorishness coagulated with tedium. We are what we eat.

What makes the grade as worthy of being published is now something different from the traditional concept of newsworthiness. It is apparent that we would rather be titillated than intellectually stimulated. Fair enough. No-one is breaking the law here, and any law that sought to determine relative worth would likely be more objectionable than the original concern. Legislating to arbitrate news content in this respect is but a step down the intellectual path towards the tyranny of totalitarianism. This is not to reject the notion of boundary regulation of our media, but it is a caution against any hastening to displace editorial freedoms. Thus humanity could appear to be checkmated, between standing by as we witness the crumbling quality of our public discourse and the self-defeating and futile desolation of commanding the tide back. These are the present coordinates of our civic life.

So it isn't the media's fault. It is in fact the fault of all of us. The journalists, editors and proprietors are merely (somewhat willing) accomplices in our own collective crime against humanity. The media is just, as ever, a reflection of what is happening more broadly. We can see this also if we look beyond what we might describe as the information exchange that broadly constitutes that which was once more certainly known as "the news". We see the full flower of our fetish of the self in the soundtrack of our daily lives. For every public intellectual seeking to advance the collective knowledge or awareness, for every *Rome* or *Barcelona*, there are a billion advertisements exhorting us to put number one first. A telecommunications company promises "power to you" while one of the big-four banks insists they "live in your world". It's an iPhone, iPod and an iPad. Literally, the "I" comes first.

Indeed, look no further than the so-called national carrier's leap across the realms: from the lofty intonation of the "The spirit of Australia", straight down to "You're the reason we fly". From the heights of the public realm, their marketing descended directly to the new, singular deity, the individual. They replaced Nationalism with Me-ism; from collectivism to individualism at the speed of an allegorical shooting star. They even want you to put your name on the aircraft!

The space constructed for the practice of citizenship is not so much slowly crumbling, but in danger of collapsing in on itself under the weight of

individualism. The invocation to ask oneself not what the nation can do for you, but what you can do for your nation, seems a lost echo, from a lost time, and one that cannot readily be reclaimed.

IV THE PUBLIC REALM: WE MUST GO THERE NOW, BEFORE IT GETS WORSE

It is in the practice of our politics, the ultimate discourse on our human existence, that we see the ugly portents of our decline. Politicians are presumed to be in it for themselves. The notion of service has been rendered anachronistic – almost incomprehensibly so – in our common consideration.

Our collective capacity to sustain debate and contemplation has been undermined by the meth-amphetamine of the 24 hour media cycle. Every answer must be immediate, and easily digestible in one bite size chunk. Yay or nay, up or down, black or white. There is little capacity for shades of grey – not even a few.

The devaluation of the civic sphere means we are beginning to lose the worth of democracy. We are too busy to notice, too consumed in consuming, to take heed. A recent study by the Lowy institute found a majority of young Australians no longer regard democracy as the best form of government. The story only hung around for 24 hours and then slipped into the darkness of yesterday's screenshot. It moved quickly from the myopic horizon of our concern, as some new study by some other nameplate was tipped into the arena. Our eyes averted, our concerns annulled by the sugar-rush of the next. Faster, faster.

This isn't the fault of the politicians any more than it is the media's fault. Just as the media are reflecting our current norms, so too are our politicians. After all, democracy was once perceptively described as giving us the politicians we deserve. All too often those in elected office, or seeking it, are only too willing to "play the game". If the game was cricket, then it would be hitting with the spin. Even those who commence their time in the arena with every intention of playing with a straight bat soon find themselves slogging at full stretch as they try to punch through the phantasmagoria of our time.

But this is a prisoners' dilemma. As each politician joins the circus, the value of the whole is diminished, and is ultimately being debased. Our civic capital is being frittered away in the frippery. There is no reward for the politician who stands apart, save for a worthy irrelevancy.

This is, of course, as much a confession as it is an appeal. I don't come to this debate with clean hands. But that shouldn't disqualify this contribution, and

perhaps it might even amplify it. For all the theatre and sport of Question Time, I would have gladly exchanged it every day for an opportunity for a substantial and considered speech, reported equally as broadly. That yearning is why, against much advice and my own enduring doubts, I continued to front up to the local ABC radio studios every Friday morning to sit aside the Shadow Treasurer. Surely our national broadcaster should be capable of facilitating a debate on ideas and policy, I convinced myself, and then re-told myself when, instead of substantial policy-dense debate, we picked over minutiae and were asked to bake a cake for next week's session. To be fair, the spot was called Party Games.

Whenever the opportunity is taken to provide a considered contribution, beyond sloganeering sound-bites, and delivered in terms beyond the monosyllabic, the usual result is to invite a shrug, or sometimes derision. In the modern combat rules of politics, intellectualism is pilloried as an admission that you can't relate to the people. It's not what the people want!

The ultimate superficiality of our political discourse is exposed by the rise of the anti-politician. "Elect me because I'm not like other politicians" is their mantra. Think Hanson and Katter. But also Nick Xenophon and, yes, Bob Brown.

Indeed the branding of Can-do was conceived in this milieu: to trade on the notion that all politicians are ditherers, full of talk and no action. It says nothing about what might be done, and gives no clue as to substance. It's not that conceptually different to a bank's recent "Can" marketing blitz; trading as it does on the notion that all banks are perceived to say no, we can't. One can only imagine their marketeers' small frustration that "Yes, we can" was already taken.

Go back and look through Bob Brown's contributions in recent years – seemingly as often as he was talking about climate change he was being quoted on politicians' remuneration and other issues designed to carve out a place away from "the politicians". The modern Greens party defines itself as much *against* the so-called old parties as they define themselves *for* a sustainable environmental future. This was Brown's great gift as a consummate practitioner of retail politics. He was beating them at their own game!

The prize probably belongs to Nick Xenophon. He once purchased a toilet and took it to a press conference he convened out the front of the South Australian Director of Public Prosecution's office to demonstrate his "otherness" to the political class. He most certainly was not one to insist on the expense of a personal lavatory: "not like the rest of them." In truth, he was

demonstrating his utter brilliance at the dark arts of modern media politicking. Of course, standing there, toilet seat in hand, he was the quintessential study of the modern politician. An ethereal echo sounds out: “The mind-obliterating power of television...”

The fragile shallowness of our civic life is exposed in regarding politicians who claim not to be politicians as authentic. They are, in truth, guilty of the greatest political swindle. When did Bob Katter last stand in front of a television camera and say something in the Burkean tradition of leadership in a representative democracy? Bob’s not a thundering idiot as many of his critics would tell you. He is in fact a highly intelligent, very gifted politician. His instincts for populism are rarely wrong. To be sure, he is rarely out in front of the curve. He usually lies in wait, sniffs the breeze and emerges triumphantly to declare “Follow me (I’ll be right behind you)”. Anyone who mistakes this for the actions of a maverick has been had. It is a style of politics that eschews any pretence of leadership for a tepid imitation of some type of functionary managerialism. It is what the people want! Tell them what they want to hear and trade on.

The anti-politician tactic can only be successful because the norm is regarded as objectionable, or at least undesirable. Here we might take aim at the small target shylocks. “Because we are not them” isn’t exactly positing an alternative. It’s just a rejection of an other. But it is enough because without ever pausing long enough to notice, our civic discourse has disintegrated. We are on a runaway train, our heads bowed toward our consuming passion, transfixed by the thrill of the tweet and the shock of the new. We forgot to look up.

The Colosseum of our politics has been blown asunder in the gladiatorial conquests that pass for public discourse. The arena carved out for the conduct of our civic life has itself been traded upon, and fully depreciated without provision for renewal. It has, without care and maintenance, been absorbing the shrapnel of the explosion of individualism, the shards of our fragmented existence and the blast of the atomising bomb of venality disguised as benign consumerism.

V REBUILDING ROME

All this might also be discounted as the grumblings of one raging against the dying of a certain light: one that presently flickers upon a hill. But it is an attempt at something else: a plea for a conscious civilisation.

There is no doubt that individuals are being empowered by technological advancement, attaining new planes of freedom with enhanced capacities.

Markets, institutions both public and private, public services and private goods – just about everything – have been made or are being made more responsive, more efficient and more effective. Public transport iPhone apps have the potential to be a change agent for social and individual benefit. On any given day it empowers the commuting consumer, and over time and collectively the information assembled helps drive investment to most advantageously improve the service. One upshot is the potential for less physical isolation amongst those who rely on public transport services.

In the thrall of the endless potential of the apparently limitless advances in technological capacity that are routinely and spectacularly being achieved, we do not yet seem to be fulsomely acknowledging the risk that it can facilitate, promote and reinforce an obsession with individualism. It is recasting human capacity. Perhaps we tend toward individualism and the natural environment has thus far dictated our communal pattern of living. An illustration in extremis: no one would attempt Antarctic exploration alone a brief century ago. Now it is technologically feasible. Free of the yoke of an existence based on survival tactics, we might be discovering our true nature.

The technology which Friedman says flattened out the world is, in many respects, tending towards the deconstruction of our hitherto known civic world as we turn inwards, away from each other, seeking self-satisfaction. But because we can, doesn't mean we should. Instead of a lament, we need to harness the socialising aspect of the technology which has done so much as an enabler of consumerism.

Consumerism cannot replace what William Faulkner called the “the old verities and truths of the heart, the old universal truths lacking which any story is ephemeral and doomed – love and honor (*sic*) and pity and pride and compassion and sacrifice”. It is alluring, but it is not absolute. There is no salvation in consumerism's absolution. We do need more, and you can't buy it. This is the human condition.

I have relearnt Faulkner's decree that “the basest of all things is to be afraid”. So too do I share his conviction that “man (*sic*) will not merely endure: he will prevail. He is immortal, not because he alone among creatures has an inexhaustible voice, but because he has a soul, a spirit capable of compassion and sacrifice and endurance.” It is why I entered the public realm in the first place.

It is why I think we must call out the malaise and direct our efforts, through new platforms, into reminding ourselves of the virtues of participation, of dedication to others. In optimistic moments one can see the Twitterverse

evolving as a forum of sharing, of direct and honest compassion. Inevitably it has its trolls but it is already a sphere of commonality, incubating countless communities. It is connecting people, the lonely and those in crowded families, in a way unimaginable even a decade ago. There is cause to be hopeful.

The shining example is the Arab Spring – liberation in pursuit of the common good facilitated by the digital revolution. A work in progress, but one that shows tyranny can be defeated by the collective capacity of enlightenment through the altruistic actions of individuals. I fear complacency, not the technology. We might acknowledge the passing of *the* news, but we shouldn't mourn the passivity, unilateralism and suffocating paternalism of it as a conduit of the human narrative. The internet means anyone can be a publisher, and be published. Our task, collectively as always, is to foster a new public realm with our own endeavours; with our own participation.

I began by supposing the dying Robert Hughes' state of mind. I could do this only because as a public intellectual his life was not expended only within the realm of the individual. He contributed. I saw him described on that day of his passing as a "friend I never met" by one mourner. Enriching the realm beyond our own privations is surely our natural calling. Contributing towards public life should be regarded as worthy, as the high art of humanity. In this there is affirmation.

We must now recreate the space for the practice of citizenship. Our task in a post GFC world is much more urgent than the present exigency to recapitalise banks and other financial intermediaries. We need to recapitalise the forum of original exchange. We need to invest in the new public arena. Against the foregoing, it is clear this will not be as simple as writing a cheque. But it is a lot less taxing, and, ultimately, entirely more rewarding. It begins with the individual, but it doesn't end there. As it never should.



L-R: Sir Zelman Cowen, Justice John Macrossan (Qld Supreme Court), Professor Charles Sampford, Professor Roy Webb (Vice-Chancellor, Griffith University 1985-2002). Photo courtesy of Professor Charles Sampford.

Sir Zelman – Fond Recollections of ‘Feeding and Watering’ Charles Sampford*

The dot points on Sir Zelman Cowen’s daunting CV are well known and easily Googled:

- Supreme Court Prize in Law from Melbourne (gaining a first in each subject he studied)
- Intelligence analyst
- Rhodes Scholarship
- Oxford Don
- Dean and Professor of Law at Melbourne university and leading what Sir Ninian Stephen called the first revolution in Australian legal education (at the same time he called the Griffith Law School the second)
- Academic expert in evidence and constitutional law
- Public intellectual and 1969 Boyer lecturer
- Vice-Chancellor of the University of New England and then the University of Queensland
- The healing Governor-General
- Provost of Oriel College
- Chairman of the UK Press Council
- Chairman of Fairfax.

Less well known is the way he supported younger colleagues as mentor and friend. I was privileged to be one of those and I was delighted when he allowed me to edit his festschrift¹ as a token of my appreciation and an opportunity to allow others to express their appreciation by writing a piece relating to one of the areas in which the life celebrated had contributed. I quickly determined that this would be a very different festschrift. Instead of celebrating contributions to different areas of an academic discipline, the chapters celebrated contributions to different areas of legal and public life.

I commissioned the following chapters:

*Professor Sampford was the Foundation Dean of Law at Griffith University. He remains Foundation Professor of Law and Research Professor of Ethics at Griffith University. He was Foundation Director of the only Australian Research Council Centre in either law or governance and is currently Director of the Institute for Ethics, Governance and Law (a joint initiative of the United Nations University, Griffith, ANU, QUT, the Center for Asian Integrity and the OP Jindal Global University).

¹Charles Sampford and Carol Bois (eds), *Sir Zelman Cowan: A life in the law* (Prospect, 1997).

- Developing the Arts in Melbourne – Dr Marjorie Tipping DLitt (Melbourne Arts Administrator and student colleague of Sir Zelman with whom she founded the Fine Arts Society)
- The Law of Evidence in England and Australia: A Comparative View – Mr Peter Carter (Wadham College, Oxford)
- How Indigenous is Australian Constitutionalism – Professor George Winterton (Faculty of Law, University of NSW)
- Recreating Australian Legal Education – Professor Harold Ford (former Professor of Commercial Law, University of Melbourne)
- The Public Life of a Law Dean – Professor Louis Waller (Faculty of Law, Monash University)
- Law Reform and Development – Mr Alan Rose (President, Australian Law Reform Commission)
- The Art of University Leadership – Professor Alec Lazenby (former Vice-Chancellor, University of Queensland)
- The Role of the Governor-General – Sir David Smith (former private secretary to several Governors-General, including Sir Zelman)
- The Press Gang: Media Regulation and Privacy – Mr Kenneth Morgan OBE (British Press Council).

I wrote the final chapter on New Law Schools in the 1990s and asked Sir Ninian Stephen to write the preface. Each of those contributing could give a host of stories about this great man and greater friend. These are some of mine.

I first met Zelman when he was making an after dinner address at Ormond College in 1979, where the Master introduced me as the latest Supreme Court Prize winner. I next met him when he addressed the 1983 Australia Day dinner in Oxford, just before I returned to Australia. I was surprised that he not only remembered me but also seemed entirely at home discussing my doctoral thesis, taking great pride in correctly guessing the subject of the third chapter after having enquired as to the subject matter of the first two. My third meeting was more decisive. Griffith University invited me to apply for the Foundation Deanship of Law in January 1991 and, two weeks later, Zelman was on the interview panel as the Vice-Chancellor's advisor. Although Professor Roy Webb (the VC) offered the job that afternoon, negotiations took three weeks because I had worked out that the legal education I wanted to provide would cost about 10 per cent more per student than any other Australian law school, with a further 10 per cent because of our then relatively small size. Sir Zelman invited me to see him at office in Treasury Place, Melbourne. He graciously told me he considered himself *functus officio* at that point, while saying that he was at my disposal in two senses – to help in ways I asked for as long as he could be of assistance. He also told me that he had

persuaded the University to leave major decisions until after the appointment of the Foundation Dean but that he had pre-emptively sought to position the incoming Dean in a very strong position to ensure that his or her vision could be implemented. He had done this by pressing for four things that I was free to concede if I preferred: a big investment in the law collection, ensuring that there was a separate law faculty, leaving business law in the business faculty and articulating law and other degrees more effectively (what he labelled ‘integrated degrees’).

The offer of assistance was naturally taken up with alacrity. I asked what we could do for him and he joked that all he needed was ‘feeding and watering’. I took delight in doing so in good (though never extravagant) eating places in Brisbane and occasionally Melbourne. Those done at university expense were some of the best investments it made, the private ones at our home and his were among the most memorable. They all provided a marvellous two way intellectual and practical engagement which demonstrated his wit, his intelligence and what was still a very open mind. He loved serious conversation in which he was open to persuasion. Initially, many of the discussions were about the reform of legal education as I got feedback on what I had written about and on our ideas for giving flesh to his concept of ‘integrated degrees’ (for months he started our meetings with: ‘what do integrated degrees mean’).

I THE ‘KIRIBILLI MOMENT’

As mentioned above, Griffith wanted me as Dean and were very generous in start-up funding, library funding and air-conditioning the law school (which I saw as a productivity measure), but had not fully agreed to the level of per student funding required at steady state (when we were teaching all five years of the degree). I put it to the Vice Chancellor that he could have the best law school in Australia for the price of the worst science department. If that excites you, I am your man. If you ask if it can be done for less, you need to ask another. Zelman was surprised at how hard the bargaining was but recognized that this negotiation was for a common cause. True to his principles, he let me have the running but stood beside me in silent support. The VC and DVC took Zelman and I out for lunch in the next ‘feeding and watering’ on 6 March 1991. Wine flowed freely but our heads were as clear as ever. The VC insouciantly suggested that we had reached agreement on enough matters for me to sign on. I did feel it necessary to point out that: ‘Vice Chancellor: there is this little matter of funding.’ ‘All right,’ he replied, ‘if I can get my way, you will have the best funded law school in Australia.’ I happily replied that ‘in that case, I would be churlish not to accept.’ Sir Zelman exclaimed: ‘in front of witnesses!’ We broke up laughing as the talk of the time was the Kirribilli agreement between Hawke and Keating in which another

knight of the realm was brought in to witness. But we also realized that this was something very different – agreement to fully back something we all believed in and in which the spirit was so much more important than the letter. Even though Roy had not agreed to the exact numbers, he had committed to something more. In the following six months, he agreed to provide a new building rather than a renovated one and not only provided all I had asked for while I remained Dean but increased the funding per student to accommodate new ideas developed by the Faculty in consultation with Sir Zelman.

II CHARMING THE QUEENSLAND PROFESSION

The ‘feeding and watering’ then took on an external dimension in which Sir Zelman introduced me to the profession, giving me an opportunity to canvas their views on how legal education could be improved. I threw out some of the ideas from my writings on legal education and discussions at Griffith on how to make dual degrees more ‘integrated’.

While I had been able to persuade leaders of the Victorian bench and bar of the kind of reforms I had been advocating, I knew no one in the Queensland profession – imagined to be the most conservative in the country – who would. Sir Zelman’s name could get us in anywhere. Once we got to the partners’ dining rooms in major firms, his benign presence, with occasional and always helpful interventions, were enormously helpful. Just as helpful were his pen pictures of those we were about to visit and feedback on meetings we were driving back from.

He also gave me the confidence to approach directly those whose eminence I thought too great for a 38-year-old novice Dean to presume to engage. ‘How should I go about seeing Chief Justice Sir Anthony Mason to discuss the curriculum?’ ‘Just drop him a letter’. I did, we met, he listened intently to our plans, and he became the patron and later chair of my research institute – as well as another long term friend.

Sir Zelman also told me that I should join the Queensland Club on the basis that nobody could think that the changes to legal education we were planning were dangerous if they emanated from a member of that Club.

Most importantly, he took me to see his old friend, Wally Campbell, the Queensland governor. Soon afterwards, we were discussing (over lunch as usual) his plan to ensure that our curriculum would sail through the three bodies that had to endorse it before we could receive accreditation (Supreme Court, Bar Board and Solicitors Board). He would ask the Governor to provide a reception at Government House to formally introduce me and the

curriculum, to the Queensland profession, including all members of the accrediting bodies. The reception became the centrepiece of our campaign – a campaign that could now be much more ambitious. We could aim beyond securing a majority on the relevant approval authorities, seeking to convert opponents into supporters, supporters into enthusiasts and both supporters and enthusiasts into potential employers.

In the lead up to the launch, I asked some of those who were already on side to list those whom they considered to be opinion leaders and to rank them in order of influence and likely sympathy. John Griffin QC and Peter Short then joined me to ‘lunch’ them in order.

At the launch, I was to give an overview speech with a ‘takeaway’ pack consisting of the law school glossy brochure and a six-page document outlining the structure, main features and rationale of the curriculum. The full submission, some sixty pages, with detailed subject descriptions and other information required for accreditation, was couriered to the offices of the judges and board members while they were at Government House (with the approval of the Chief Justice and the Secretary of the two boards). When they came to look at the larger document, I hoped that they would already be enthused about the overall approach and would not question or niggle about details about which they might otherwise differ. Of the 80 members of the three approving bodies, only one (a barrister) suggested that accreditation not be given immediately – a suggestion with which he did not persist when it was clear that all others were in favour. Not content with an overwhelming majority, John Griffin and I ‘lunched’ the one potential dissident and got him fully on board. Thus, it was that the ‘revolutionary’ curriculum passed through what some had imagined to be the most conservative profession in Australia with the toughest and most restrictive rules for accreditation.

Sir Zelman made it possible. He engaged in constructive dialogue and gave me the confidence to engage in constructive dialogue with professionals whom I had not met and propound my ideas that he endorsed by his association. When it came to the reception, he flew off to speak elsewhere. I initially thought he was abandoning me. He was, in fact, giving me room to fly.

He returned to all major law school events for the following decade – starting with the opening of the Law School three months later. He thought it best that he did not perform the official opening. We agreed that I should approach Sir Ninian Stephen whom I had previously recruited to the Board of the Ethics Centre I had worked to establish in Melbourne two years earlier. As Sir Ninian

praised Zelman's first, and my second 'revolution in legal education',² we were two immensely happy, if unlikely, revolutionaries sharing a bond that was special to both of us. No revolution goes according to plan and the Griffith one exhibited a little too much of the tendency for revolutions to devour their own. But, 20 years later, they both pass the core test that what was once revolutionary is now commonplace.³

III THE FAIRFAX CHARTER

Having been a formidable media performer in his own right and later Chair of the UK Press Council, Sir Zelman had much to say about the press in all the countries he cared about. At another delightful 'feeding and watering' event at the same restaurant where we had shared our Kirribilli moment, Sir Zelman told me that he had accepted Conrad Black's invitation to become Chair of Fairfax. At the time, *The Age* journalists were clamouring for a charter of editorial independence and he did not see the point of it. He was not given to playing devil's advocate and I sensed that this was his current view but he was keen to hear other views. A great conversation ensued during which he told a story about a puzzled colleague asking Lord Beaverbrook why he had bought the *Telegraph and Evening Standard*, given the apparently limited financial returns that could be expected. Beaverbrook's answer was simple: 'power'. This story was not put as a criticism of Beaverbrook, but as a part of the natural order of things. I said that such a view was unacceptable in a democracy and provided an argument which I later used as the basis for later academic and policy writing (including a submission to the Finkelstein Inquiry and a recent op-ed).⁴

Defining and policing the boundaries between the market and democracy is a perennial problem in most modern states committed to both democratic and market principles. In most countries, the majority of citizens value both democracy and the market – wanting politics to be run according to democratic principles (one-vote-one-value) and the market largely by market

² Sir Ninian Stephen, 'Once and Future Law Schools' (1992) 1 *Griffith Law Review* 10.

³ More information can be found in pieces I was asked to write on the process including: Charles Sampford 'Starting a Law School from Scratch: the Griffith Experience' (1995) *Reporter of the Society of Public Teachers of Law*; Charles Sampford, 'Reflections on a Respectable Revolution' (2003) 11 *Griffith Law Review* 252; Charles Sampford, John Goldring and R. L. Simmonds, *Legal Education: New Foundations* (Cavendish, 1998).

⁴ Charles Sampford and Ramesh Thakur, *The Fairfax Charter: Balancing media, markets and democracy* (2 July 2010) The Conversation <<http://theconversation.edu.au/the-fairfax-charter-balancing-media-markets-and-democracy-8012>> and Charles Sampford, Submission to Independent Inquiry into Media and Media Regulation, 3 November 2011, <http://www.dbcde.gov.au/__data/assets/pdf_file/0003/142725/Institute-for-Ethics-Governance-and-Law.pdf> both of which drew on R Lui and C Sampford 'Media Ethics Regimes and Ethical Risk Management in Australia' (2004) 19 *Journal of Mass Media Ethics* 86.

principles (‘one-dollar-one-value’). Media have a critical role in a democracy but most also operate in the market. If Beaverbrook’s answer were deemed acceptable, it would allow the market to dominate our polity. Democratic competition needs to be carried out on a level playing field. If most of the playing fields are owned by those barracking for one side and using their ownership to skew the result, democracy cannot thrive.

Zelman agreed and entered into good faith negotiations with the journalists, producing *The Age* (later Fairfax) Charter.

IV THE REPUBLIC

During the mid and late 1990s, another predictable issue for two constitutional lawyers to discuss was the Republic. I had been a supporter of an eventual Republic since I was 19 and was heavily involved in the Australian Republican Movement through most of the 1990s. However, I have always been a strong defender of parliamentary over presidential systems – most particularly because it denies to the political head of government the symbols of statehood and places them in the hands of an apolitical office. My republicanism has been to want that office to be an Australian one. However, I have also always been a gradualist, agreeing with the late Colin Howard (who was once a Republican and with whom I had debated monarchists in 1979) that it was something that should happen when it had 70 per cent, not 51 per cent, support. I was not one who thought that 1975 dismissal of Whitlam provided a reason for supporting a republic. If anything, it pointed in the opposite direction as few thought that the Queen would ever have contemplated acting as Sir John Kerr had done. This was not a matter of the personal qualities of the Queen. (I always greatly annoyed my mother by warning her that the more she praised the personal qualities of the Queen, the more she undermined the monarchy. If the performance of the monarchy is based on the qualities of the occupant then it is necessary to appoint them on the basis of the required qualities rather than a genetic lottery.) It was based on the limited legitimacy of an English Queen to make decisions in Australia with huge political consequences. If anything, the appointment of Australians to the position of Governor-General gave them political legitimacy that made actions such as the dismissal conceivable. Calling them ‘President’ might increase the risk that the constitutional conventions at the heart of our democracy (but not written into the Constitution) might be weakened and break under political pressure.

It was legendary that Zelman did not reveal his views on the dismissal and I never felt it appropriate to ask. However, in discussing the Republic, I was fascinated that the differences between the former Governor-General and the Vice-President of the Queensland branch of the ARM came down to the

critical question of how to ensure that the Westminster conventions could be preserved. He thought the risk was too great; I thought it could be managed. This position involved some wonderful legal, constitutional, political and practical discussions. In the end, I persuaded him that George Winterton's proposals would do the trick.

At a dinner at his house (he and Lady Anna Cowen were, feeding and watering my wife and I), he said that it was obvious that we should become a Republic and what were we waiting for. For once, I was the cautious one, repeating the 70 per cent idea and that we might have to wait a little longer to get others less progressive than he on board. He did sterling work advocating for the Republic as the referendum approached and my research institute organized a large conference in Brisbane to discuss it at which Sir Zelman and Sir Anthony Mason (another valued mentor) took a very prominent part and drafted a joint call for a plebiscite on whether we should have a republic, a convention on the form it should take and then a referendum. As it was, 70 per cent were in favour of a republic but they split between minimalist republicans and those who claimed they wanted a vote.

V THE 'MASTERCHEF MOMENT'

My wife, Jenny, and I were used to putting on dinner parties in Melbourne and Zelman was a frequent and welcome guest at our 'new' house in Brisbane. There were many scintillating discussions, story telling (at which Zelman excelled). However, he also loved to act the one-eyed fan of the St Kilda Football club, of which he held the #1 ticket – and revelled in disarming boyishness. One such expression of the latter was when he announced that nobody ever served jelly anymore. The next time, Jenny put together orange jelly, with mandarin segments soaked in Cointreau. As she placed the two-litre bowl in front of him, his eyes lit up, he wrapped his arms around it and asked where the desserts for the rest of us were.

Like many who knew Zelman, I valued his friendship and generous support.

He was never demanding.

He did not seek acolytes or sparring partners but those with whom he could discuss.

He was a wonderful friend, much valued by those he befriended and missed by all of us.

Rest in peace, you will live on in our memories.



Professor Graeme Orr

An Interview with Professor Graeme Orr on *'The Law of Politics: Elections, Parties and Money in Australia'**

PB: Professor Orr, thanks very much for joining us. Why do you think the study of electoral law is important?

GO: It is just inherently interesting at so many levels. The basic rules for electoral democracy are fundamental to public affairs, government legitimacy and participation. It also has to do with the way in which we set up mechanisms for deliberation. For the average person the experience of voting is largely a ritual. Your one vote is unlikely to determine anything, but it's a public aspect of your involvement in society.

PB: There are five main sources of electoral law: constitutions, courts and tribunals, legislation, parliamentary committees and electoral commissions. You say that the last two are the most important. Why?

GO: They drive the detail and the actual giving of flesh to the bones of the system. We wouldn't want to leave it just to self-interested parties. The independent electoral commissions have a lot of expertise, and the parliamentary committees go around after every election in most states and consult very widely.

PB: Australia was among the first countries to give women the vote. The secret ballot and preferential voting were also first introduced here. Is electoral law still an area of rapid change, or have things become more stagnant?

GO: We have certainly gone off the boil. We are well behind. Our system of regulating political finance is moribund by international standards, even compared to the United States, which we think of as being all about money and the freedom of money.

It is not entirely true to say that Australia is some kind of paragon of democratic virtues. We excluded many indigenous people from the vote until 1962. New Zealand beat us to enfranchising women. We didn't invent the secret ballot; what we did was invent an official

* Professor Orr teaches and researches at the T.C. Beirne School of Law, University of Queensland. This interview was conducted in April 2011 by Will Isdale and Lucy Hirsch. Questions were based on issues canvassed in Professor Orr's book *'The Law of Politics: Elections, Parties and Money in Australia'* (Federation Press, 2010).

version of the ballot. We have a system that's very good with integrity of the process, but we've stopped innovating with voting systems. It is 60 odd years since we brought in proportional voting for the Senate.

PB: In the United States the major parties don't have an incentive to get rid of the filibuster (where the time limits for speaking are exhausted so as to avoid a vote). Are there some equivalent examples here in Australia?

GO: There is some ossification of the political system around the major parties that have become, on some arguments, a kind of two party cartel. Many aspects of the system suit them fine. The obvious example is majority voting systems, which dominate the houses by which we get our governments. Much of the rest of the world has moved to proportional representation.

PB: There have not been many instances of major electoral corruption in Australia. Who/what deserves the credit for that success?

GO: We have had an easy ride for a lot of reasons. A lot of them are to do with being a relatively prosperous island nation. In terms of pure electoral matters, even before we had a formal electoral commission, going right back to the early 1900s, we have had relatively strong independence for the bureaucracy. People think we're all kind of laid back but actually, we're very good at doing bureaucracy and doing government. We are very cynical about that but it is actually one thing other countries could learn from us.

PB: The High Court has said that there is a constitutional right to vote. Could you tell us a bit about that, and about who exactly is entitled to vote under our current laws?

GO: The Constitution doesn't say a lot about voting. On the face, it appears to leave it up to Parliament. But, there are Constitutional provisions which say that members of the Houses of Parliament must be "directly chosen by the people," so from that you can imply that there are limits to how parliaments can restrict the franchise. We have tended to assume that there is a basic liberal agreement about who should vote. You have to be over 18, a citizen, and living in an electorate.

But should we allow permanent residents to vote? What about Australians who travel or live abroad? At the moment, you have to

have an intention to return within six years. There are some issues like that. Obviously the talismanic one is prisoner voting, which is a bit of a political football. We only exclude people who are currently in prison for a period of time, whereas in the United States you can be excluded for life.

PB: One notable feature of the Australian electoral system is compulsory voting. What kind of effect do you think that has on the result of elections?

GO: The assumption is that it is progressive, in the sense that it is more egalitarian, meaning younger people are more inclined to enrol than they might otherwise be. People who are new citizens are more inclined to enrol. People who otherwise might be on the margins of society, because of homelessness or whatever, are more inclined to stay in touch with the voting and political system.

But I suspect compulsory voting tends to reinforce the status quo. On election day you get a lot of apathetic people who probably wouldn't go out to vote unless it was compulsory. They tend to just stick with the devil they know, until they think they have really strong reasons to kick out a government. So in some ways, compulsory voting may distort the results that would otherwise occur, but we are not going to get rid of it. The parties all love it.

PB: You write that something like 10 percent of eligible voters aren't actually enrolled. You suggest that we could move towards automatic enrolment. Wouldn't that risk damaging the integrity of the roll?

GO: Integrity cuts both ways. If you have 10 percent of the population who aren't enrolled or have been kicked off the roll without them really being aware of it, then you have got problems. If I want to defraud an election, the best thing I can do is know that there is a large body of people who aren't on the roll and then I just impersonate them. I get someone else to fill in a form to try and get him or her on the roll. I am not saying that sort of thing occurs in Australia, but it certainly occurs in other countries. If we have a roll that is comprehensive, it is not only better for participation, it's also better for integrity.

PB: People seem to feel increasingly disconnected from the political process. There is a perception that the ranks of politicians are filled by ex-staffers of other politicians, and that it is a rather insulated

profession. Do you have any views on whether moving to an American style primary system, where voters chose the candidates directly, instead of having political parties choose them, would be a good move?

GO: I think it's the wrong answer to the right question. There is malaise in the parties. Their membership bases are shrinking. We increasingly feel they are disconnected from the community. However, primaries add a lot of expense to the process. They turn an election season into a year long affair. Whilst the parties are not perfect, I think they are still useful vehicles because people see them as a sort of rule of thumb; you know, "I support Labor because I am a trade union member, I am from a working class background." In the United States, you don't see that. The Republicans and the Democrats overlap, and it's all about the charismatic individual.

PB: One very heated issue is political broadcasting. Could you tell us, first of all, a bit about the *ACTV* case?¹

GO: I can remember when that case came down. I was studying in London and it was just a real surprise because, in Britain, no one can buy advertising time on TV and radio for out-and-out political, electoral campaigning. The Hawke government decided we would borrow that kind of British model and the High Court said, "We don't think that's democratic enough for here." It was a real surprise because that was one of the first cases where the High Court said, "We're going to read stuff into the constitution that isn't obviously there."

You've got to have some level of freedom of speech to have meaningful elections, but simply preventing people buying airtime on TV during an election campaign doesn't stop us being a democracy. It would just make us a different democracy than, say, the American system, which is all about large amounts of money and electronic advertising. It's the main cost in election campaigns at the moment and so regulating this to try and limit the costs that lead to inequality and the appearance of corruption is a big issue.

PB: Isn't this kind of advertising necessary so that people are aware of the issues?

GO: What does it add to the debate, let alone informed deliberation, to

¹ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

have so much money go into 30 second TV grabs? In Britain, the parties still deliver, physically, a copy of their policy platform to every household. They still door knock, and partly because they have to as the law does not allow TV and radio advertising.

PB: Some people have suggested that more 'direct democracy' would invigorate our political system and encourage greater involvement and public deliberation. What do you think about that?

GO: Well, it has been a longstanding debate in Australia. People often look to the Swiss and the American models of direct democracy, where you can either have a referendum to recall a politician or to initiate legislation, rather than just on changing the Constitution. It is citizens basically drafting a law in the American experience.

But California is broke in large part because people pushed for laws requiring a certain amount of expenditure on services and then also saying you can't raise taxes. Most people do not have a wide understanding of how government works. While there are issues like changing the government and voting for politicians and encouraging everyone to get out there, I don't think a system of citizens' referenda would be all that great. Sometimes it looks interesting and fun. Medical marijuana is legalised in California through citizens' referenda. That's a libertarian thing and sometimes I think citizens need to oppose laws that are heavy-handed, but what if it was heroin, for example?

PB: When you first started looking at the laws surrounding organised politics in Australia over 12 years ago, you wrote that electoral law in Australia had "Cinderella status". Today you say that many are enjoying the ball. What do you see as the greatest issues ahead for the field before we can say that we have reached the after-party?

GO: We have to think broadly about how we modernise and experiment with the system, because it has got to be a living and changing one. We can't just imagine that somehow parliamentary and electoral democracy was finally and fully formed in the late 19th century by the Chartists and other movements. We have got to see it as a continuing process, and that involves a certain amount of academic insight and a certain amount of public discussion. It involves a certain amount of pushing by governments and electoral commissions.

PB: Professor Graeme Orr, thank you very much!

The Dark Knight and the Natural Theory of Justice

Jonathan Choi*

I INTRODUCTION

What is the basis and justification of our duty to obey the law? According to John Rawls, the most appropriate explanation is from the standpoint of *justice as fairness*. In assessing the merits of this approach, the key criticisms of his thesis are considered – namely, the issues of *particularity* and *insufficiency* – along with their countervailing arguments. This paper will close with an attempt to reconcile the opposing schools of thought, and consider the possibility of a pluralised or ‘hybrid’ solution to the problem of political obligation.

II THE NATURAL DUTY OF JUSTICE

In considering the problem of political obligations, Rawls proposes a *duty*-centred account of the bond between individuals and their political institutions. Adopting a traditional view of natural law – namely, that such laws ‘oblige us in conscience, since they derive from eternal law’¹ – Rawls proposes a *natural duty of justice* (the ‘natural-duty’), requiring that we:

- Support and comply with just institutions that exist and apply to us (‘L1’), and
- Further just arrangements not yet established, at least when this can be done with little cost to ourselves² (‘L2’).

In doing so, Rawls distinguishes between natural duties and *obligations*, noting that the former:

- Binds each person persons ‘irrespective of [their] voluntary acts’;³
- Holds between us as equal moral persons, independent of ‘their institutional relationships’;⁴ and
- Includes both positive and negative duties.⁵

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The author gratefully acknowledges the guidance and support of Dr Kevin Walton, and thanks him on behalf of all his students for being an absolutely wonderful teacher.

¹ *Summa Theologiae* I-II, 94:4 (St Thomas Aquinas, *Summa Theologiae: A Concise Translation* (Methuen, 1991), 291.

² John Rawls, *A Theory of Justice* (Harvard University Press, 1999), 98-9.

³ *Ibid* 98.

⁴ *Ibid* 99.

⁵ *Ibid* 98.

- The outcome is a generalised account of our political duties to the state, grounded upon moral obligations.⁶

III CRITICISMS OF THE NATURAL DUTY

A *The two arguments*

The most significant argument which the natural-duty approach is vulnerable to is what Simmons calls the '*particularity*' requirement. Simply put, in terms of L1, which are the institutions that 'apply to us'? Let us begin our analysis with a familiar example. It would be clear why Bruce Wayne should support justice, through supporting just states or laws; however, it is much harder to see why Bruce should support *Gotham City's* institutions and its laws above all others.⁷ Simmons expands this further to explain why it is fatal to Rawl's proposed duty. First, he notes that institutions can 'apply to us' on three levels, either:

- *weakly* (for example, where a Brotherhood of Mild-Mannered Villains proposes to levy arbitrary 'superhero license fees' upon Bruce);
- *territorially* (merely because Bruce was born in Gotham); or
- *strongly* (where certain 'transactions' tie Bruce to Gotham – for instance, through express consent, or an acceptance of state benefits).⁸

Of the three, Simmons proposes that only (c) is sufficient to ground a political obligation; even (b) is considered insufficient due to Bruce's lack of input into where he is born. Moreover, he asserts that *removal* of the 'application clause' is likewise problematic;⁹ without the clause, there would be no 'special bond' between Bruce and the institutions of Gotham¹⁰ – a bond which Simmons asserts that all theories of political obligation must provide.¹¹ The consequence is that Bruce is equally bound to support *any* just political institution, whether it is Gotham or Australia.¹² This presents a further difficulty if Bruce were a citizen of Gotham *and* Australia; both states go to war; and he is called upon to serve in the military forces of both. Simmons concludes that the impossibility

⁶ Ibid 98-9.

⁷ A. John Simmons, 'Political Obligation and Authority' in Robert L. Simon (ed), *The Blackwell Guide to Social and Political Philosophy* (Blackwell Publishers, 2002), 30.

⁸ Ibid 147-156.

⁹ A. John Simmons, *Moral Principles and Political Obligations* (Princeton University Press, 1979), 31-5, 155-6.

¹⁰ Ronald Dworkin, *Law's Empire* (Fontana Press, 1986), 193.

¹¹ A. John Simmons, 'Political Obligation and Authority' in Robert L. Simon (ed), *The Blackwell Guide to Social and Political Philosophy* (Blackwell Publishers, 2002), 29.

¹² See also section: '*Conflicts between competing duties*'.

of addressing the particularity requirement through natural duties means that Rawl's theory constitutes a 'dead end'.¹³

A second set of issues is raised by this example, which I shall refer to as the '*insufficiency*' problem – Bruce, despite being a virtuous and respectable citizen of Gotham, may reason that: (a) the breach of minor laws will have little appreciable effect on overall justice; and (b) the acts of an individual would likewise have little impact on justice.¹⁴ The result is that this 'unconditional' account of our political obligations¹⁵ may not always counsel obedience. Thus, this scenario highlights two of the principal criticisms raised against the natural-duty, which will remain the focus of this paper. It is now necessary to examine the thread of philosophical responses to both these criticisms – first beginning with the 'particularity' requirement.

B *The requirement of 'particularity'*

1 *Waldron's range-limited approach*

In defending the natural-duty approach, Waldron attempts to demonstrate that there is a special political bond between an individual and his country, such that its institutions 'apply' to him in a way which other institutions do not. He specifically outlines the two objections:

- (i) The *special allegiance* objection (i.e. the particularity requirement); and
- (ii) The *application* objection (i.e. how a *particular* institution within a territory comes to be the one which individuals owe their obedience and support).

In response to (i), Waldron proposes that while there are certain duties which apply *everywhere* (e.g. Bruce not exploiting his sizeable fortune to undermine foreign governments) – certain principles of distributive justice remain *range-limited*.¹⁶ By classifying principles as such, Waldron establishes a distinction between respective 'insiders' and 'outsiders'; the latter being those in the set of persons referred to by a given range-limited principle.¹⁷ To illustrate, Bruce has a special *insider* relation to the laws of Gotham, because the laws have been set up precisely to address the questions of rights and duties of someone in his

¹³ William A. Edmundson, 'State of the Art: The Duty to Obey the Law' (2004) 10 *Legal Theory* 215, 230.

¹⁴ A. John Simmons, *Political Philosophy* (Oxford University Press, 2008), 59-61.

¹⁵ John Rawls, *A Theory of Justice* (Harvard University Press, 1999), 99-100.

¹⁶ Jeremy Waldron, 'Special Ties and Natural Duties' (1993) 22(1) *Philosophy and Public Affairs* 3, 12.

¹⁷ *Ibid* 12.

position vis-à-vis his fellow Gothamites.¹⁸ He remains an *outsider*, however, to the laws of Hong Kong; since Bruce lacks any geographic or legal connection to Hong Kong, its laws would not 'refer' to him. In justifying this approach, Waldron draws upon Kantian notions for the necessity of a political state, namely that: all humans share the earth; we therefore need to enter into 'a form of society' with our nearest neighbours; and to avoid descending into 'fighting' and 'wild violence' with our neighbours, any *unavoidable* conflicts must be resolved on the basis of 'just' institutions.¹⁹

Addressing (ii), Waldron proposes that an institution is entitled our compliance and support provided it is: 'just, effective, and legitimate';²⁰ the latter being established by superior strength, or if it commands popular support.²¹ Here, Waldron distinguishes between two interpretations of 'just' – that although an institution *operates* justly, it may not necessarily be an institution whose activities are *required* by justice.²² For instance, the evil Brotherhood may be internally just, and even apply to Bruce; however it cannot impose duties upon him simply because it was not designed to promote justice. Thus Waldron concludes that each person will have a range-limited natural duty to support and comply with one *particular* just institution (or set of institutions) whose rules apply to him.

(a) Simmon's critique of Waldron

Several criticisms have been made in response to Waldron's defence of the natural-duty. First, Simmons asserts that a state simply naming someone as to whom its institutions apply is exploitable – states could merely name anyone (or everyone) and thereby impose special duties of compliance upon them.²³ Though this is true to some extent, the obvious response would be that Waldron addresses this issue through the 'just, effective and legitimate' conditions in his thesis. That is, while the Brotherhood may propose to enact a law providing that: all Gothamites are required to donate half their salaries to the Brotherhood – provided the Brotherhood fails to satisfy the above requirements, no citizen would be under a duty to comply. Thus this first issue appears to be resolved.

¹⁸ William A. Edmundson (ed), *The Duty to Obey the Law: Selected Philosophical Readings* (Rowman & Littlefield, 1999), 73.

¹⁹ Jeremy Waldron, 'Special Ties and Natural Duties' (1993) 22(1) *Philosophy and Public Affairs* 3, 15.

²⁰ *Ibid* 20-7.

²¹ *Ibid* 25.

²² *Ibid* 14.

²³ A. John Simmons, *Political Philosophy* (Oxford University Press, 2008), 60.

Simmon's second assertion is that the naming of a person and a territory as its own is not 'morally significant' in any way.²⁴ Natural duties bind those because of *moral* considerations – that justice must be done and promoted because of the moral importance of justice, period²⁵ – not because of a special position (or location) of a person.²⁶ On the other hand, the 'mechanical' means by which Waldron distinguishes between insiders and outsiders appears to conflict with the duty's emphasis on morality. I find this the more difficult argument to refute, since any attempts to argue that Bruce is morally-bound to Gotham *in particular*, appear to oscillate back towards the associative and transactional arguments Rawls attempts to shy away from. For such reasons, I propose that establishing such a particularised, *moral* bond is simply not feasible here. Yet I do not think that this is necessarily fatal to Waldron's thesis. It should be remembered that the pursuit of justice is the moral imperative underlying the natural-duty approach.²⁷ Furthermore, any institution that has *eo ipso* a claim on our allegiance must nevertheless be *just* under Waldron's requirements.²⁸ Consequently, supporting one or more of these institutions – *however so elected* – would still further the demands of justice, and the moral imperatives of the duty.

(b) Duncan's critique of Waldron

In contrast, Duncan proposes that range-limitation itself is inconsistent with Waldron's argument for the necessity of a political state. He emphasises that the borders of states, which dictate to whom range-limited principles of justice should apply, are highly contingent and often an outcome of historical accident (eg the same government administering distributive justice to residents of both Alabama and Hawaii).²⁹ Consequently, states do not necessarily adjudicate claims between those involving me and those who I am 'unavoidably side-by-side with'.³⁰ Similarly, Simmons notes that Waldron's theory does not account for historical legitimacy – such as distinguishing between elected governments, and those that come into power by force.³¹ These appear to be fair criticisms. Yet what is the significance of such arguments? Despite the United States

²⁴ Ibid 62.

²⁵ Jeremy Waldron, 'Special Ties and Natural Duties' (1993) 22(1) *Philosophy and Public Affairs* 3, 28.

²⁶ A. John Simmons, 'The Duty to Obey and Our Natural Moral Duties' in R. G. Frey (ed), *Is there Duty to Obey the Law?* (Cambridge University Press, 2003), 164.

²⁷ John Rawls, *A Theory of Justice* (Harvard University Press, 1999), 3.

²⁸ Jeremy Waldron, 'Special Ties and Natural Duties' (1993) 22(1) *Philosophy and Public Affairs* 3, 27.

²⁹ Sam Duncan, 'The Borders of Justice: Kant and Waldron on Political Obligation' (2007) 33(1) *Social Theory and Practice* 27, 31.

³⁰ Ibid., 30; citing Jeremy Waldron, 'Special Ties and Natural Duties' (1993) 22(1) *Philosophy and Public Affairs* 3, 14.

³¹ A. John Simmons, 'The Duty to Obey and Our Natural Moral Duties' in R. G. Frey (ed), *Is there Duty to Obey the Law?* (Cambridge University Press, 2003), 174.

government proposing to apply range-limited principles in remote locations such as Hawaii – it simply *does so*. Note that if it were *incapable* of exacting justice over its territories, it would be insufficiently ‘effective’ and therefore unable to exercise claims of allegiance. Likewise, a deposed government, while possibly legitimate from a historical-basis, would be nevertheless ineffective in promoting justice in the territory. Therefore as long as an institution that applies to us meets Waldron’s requirements, it may exact a claim on our allegiance. Considering the opposing view, if *historical circumstances were a necessary consideration* – then almost every government in the world would be undermined by competing claims of historical legitimacy. Therefore this criticism does not serve to undermine Waldron’s thesis to any significant extent.

Furthermore, Duncan questions: why must there be range-limitation at all? Why not have a ‘world government’?³² His argument is as follows:

- While the ‘state of nature’ between men will inevitably lead to violence,³³ *states* are likewise in a state of nature with regards to one another.³⁴
- The threat of violence between states is far worse, due to the greater intensity of violence involved.
- Consequently, a *world government* is desirable to adjudicate claims to resources between states, outweighing the need for range-limited principles.³⁵

The likely counter-argument to this question, as Duncan himself posits, is that there is no requirement that governments be limited in their range; they simply *are*.³⁶ It seems this argument remains true. Range-limitation merely represents a means of delimiting the scope of an institution’s influence and reflects each state’s territorial claims. A ‘world government’ does not exist now, simply due to our present circumstances. However, even Waldron accounts for the possibility of unitary systems arising – noting that as the ‘sphere of human interaction expands’, the ‘scope of the legal framework must be extended, and if necessary re-thought.’³⁷ Edmundson adds there already has been a movement towards fashioning transnational political institutions capable of

³² Sam Duncan, ‘The Borders of Justice: Kant and Waldron on Political Obligation’ (2007) 33(1) *Social Theory and Practice* 27, 31.

³³ Jeremy Waldron, ‘Special Ties and Natural Duties’ (1993) 22(1) *Philosophy and Public Affairs* 3, 14.

³⁴ Sam Duncan, ‘The Borders of Justice: Kant and Waldron on Political Obligation’ (2007) 33(1) *Social Theory and Practice* 27, 32.

³⁵ *Ibid.*

³⁶ *Ibid.* 31.

³⁷ Jeremy Waldron, ‘Special Ties and Natural Duties’ (1993) 22(1) *Philosophy and Public Affairs* 3, 15.

doing justice (eg the United Nations, and the International Court of Justice).³⁸ Consequently, territorial exclusivity appears to be more of a ‘contingent administrative expedient’,³⁹ rather than some necessary element of legitimacy, and should not detract from Waldron’s thesis itself.

2 Other responses to the requirement of ‘particularity’

(a) Questioning the requirement

After considering Waldron’s defence of the natural-duty, it may be helpful to critique the particularity requirement itself. Greenawalt stresses that Simmon’s challenge is ‘inapt’,⁴⁰ noting that a duty to obey the law may exist despite a lack of particularity. He proposes that one’s *status* reasonably affects what justly can be demanded or expected – for example, a country may reasonably demand military service for its residents, but not for visitors.⁴¹ Edmundson adds that Simmon’s concerns are ‘overwrought’ – arguing that there is no reason why the particularity requirement should be anymore sacrosanct than the intuition that political obligations exist.⁴² Finally, Dudley characterises Simmon’s argument as ‘misleading’.⁴³ He presents the analogous principle: that children should respect their parents if and only if their parents treat them with tender loving care. However, the mere fact that a child shows respect to *other* parents does not render the principle flawed; rather, it represents an entirely unrelated issue. Thus he arrives at a similar conclusion as Greenawalt⁴⁴ – that different duties may be imputed to us, depending upon our *status* (eg as citizens, tourists, or resident aliens) – and these duties will vary from case to case. Any institution that ‘applies to us’ merely asserts a range of duties, rights and responsibilities as a constitutive of a variety of roles, and this particular role happens to fit us.⁴⁵

At first glance, these arguments seem intuitively appealing, with each softening the significance of the particularity requirement. Whether Bruce decides to support justice in Gotham, or in Hong Kong, does not necessarily derogate from the existence of such a duty. Yet each argument fails to address Simmon’s central concern – that failure to address the particularity

³⁸ William A. Edmundson, ‘State of the Art: The Duty to Obey the Law’ (2004) 10 *Legal Theory* 215, 233.

³⁹ *Ibid.*

⁴⁰ Kent Greenawalt, ‘The Natural Duty to Obey the Law’ (1985) 84 *Michigan Law Review* 1, 16.

⁴¹ *Ibid.*

⁴² William A. Edmundson, ‘State of the Art: The Duty to Obey the Law’ (2004) 10 *Legal Theory* 215, 232.

⁴³ Dudley Knowles, *Political Obligation: A Critical Introduction* (Routledge, 2009), 158.

⁴⁴ Kent Greenawalt, ‘The Natural Duty to Obey the Law’ (1985) 84 *Michigan Law Review* 1, 16.

⁴⁵ Dudley Knowles, *Political Obligation: A Critical Introduction* (Routledge, 2009), 158.

requirement leads to *conflicts between competing duties* to promote justice, particularly in situations where one owes duties to multiple institutions.⁴⁶

(b) Conflicts between competing duties

Thus the effect of an un-particularised duty is that individuals may find themselves to be insiders with respect to multiple institutions administering incompatible principles. As noted, Simmons declares that it is merely 'good fortune' which allows holders of multiple citizenships to satisfy *all* of their political obligations of their respective citizenships.⁴⁷ He emphasises that even Socrates was the offspring of one community, was given the goods of citizenship by one community, and only promised to 'obey or persuade one state's laws'.⁴⁸ Even if Socrates were to make promises, or receive goods from *other* states, he could only acquire obligations insofar as these obligations *were consistent with* his prior obligations to Athens.⁴⁹ Therefore Simmons concludes that only transactional and associative accounts may provide sufficient guidance as to where one owes his or her allegiance.⁵⁰

I propose that this problem be addressed on two levels – in cases of: (i) *minor* conflicts between opposing duties; and (ii) *significant, seemingly unavoidable* conflicts. In respect to the former, relatively minor breaches of law are already accounted for by the Rawlsian theory.⁵¹ Furthermore, Simmons himself acknowledges that 'self-benefiting, relatively harmless illegalities' may make little difference to the cause of justice.⁵² Consequently, such cases do not serve to undermine the duty to any significant degree. However, the argument which is potentially more fatal to Waldron's thesis is that relating to more substantial conflicts.

Here, Simmons repeatedly points to the situation where one is called to serve in the military of more than one state.⁵³ Wellman outlines a somewhat convincing response, questioning whether a citizen even has a moral obligation to support his own country's military campaigns. He notes that most people may be naturally inclined to sacrifice for their country in times of war, and might even be uncomfortable with someone who was indifferent whether or

⁴⁶ John Simmons, 'Political Obligation and Authority' in Robert L. Simon (ed), *The Blackwell Guide to Social and Political Philosophy* (Blackwell Publishers, 2002), 29-30.

⁴⁷ *Ibid* 29.

⁴⁸ *Ibid*.

⁴⁹ *Ibid*.

⁵⁰ *Ibid* 30.

⁵¹ See also section 'C: *The problem of insufficiency*'.

⁵² A. John Simmons, *Political Philosophy* (Oxford University Press, 2008), 60.

⁵³ A. John Simmons, 'Political Obligation and Authority' in Robert L. Simon (ed), *The Blackwell Guide to Social and Political Philosophy* (Blackwell Publishers, 2002), 29.

not her country was militarily victorious.⁵⁴ Yet he argues that the forced imposition of any *non-essential state function* is not only inefficient, but *unjust*.⁵⁵ One example is the state postal service – arguably in this era of telephones, emails and reliable private couriers, it is neither ‘crucial’ nor ‘just’ to impose such a service upon its citizens.⁵⁶ Moreover, he stresses that a country’s military build-up is even less meaningful, since: (a) citizens have been already taxed for this ‘service’, and (b) countries often use their military forces to ill-effect.⁵⁷ Thus Wellman reasons there is no duty to serve in one country’s military – even in times of national crisis. Indeed, even Simmons fails to argue we have a *moral* duty to support our own country’s political or military campaigns.⁵⁸ Finally, Wellman adds that there is an element of ‘voluntary acceptance’ for those who choose to hold multiple citizenships;⁵⁹ at any point, such an individual faced with opposing duties could simply elect to renounce his citizenship.

It appears these arguments – while not comprehensive of every conflict or scenario that may arise – appear to considerably weaken the requirement of particularity. More notably, Wellman appears to suggest that in especially contentious issues as ‘war’ and conflict between nations, one may always *elect* to act upon what one perceives is ‘just’ under the circumstances. While this may seem contrary to Rawl’s original thesis, it should be noted that such an election would likely only occur in rare circumstances. Alternatively, my proposition is that such matters are overly-sensitive to competing arguments as to their impact on ‘justice’, and should therefore be considered *extrinsic* to the theory itself. Consequently, any conflict raised by such an election in respect to considerations of justice is removed.

Finally, Wellman proposes that the particularity requirement itself is *secondary* to the core issues of state legitimacy and political obligation.⁶⁰ He concedes that even his preferred ‘samaritanism’ approach (the details of which are outside the scope of this paper) cannot fully explain all pretheoretic intuitions on its own.⁶¹ However, he states that if the choice is between ‘the most promising

⁵⁴ Christopher Heath Wellman, ‘Samaritanism and the Duty to Obey the Law’ in R. G. Frey (ed), *Is there a Duty to Obey the Law?* (Cambridge University Press, 2003), 113.

⁵⁵ *Ibid* 73.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*.

⁵⁸ Christopher Heath Wellman, ‘Political Obligation and the Particularity Requirement’ (2004) 10(2) *Legal Theory* 97, *supra* Note 23.

⁵⁹ Christopher Heath Wellman, ‘Samaritanism and the Duty to Obey the Law’ in R. G. Frey (ed), *Is there a Duty to Obey the Law?* (Cambridge University Press, 2003), 49-50.

⁶⁰ *Ibid* 48.

⁶¹ Christopher Heath Wellman, ‘Political Obligation and the Particularity Requirement’ (2004) 10(2) *Legal Theory* 97, 114.

theory of political obligation⁶² and philosophical anarchism⁶³ – it would be ‘ridiculous’ to dismiss a theory for a mere *desideratum* rather than a requirement.⁶⁴ By way of analogy, he states that one should only abandon a scientific theory when a better one arises; not simply because the present theory fails to accommodate for *all* the data.⁶⁵ Based upon the merits of the various responses to the particularity problem, this is a conclusion I tend to agree with.

C *The problem of ‘insufficiency’*

The second set of issues raised by Simmons is what I shall refer to as the ‘insufficiency’ problem. This argument consists of two parts.

1 *The first issue*

The first is that natural moral duties *lack uniform legal compliance* as an implication.⁶⁶ Here, the duty to comply with just institutions may not always counsel obedience; Simmons points to ‘self-benefiting, relatively harmless illegalities’ which make no difference to the cause of justice.⁶⁷ In fact, the duty may be met sometimes more appropriately with *non-compliance* than compliance⁶⁸ – Bruce, despite being guided by principles of virtue and righteousness, may occasionally feel the need to dispense with rigid legal rules in order to promote and exact justice. Furthermore, it should be noted that even Rawls concedes that a theory of justice requires a theory of civil disobedience, in cases where distinct duties of justice conflict in what he calls a *nearly just* society.⁶⁹ One of the necessary conditions for such an act is that there must be a ‘substantial and clear injustice’⁷⁰ in order to justify a ‘non-violent’ and ‘public’ act of civil disobedience.⁷¹

Yet how can such considerations be reconciled with the original duty? Drawing upon Waldron’s definition of ‘just’ institutions, Green contends that it is false to assume that all of a ‘reasonably just’ state’s activities will be

⁶² Ibid 105.

⁶³ A. John Simmons, ‘The Anarchist Position’ (1987) 16 *Philosophy & Public Affairs* 268, 268.

⁶⁴ Christopher Heath Wellman, ‘Political Obligation and the Particularity Requirement’ (2004) 10(2) *Legal Theory* 97, 102.

⁶⁵ Christopher Heath Wellman, ‘Samaritanism and the Duty to Obey the Law’ in R. G. Frey (ed), *Is there a Duty to Obey the Law?* (Cambridge University Press, 2003), 48.

⁶⁶ A. John Simmons, *Political Philosophy* (Oxford University Press, 2008), 59.

⁶⁷ Ibid 60.

⁶⁸ Ibid.

⁶⁹ John Rawls, *A Theory of Justice* (Harvard University Press, 1999), 319.

⁷⁰ Ibid 327-8.

⁷¹ Ibid 320.

considered in the pursuit of justice.⁷² This appears to be a valid argument – how could a natural duty of justice validate laws for the purpose of maintaining an art gallery, regulating the economy, or protecting the environment? Yet such laws do exist, and these ideals are considered important by many. Therefore, Green proposes that we should account for ‘tolerable injustice’;⁷³ suggesting that justice should sometimes take a backseat to other ideals. On this view, the natural-duty argument will only be sufficient to ground a *narrow* obligation to obey the law – an obligation to obey those laws which are intimately connected with the requirements and administration of justice.⁷⁴ While this interpretation recognises and allows for acts of non-compliance, the problem which then arises is how can laws which are unconnected to justice be grounded as political obligations? This latter issue will be considered in the final section of this paper.

2 *The second issue*

The second issue raised by Simmons is that there is typically little appreciable effect to the cause of justice as to whether a *single* individual obeys or disobeys the law, since most people carry relatively insignificant influence.⁷⁵ Similarly, he maintains that small increments of *increased* obedience are unlikely to have an obvious beneficial effect on justice. Thus, Simmons concludes that such a duty cannot ground a sufficient obligation to obey domestic law.⁷⁶

There are a few possible responses to this problem. Greenawalt suggests that the answer rests upon a moral principle of ‘generalisation’: that is, if the circumstances are such that the consequences of *everyone* acting that way would be undesirable, then the act is wrong, and it is irrelevant that the consequences of one person’s acting in that way would not be undesirable.⁷⁷ For instance, if Wayne Enterprises elected to discharge a tiny amount of pollutants into the Gotham Lake, then despite the relative harmlessness of the act itself – the principle of generalisation will nevertheless render the act wrongful. Parfit, in combining notions of Kantian ethics⁷⁸ and contractualism,⁷⁹ arrives at a similar

⁷² Leslie Green, ‘Law and Obligations’ in Jules Coleman and Scott Shapiro (ed), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2004), 539.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ A. John Simmons, ‘The Duty to Obey and Our Natural Moral Duties’ in R. G. Frey (ed), *Is there Duty to Obey the Law?* (Cambridge University Press, 2003), 168.

⁷⁶ A. John Simmons, *Political Philosophy* (Oxford University Press, 2008), 60.

⁷⁷ Kent Greenawalt, *Conflicts of Law and Morality* (Oxford University Press, 1989), 177-8.

⁷⁸ Derek Parfit, *On What Matters* (Oxford University Press, 2011) vol. 1, 338-342.

⁷⁹ Ibid 360.

principle: that an act is wrong if forbidden by the rules whose universal acceptance would have the best consequences, impartially considered.⁸⁰

Moreover, Greenawalt counsels that there can be *other* arguments against disobedience,⁸¹ including:

- If the violation involves a known infringement of an individual right;
- If there is even a slight indirect negative effect (e.g. the non-payment of taxes by an individual may make a slight difference to the national budget); or
- Where there is only a *risk* that disobedience beyond a specific threshold may cause harm.⁸²

Thus, both Greenawalt and Parfit's theories focus upon the *consequences* of an individual's act – and in response to the initial issue, poses the question: “But what if everyone did the same?” One foreseeable difficulty with such an approach is the situation where there are *no* negative consequences to non-compliance. Nonetheless, Greenawalt maintains that even apparently harmless acts can result in ‘subtle and indirect undesirable consequences.’⁸³ While a more in-depth analysis of ‘consequentialism’ remains outside the scope of this paper, it should be noted for now that there are *multiple* approaches to warranting obedience. This particular point leads into the closing section of this paper.

IV CONCLUSION: A PLURALITY OF PRINCIPLES?

While the arguments of ‘particularity’ and ‘insufficiency’ appear to be less fatal to the Rawlsian duty than as originally maintained, the various attempts to address these issues – while arguably successful – nevertheless result in a significant narrowing of the original duty. The question arises: how can such a duty remain a generalised account of our political obligations?⁸⁴ Rawls in his original thesis alludes to the solution – simply put, there are several ways in which one may be bound to political institutions.⁸⁵ A number of philosophers, notably Klosko⁸⁶ and Wolff⁸⁷ have called for a *pluralistic* approach to political

⁸⁰ Ibid 412-3.

⁸¹ Kent Greenawalt, *Conflicts of Law and Morality* (Oxford University Press, 1989), 177.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ John Rawls, *A Theory of Justice* (Harvard University Press, 1999), 99-100.

⁸⁵ Ibid.

⁸⁶ George Klosko, *Political Obligations* (Oxford University Press, 2005), ch 5.

⁸⁷ Jonathan Wolff, 'Political Obligation: A Pluralistic Approach' in M. Baghamrian and A. Ingram (ed), *Pluralism: The Philosophy and Politics of Diversity* (Routledge, 2000).

obligation, with both noting that there is no single answer to the problem. Gilbert⁸⁸ and Steinberger⁸⁹ similarly have developed hybrid theories of political obligation, with the latter noting that any *generalised* attempt to ground such obligations is 'doomed to fail'.⁹⁰

However, such an approach is not without its critics. Wellman, in conceding that the natural-duty approach is incapable of satisfying *all* theoretical demands,⁹¹ nevertheless criticises the use of such hybrid explanations as being overly 'messy'.⁹² A further criticism is that merely combining principles is unhelpful, since the aggregation of 'weak and unsatisfactory' principles will hardly produce a strong and satisfactory theory.⁹³ Yet if the alternative is either: being restricted to a particular (flawed) theory of political obligation or natural duty; or resorting to philosophical anarchism⁹⁴ – the pluralistic view appears to be the most plausible means of reconciling the various approaches, as well as minimising their respective deficiencies.

Yet while we may be bound to political institutions in different ways, we are reminded that the natural duty to pursue justice should nevertheless remain the most 'fundamental'⁹⁵ and continue as our 'moral imperative'.⁹⁶ As a certain caped crusader once remarked, 'We're seeking justice, Alfred. How can that *ever* be a mistake?'⁹⁷ I am reluctant to disagree.

⁸⁸ Margaret Gilbert, *A Theory of Political Obligation* (Oxford University Press, 2006).

⁸⁹ Peter Steinberger, *The Idea of the State* (Cambridge University Press, 2004).

⁹⁰ *Ibid* 211.

⁹¹ Christopher Heath Wellman, 'Political Obligation and the Particularity Requirement' (2004) 10(2) *Legal Theory* 97, 114.

⁹² *Ibid* 114.

⁹³ Richard Dagger, 'Political Obligation' in Edward. N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2010 Edition).

⁹⁴ A. John Simmons, 'The Anarchist Position' (1987) 16 *Philosophy & Public Affairs* 268, 268.

⁹⁵ John Rawls, *A Theory of Justice* (Harvard University Press, 1999), 100.

⁹⁶ Jeremy Waldron, 'Special Ties and Natural Duties' (1993) 22(1) *Philosophy and Public Affairs* 3, 12.

⁹⁷ *Batman* (DC Comics, 1989) vol. 1 #437 (emphasis added).

Men: The Hidden Victims of Domestic Violence

Anita Siek*

I Introduction

Every year, thousands of Australians suffer physically, psychologically and financially as a result of domestic violence.¹ The total number of incidences, however, remains unknown due to the difficulty of data collection and unreported abuse cases. Although the Queensland Government has over the last few years developed a number of initiatives to reduce domestic and family violence, more needs to be done to enhance perpetrator accountability, to explore the causes of domestic and family violence, and to provide support to the “silent victims” of domestic violence, such as men. In an overwhelming majority of cases, it seems that women have been the main victims of domestic violence², however a question emerges: “What about the male victims of domestic violence?”

The notion of domestic violence is broadly defined under Section 11 of the *Domestic and Family Violence Protection Act 1989* (Qld). It includes not only physical violence but also that of wilful damage to property, intimidation, harassment, psychological and indecent behaviour.³ Throughout my nine-week Magistrate Work Experience Program at the Caboolture Magistrates Court, I was astonished to see the high prevalence of domestic violence cases dealt with on a daily basis in Brisbane Courts. However, what certainly surprised me most was that a number of these cases concerned male victims with female perpetrators, a scenario which often does not cross our minds.

This paper will consider the relevant perceptions concerning the prevalence of male victims and domestic violence. Through an in-depth discussion of domestic violence and its laws in Queensland, it will be the aim of this paper to examine and evaluate whether current domestic violence laws adequately protect and provide support for male victims of domestic violence. In doing so, the paper will highlight aspects of current laws governing domestic violence which should be altered to ensure that all Australian victims of domestic violence, not only the stereotypical female victims, are protected.

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¹ Jane Mugford, *Domestic Violence – Australian Institute of Criminology* (2011) Australian Institute of Criminology <<http://www.aic.gov.au/documents/5/9/5/%7B595AF09F-D3E0-42BD-AEB4-31194D259F52%7Dvt02.pdf>>

² Sandra Egger, *A Preview of Violence in Australia*, Australian Institute of Criminology (1995, AGPS).

³ *Domestic and Family Violence Act 1989* (Qld) s 11.

II Domestic Violence in Australia

Domestic violence is specifically identified as a public health issue under the "Goals and Targets for Australia's Health in the Year 2000 and Beyond",⁴ and is estimated to cost the Australian economy more than \$13.6 billion a year.⁵ Conventionally, it is held that, given the stereotype of males being physically stronger, violence is more likely to be perpetrated by men. Feminists for example, tend to argue that men are more violent due to the way that 'gender and power operate against women and children.'⁶ Numerous studies in Australia relating to domestic violence have supported this, indicating that women were five times more likely to be hospitalised for domestic violence related injuries than men⁷ and, further, are 3.6 times more likely to be killed by their male partners⁸ during acts of domestic violence.⁹ On the other hand, a closer look at the statistics relating to domestic violence in Australia reveals that police and hospital data underestimates the true number domestic violence incidences. According to the Australian Bureau of Statistics' (ABS) Personal Safety Survey conducted in 2006, it was found that whilst 5.8% (443,800) women were physically assaulted in the last 12 months prior to the survey, 11% percent of men (808,300) claimed that they experienced physical abuse by their female partners.¹⁰ Further, results also showed that since the age of fifteen years, that whilst 39.9% (3,065,800) of women were reported to have experienced some form of violence, the result for men were higher, at 50.1% (3,744,900).¹¹ Therefore, it seems that although Australian society today has come somewhat closer to understanding the significance of domestic violence against women, it has turned its back towards the issue of domestic violence towards men.

⁴ Dale Bagshaw, Donna Chung and Murray Couch, *Reshaping Responses to Domestic Violence* (UNSW, 2000) 4.

⁵ Bronwyn Herbert, *Domestic Violence costs \$13bn a year* (2011) ABC News <<http://www.abc.net.au/news/2011-03-07/domestic-violence-costs-13bn-a-year/57284>>.

⁶ *Ibid* 19.

⁷ Jenny Sherrad, Jane Ozanne-Smith, Irene Brumen, Virginia Routley and Fiona Williams, 'Domestic Violence: Patterns and Indicators' (Report No 63, Monash University Accident Research Centre).

⁸ Marianne, James and Carlos Carach, 'Homicide in Australia 1989-96', (Research and Public Policy Series No 13, Australian Institute of Criminology).

⁹ *Ibid*.

¹⁰ Australia Bureau of Statistics, *Personal Safety, Australia 2005* (2005) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0/>>.

¹¹ *Ibid*.

III Domestic Violence and the Law

Domestic and family violence in Queensland is dealt with under the *Domestic and Family Violence Protection Act 1989* (Qld) (“DFVP Act”). The Queensland justice system provides a combination of both civil and criminal responses to domestic violence. Under the *DFVP Act*, a member of the police force and/or a victim of domestic violence can seek protection from abuse by applying to the court for a domestic violence order (“DVO”). A DVO is a civil order, which will require a perpetrator to comply with the standard conditions of the order set out under the *DFVP Act*. Under Sections 17 of the *DFVP Act*, a respondent is to be of good behaviour and not commit acts of domestic violence,¹² and further, he or she must also comply with any other conditions imposed by the court and stated in the order.¹³ Failure to do so constitutes a criminal offence.

To grant a DVO, the court must firstly be satisfied that the perpetrator: (i) committed an act of domestic violence, (ii) that a domestic relationship existed between the two parties,¹⁴ and that (iii) the perpetrator is likely to recommit,¹⁵ or where the act of domestic violence was a threat, and likely to be carried out.¹⁶ Once a DVO is issued it can last up to two years from the date from which it is made, and be prolonged in special circumstances.

IV Men as Victims of Domestic Violence

A Gender roles and stereotypes

Stereotypes often shape the way society perceives situations involving men and women. The traditional societal view of domestic violence involves the notion of men engaging in the domestic abuse of their female partner or spouse, hence often making it difficult to accept that male spousal abuse is also a serious problem.¹⁷ Men are also stereotypically considered to be masculine and “strong”, and for this reason men are less likely to realise they are victims of abuse, be less likely to tell anyone about the abuse, and less likely to obtain

¹² *Domestic and Family Violence Act 1989* (Qld) s 17(a).

¹³ *Ibid.*

¹⁴ *Domestic and Family Violence Act 1989* (Qld) s 20(1)(a).

¹⁵ *Domestic and Family Violence Act 1989* (Qld) s 20(B)(ii).

¹⁶ *Ibid.*

¹⁷ Alexander Detschelt, ‘Recognizing Domestic Violence Directed Towards Men: Overcoming Societal Perceptions, Conducting Accurate Studies, and Enacting Responsible Legislation’ (2003) 12 *Kansas Journal of Law and Public Policy* 249.

help for such abuse.¹⁸ Consequently, men have predominately not been the target of data collection, thus indicating that official figures underestimate the true extent of male victims. Whilst the Australian community has, over the last decade, begun to acknowledge that domestic violence against women is unacceptable via mediums such as television advertisements, and well-known campaigns such as “Domestic Violence against Women, Australia says No” it would seem that the Australia is yet to fully accept that men can be victims of domestic violence as well.

B *Support Services for male victims of domestic violence*

Although numerous support services have been established to assist female victims of domestic violence, there is evidently a lack of support services for male victims in Queensland. With current campaigns placing gender based violence into the national and international agenda, advocates for men's health and male victims would likely be faced with a battle to convince the federal government in Australia to fund programs to assist the male victims of domestic and family violence.¹⁹

V Women and Violence

Males are typically perceived as physically stronger than females and consequently, more likely to engage in domestic “violence”. However, it is important to consider that a broad definition of ‘domestic violence’ is provided under the *Domestic and Family Violence Protection Act 1989*, which includes non-physical violence such as verbal abuse, or intimidation. Additionally, according to a study conducted by the University of Melbourne, which examined both physical and non-physical assault rates between males and females, no significant differences were found between the genders. Further, it was also found that men and women reported approximately equal rates when asked whether they have been assaulted by their partners (including de facto spouses) either through ‘slapping’, ‘hitting with fist’, having something thrown at them’, ‘kicked’ as well as ‘other forms of physical assault.’²⁰ In addition to asking participants about actual physical violence, notions of threats, intimidation and harassment were also examined. Results indicated again that men and women

¹⁸ Dennis Campbell ‘More than 40% of domestic violence victims are male, report reveals’ (2010) *The Guardian* <<http://www.guardian.co.uk/society/2010/sep/05/men-victims-domestic-violence>>.

¹⁹ Deborah Robinson, *No Support for Male Victims of Domestic Violence* (2010) Australian Women Online <<http://www.australianwomenonline.com/no-support-for-male-victims-of-domestic-violence>>.

²⁰ Bruce Headey, Dorothy Scott, David de Vaus and Kathleen Funder, ‘Domestic Violence in Australia: Are women and men equally violent?’ (1999) 2 *Australian Social Monitor* 57.

experienced the same levels of non-physical violence and required the same level of medical attention for injuries resulting from domestic violence.²¹

Violence and abuse by a female is triggered differently compared to violence initiated by a male perpetrator. A study conducted by Scutt in 1983 found that whilst a man's violence was more likely to emanate from his position of dominance, a woman's violence towards her partner emanates mainly from a refusal to accept less powerful position.²²

VI Proposal

Queensland's current legal response to domestic violence relies on both civil domestic violence orders and criminal sanctions. As explained in Sections III, failure to comply with the terms of a civil DVO order is a criminal offence. In order to adequately reduce the prevalence of domestic violence, a 'zero tolerance' message on domestic violence needs to be enforced, and accountability of perpetrators needs to be enhanced. To achieve this, a stronger criminal law approach should be implemented. The current approach does not effectively hold all perpetrators of domestic violence accountable, rendering existing penalties are ineffective. A way to enhance the criminal approach would be an amendment to Section 67 of the *DFVP Act* that will allow members of the police force (when investigating suspected domestic violence incidents), to charge a perpetrator for a criminal offence when sufficient evidence exists in addition to making an application for a DVO.

Queensland requires an "integrated approach" to service delivery. An integrated approach would require '*agreed protocols and codes of practice, joint service delivery, agencies reconstituting or realigning their core business to confront the challenges posed by a broadened conception of the problem*'²³ An integrated approach would work to ensure that victims of domestic violence, including men, women and children, do not have to re-tell their stories multiple times and do not have to approach multiple services, whilst preventing the victims from 'falling between the gaps'²⁴ and achieving a more effective response to safety.²⁵ Availability of such support services need to be publicised so men who may be victims of

²¹ Ibid.

²² Joceyln Scutt, *Even in the best of homes: Violence in the family* (Penguin, 1983).

²³ Domestic Violence and Incest Resource Centre, 'Developing an Integrated Response to Family Violence in Victoria: Issues and Directions' (Report, Domestic Violence and Incest Resource Centre, 2004) 11.

²⁴ Jane Mulrone and Carrie Chan, *Men as Victims of Domestic Violence* (2005) Australian Domestic and Family Violence Clearing House, Domestic Violence, Australian Domestic and Family Violence Clearinghouse <http://www.adfvc.unsw.edu.au/PDF%20files/Men_as_Victims.pdf>.

²⁵ Ibid.

domestic violence are aware of what is available to address their immediate needs. Scholars such as Connell, remind us that men are not a homogenous group,²⁶ and given societal expectations of men which require them to project a high level of supposed invulnerability, men do not often discuss their feelings, seek help for individual problems, or access support services until there is an absolute necessity. A better understanding of male behaviour is necessary to inform how we provide effective support services.²⁷

Lastly, present statistical data fails to estimate the true extent of male victims of domestic and family violence. The main reasons for this is likely to relate to the number of un-reported cases and the marked variance in how domestic violence is measured and defined. Often, statistical data only measure incidences of physical violence, however, given the broad interpretation that current Queensland legislation has of domestic violence, it would be important to consider other forms of violence such as intimidation or harassment. Improvements towards data collection of male experiences of domestic violence are therefore required. By gathering data that adequately represents the context and dynamics in which violence is initiated, it would provide a transparency in discussions and behavioural programs to support women who use violence against a partner.²⁸

VII Conclusion

The current laws relating to domestic violence in Queensland fail to adequately protect male victims, the silent sufferers of domestic violence. Whilst the Queensland Police and the courts are entitled to impose a domestic violence order against a perpetrator of abuse, the notion of a DVO does not sufficiently enforce a 'zero tolerance message' regarding domestic violence, fails to ensure perpetrators are held account for the abuse, and, finally, fails to recognize that assault which occurs within the home is a serious crime, and should not be treated any differently from any other form of assault.

²⁶ Raewyn Connell, *Gender and Power: Society, the Person and Sexual Politics* (Allen & Unwin, 1987).

²⁷ *Ibid.*

²⁸ Mulroncy and Chan, above n 25.



Dr Joo-Cheong Tham

An Interview with Dr Joo-Cheong Tham on '*Money and Politics: The Democracy We Can't Afford*'*

PB: Hi Dr Tham, thanks very much for joining us. Can you tell us a bit about what you think the aims of political finance regulation should be? What is the balance that we are trying to achieve in this area?

JT: In my view, there are four central aims of a democratic political finance regime. Firstly, to protect the integrity of representative government, in particular to prevent various forms of corruption; to promote fairness in politics, in particular, to ensure fair elections; to support political parties to discharge their democratic functions; and to respect political freedoms.

PB: In your book you argue that Australian political finance law is quite laissez-faire. Australia doesn't have an extremely demanding or restrictive regime. Have there been any major developments since your book was published?

JT: We have seen a continuation of the status quo at the Commonwealth level, and in my view we are probably going to see the status quo remain for the next few years. We are seeing significant changes at the level of state and territory parliaments, however. Quite fundamental changes have occurred in the states of New South Wales and Queensland.

PB: I believe the New South Wales amendments were introduced quite recently. Could you tell us a bit about what those changes have entailed? I believe it was quite a radical shift. Some commentators have said that the New South Wales reforms created the tightest regulations that we have seen in any Australian jurisdiction.

JT: They took effect early in 2011, last year. As you say, they mark in some ways a paradigm shift in terms of the regulation of political funding in Australia, in that you basically see for the first time in Australian political history a whole series of restrictions on donations to political parties, candidates and non-government organisations.

* Dr Tham is an Associate Professor at the University of Melbourne Law School. This interview was conducted on the 9th of August 2012 by Will Isdale and Sam Walpole. Questions for the interview were based on issues canvassed in Dr Tham's book '*Money and Politics: The Democracy We Can't Afford*' (UNSW Press, 2010) and subsequent developments arising in the field of political finance law.

There are also restrictions in terms of how much they can spend in the lead-up to elections.

PB: How do the Queensland reforms compare to those in New South Wales?

JT: There are strong similarities. Queensland has followed the New South Wales approach in terms of putting in place caps on political donations and caps on electoral spending. The difference is in terms of the scope the caps cover. Generally speaking, the scope of the restrictions under the Queensland regime are narrower than those in New South Wales.

PB: An important feature of both these reform packages has been increased public funding of political parties. Do you think increased public funding makes a difference?

JT: What we see in Queensland and New South Wales is a combination of caps on political donations and public funding. Political parties and candidates are more reliant on public funding now than private funding in those states. I think that can be a good thing. But what I emphasise in the book is that it shouldn't be about public versus private funding. That's a very crude debate. It should be about what kind or amount of public funding we should provide, and how we should design that scheme.

PB: One theme that comes through in your book is how, in many ways, the political finance regimes that we have had, and which many states continue to have, work well for the two major parties, at the expense of smaller parties or independents. You talk about how one benefit of having public funding might be an equalising effect. Are we likely to see greater electoral success for smaller parties after these reforms, or will the major parties continue to disproportionately benefit from political finance laws?

JT: That's a very good question. I suppose the long and the short of it is that I don't have the answer right now. What I could say – this is one difference between the New South Wales and Queensland schemes – is that the New South Wales scheme has some form of policy development fund. It provides money for parties that don't have any elected MPs. That is absent from the Queensland scheme. That is a fund that plays an important role in providing fairer access to the electoral contest.

PB: Another reason that the political parties have such a stranglehold on Australian political life is that they are overwhelmingly the recipients of monetary donations. Who tends to give money to political parties and why?

JT: The first question is easier to answer than the second one. In terms of where they get the money from, that varies by party. Let me focus on the Labor Party and the Liberal Party at the federal level. They get about a third of their funding from public funding. Then they get about third from political donations, which are predominantly corporate donations. Of the remaining third, a proportion comes from membership fees. Within the Labor Party, that includes trade union membership fees. The rest is accumulated in various ways, including a fair bit of income generated by both parties from investments.

PB: One striking figure in your book is that small donations from citizens only make up about 4% of all money donated to political parties. I am not sure if that figure is still true. Do you think that political donations should be limited only to individual citizens?

JT: I don't think so. You are right in terms of the figure that you quoted. Very few individuals donate to political parties. Many corporations and companies, however, are contributing through various groups. I am not opposed to groups or collective organisations making donations. Sometimes individuals donate by themselves, or sometimes they group together in public organisations, whether they be a professional society or public organisations like *GetUp!*, and those organisations might then in turn make donations to political parties.

PB: Before being voted out of office, the Howard government copped quite a bit of heat for their spending of public money on advertisements for their 'WorkChoices' reforms. Many people thought this was simply disguised political campaigning, rather than a public information effort, because the advertisements began before legislation on the topic had been passed by Parliament. There has been a lot of debate about the legitimacy of these sorts of advertisements. Are governments able to advertise and spend public money on whatever kinds of advertisements they like, or are there limits?

JT: The Labor Party, to its credit, has improved the stringency of the regulation of government advertising at the Commonwealth level. The

regulation is basically in the form of guidelines. They don't take the form of statutory regulations, which means that the executive is able to change the guidelines without parliamentary approval. That is a definite drawback compared to legal forms of regulation. For instance, the Labor Party government ran ads in support of the Mining Tax – that was because the guidelines enabled the government to exempt certain campaigns.

PB: Do you think that is legitimate or not?

JT: No. Generally speaking, I would be against such discretion. I think the guidelines should be applied strictly. If there are exceptions, exceptions should be set out in the guidelines. It shouldn't be at the discretion of a Minister to exempt advertisements for a political campaign from the guidelines.

PB: You talk about spending limits in your book. Do you think there should be spending limits on third parties like the mining companies that were running advertisements against the Federal government's proposed mining tax?

JT: I think so. This is an important feature of both the New South Wales and Queensland schemes. I definitely support spending limits on third parties such as the mining companies.

PB: Whilst we're on the topic of advertising, in the early 1990s the High Court struck down a scheme regulating political advertising as infringing the 'freedom of political communication' implied in the Constitution. That was the *ACTV* case. This year marks the 20th anniversary of that decision. In your book you mention that the precedent of that case should not be seen as a roadblock to regulation of political advertising. How would one bring about advertising regulations without infringing the rule in that case?

JT: One obvious way, the way New South Wales and Queensland have taken it, is spending limits. Of course the constitutional restriction should be taken seriously. What has happened, though, is that its significance has been exaggerated or used as a convenient excuse not to pursue reform. It should be taken seriously and thought about in terms of how we design restrictions and so on. It is clear from the High Court decision, however, that if you have got properly designed restrictions, they can pass muster in terms of the constitutional restrictions.

PB: What do you think are the most urgent reforms that are needed at the Commonwealth level? Do you think we are likely to see the Commonwealth follow the lead of New South Wales and Queensland?

JT: I will answer the second question first. I am reasonably pessimistic as to the possibility of change at the Commonwealth level. The obvious explanation is inadequate political will to bring about the quite necessary changes. In terms of – if there were effective political will, what would be the most important reforms – two sets of reforms are urgent. One is enhanced disclosure obligations. Secondly, I think a well-designed system of spending limits is necessary.

PB: Thank you very much, Dr Tham. We've learnt a lot!

Book Review: *'The Rule of Law'*

Laura Hilly*

I INTRODUCTION

When the editors of this journal approached me to review Tom Bingham's *The Rule of Law*¹ I was somewhat surprised. First published in 2010, six months before his untimely death, this book has been celebrated in much the same way Tom Bingham's life work and service was – with the utmost adulation and praise. At first glance, I felt that there was not much left to say about *The Rule of Law* that hasn't already been said elsewhere, and in great flourish at that. This is not surprising. The final work of a man considered to be one of Britain's greatest Law Lords is bound to be worth a read. British commentators from all walks of life praise this work. Shami Chakrabarti, director of leading London-based human rights not-for-profit *Liberty* recommends that 'everyone should read this book.' The *Financial Times*, the *Observer* and the *New Statesman* all acclaimed it the book of the year and in 2011 it won the Orwell Prize, Britain's most prestigious prize for political writing.

So what more is left to say? One thing that has not been said is why this book is such an essential read for an Australian audience. This piece will begin with an overview of this 'gem of a book'² and then illuminate some of the important lessons that it can offer an Australian audience not only trying to make sense of the ubiquitous but recondite phrase 'the rule of law,' but also striving (and sometimes failing) to live up to the expectations that the principle demands.

II LESSONS FOR ALL

In choosing to focus his mind on this subject, Lord Bingham did so because he felt that although the rule of law was 'an expression that was constantly on people's lips, [he] was not sure what it meant either, or [if it] meant the same thing.'³ Although focused upon the English legal system, the wisdom shared

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¹ Tom Bingham, *The Rule of Law* (Penguin Books, 2011). Tom Bingham was an English jurist who held office successively as the Master of the Rolls, Chief Justice of England and Wales and Senior Law Lord of the United Kingdom.

² Robert Gaisford 'A commensurately entertaining summation of our legal system by a former Lord Chief Justice' (31 January 2010) *Independent* <<http://www.independent.co.uk/arts-entertainment/books/features/the-rule-of-law-by-tom-bingham-1880966.html>>

³ Tom Bingham, *The Rule of Law* (Penguin Books, 2011), vii.

in this very short and clearly expressed book is without doubt universal in application and will not be easily dated. Bingham intentionally writes for a wide, non-legal audience:

[this] book, although written by a former judge, is not addressed to lawyers....It is addressed to those who have heard references to the rule of law, who are inclined to think that it sounds like a good thing rather than a bad thing, who wonder if it may not be rather important, but who are not quite sure what it is all about and would like to make up their minds.⁴

Part I traces the history of the expression 'the rule of law.' The coining of this phrase is often accredited to Professor A.V. Dicey in 1885, however, in Part I Lord Bingham offers what he calls 'an impressionistic, episodic and highly selective' overview of the many important global milestones that led to the development of the rule of law. In doing so, he pays careful attention the way in which ideas were borrowed and shared across global borders on the evolution trajectory of what is now the modern day conception of the rule of law. For example, he begins by considering the Magna Carta, 'an event that changed the constitutional landscape in [England] and, over time, the world',⁵ as the starting point for the evolution of the rule of law with its declarations on freedom, democratic rule and checks on executive power. The Constitution of the United States is also considered a 'crucial staging-post in the history of the rule of law' as it, for the first time, saw the law as expressed in the Constitution to be supreme and 'binding not only on the executive and the judges, but also the Legislature itself.'⁶ He refers to the French influence from the Declaration of the Rights of Man and Citizen 1789, the American Bill of Rights, the regulation of the laws of war through international instruments and courts and finally, the Universal Declaration of Human Rights as further significant milestones that have led to 'the almost worldwide acceptance of [the rule of law] and for the steps taken in many countries thereafter to make the principle enforceable and effective.'⁷

In Part II Lord Bingham interrogates the substantive content of the rule of law. His starting point for the core of the definition is:

That all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws

⁴ Ibid viii.

⁵ Ibid 11.

⁶ Ibid 27.

⁷ Ibid 33.

publically made, taking effect (generally) in the future and publicly administered in the courts.⁸

However, Lord Bingham then elaborates eight additional points in an attempt to 'try and identify what the rule of law really means to us, here and now.'⁹

These include:

- (1) that the law must be accessible and so far as possible intelligible, clear and predictable;
- (2) questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
- (3) the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
- (4) ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding limits of such powers and not unreasonably;
- (5) the law must afford adequate protection of fundamental human rights;
- (6) means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
- (7) adjudicative procedures provided by the state should be fair;
- (8) the rule of law requires compliance by the state with its obligations in international law as well as in national law. This last point is of particular importance for an Australian audience to reflect upon, as will be discussed below.

Part II elaborates on these eight points through pithy chapters that draw from a fantastic array of sources from history and modern day experience. This then lays the base for Part III where Lord Bingham considers two general topics. The first is a gripping account of the downfalls in the application of the rule of law in light of the impact of terrorism, juxtaposing the British adherence to the rule of law with that of the United States of America in respect to specific concerns arising in policy and legal response to the US led 'war on terror.' Such areas of concern include extraordinary rendition, detention without charge or trial, the use of secret evidence and evidence obtained by torture and the heightened level of surveillance of the general public. The second is a discussion of the interaction of parliamentary supremacy and the rule of law, a topic with special resonance for an English audience.

⁸ Ibid 37.

⁹ Ibid.

III LESSONS FOR AUSTRALIA

We often hear the words 'rule of law' thrown around on the Australian political stage and in the press. However, one can easily be left wondering at times whether many Australians, particularly our leaders, might be laboring under a similar state of confusion as the one Lord Bingham expressed at the outset as to what this catchy phrase, capable of arousing both instant authority and ambiguity, actually means in practice.

A clear theme running throughout *The Rule of Law* is the closeness of the relationship between the international protection of human rights and the rule of law. So close is the link, according to Lord Bingham, that one cannot speak of one without committing to the other:

The interrelationship of national law and international law, substantively and procedurally, is such that the rule of law cannot plausibly be regarded as applicable on one plane but not on the other.

...

If the daunting challenges now facing the world are to be overcome, it must be in important part through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order.¹⁰

One such daunting challenge for Australia is how to humanely respond to people who seek asylum on our shores, fleeing from states where the rule of law has failed. It doesn't take much to imagine what Lord Bingham, heralded as one of the greatest contemporary legal minds, would make of the recent passing of the *Migration Legislation (Regional Processing and Other Measures) Bill 2012* on 16 August 2012.

In an attempt to reduce the number of asylum seekers who reach Australia by boat, this new law gives the Government power to transfer people who arrive by boat to a 'regional processing country' to have their asylum claims processed. This measure arguably violates Australia's non-refoulement obligations under the Refugees Convention. The legislation expressly excludes the application of natural justice to Ministerial decisions such as which processing centre an asylum seeker should be sent to, and which countries should be identified as regional processing centres, severely compromising the individuals right to a fair hearing enshrined in Art 14 of the International Convention on Civil and Political Rights. When the legislation was introduced

¹⁰ Ibid 119.

it was not accompanied by a Statement of Compatibility with human rights, contrary to the *Human Rights (Parliamentary Scrutiny) Act 2011* and calls into question the government's commitment to Australia's National Framework for Human Rights, which seeks to promote greater scrutiny of legislation for compliance with international human rights obligations.¹¹ Finally, these measures, which apply to adults and children alike call into question Australia's commitment to its legal obligations under the Convention on the Rights of the Child.¹² If ever there were an example of a break-down in commitment to the rule of law, this would be it.

IV CONCLUSION

This book, *The Rule of Law*, like the topic itself, is one deserving of revisiting again and again. Lord Bingham's enormous contribution to the development of the law as a judge, academic and writer is undisputed. This, his last offering, concludes with an urgent call for the rule of law to be more than just an aspiration. Rather, 'it is deeds that matter. We are enjoined to be the doers of words, and not hearers only. And it is on the observance of the rule of law that the quality of government depends.'¹³ This is a timeless book that all Australians should read and then demand that its principles be applied when responding to current day challenges.

¹¹ Laura Hilly 'Australia's new offshore processing laws for asylum seekers raise doubt over Australia's commitment to fundamental human rights and beyond' (4 September 2012) *Oxford Human Rights Hub Blog* <<http://ohrh.law.ox.ac.uk/?p=238>>.

¹² Katie O'Byrne and Jason Pobjoy 'Getting Real on Children's Rights: Is Offshore Processing Compatible with Australia's Legal Obligations to Child Refugee Applicants?' (8 September 2012) *Oxford Human Rights Hub Blog* <<http://ohrh.law.ox.ac.uk/?p=248>>.

¹³ Bingham, above n 3, 137.

Book Review: *'Rationality + Consciousness = Free Will'*

Brian D. Earp*

By this it appears how necessary it is for any man that aspires to true Knowledge, to examine the Definitions of former Authors; and either to correct them, where they are negligently set down; or to make them himself.

—Thomas Hobbes, *Leviathan*

Do we have free will or don't we? Or do we have it in degrees? Is free will compatible with determinism or is it not? What about *indeterminism*? David Hodgson is not the first to explore this thicket. Following the advice of Hobbes, the first step in any attempt to answer such questions should be to pose another set of questions: What do you mean by "free"? By "we"? By "have" and "will"? What is your notion of "compatible" and "incompatible"? How do you define "determinism"? And so on through the list of terms.

In his latest book,¹ Hodgson does somewhat less to "examine the Definitions of former Authors" than to "make them himself." Though he does give some broad gestures at foundational texts in the opening chapters of his work, and while he sprinkles some references to his contemporaries throughout, Hodgson spends the bulk of his time developing his own distinctive account. Let us try to make some sense, then, of what that account is saying. Starting with just the notion of free will (which Hodgson thinks we do have: that's the whole point of his tome)—and setting aside for now "determinism," "compatible," "we," and all the rest—we can see that Hodgson's own definition is first laid out in the spare equation he uses for a book title:

$$\textit{Rationality} + \textit{Consciousness} = \textit{Free Will}$$

Alright, then, "free will" – on Hodgson's theory—is "rationality plus consciousness." So in good Hobbesean form, we ask: what does he mean by "rationality" and what does he mean by "consciousness"? (Let's assume that we know what "plus" means well enough for now.)

First – rationality. Somewhat problematically, Hodgson does not quite spell out just what is meant by this term: that is, he doesn't say what rationality *is* (for the purposes of his argument), although he does say a number of things

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¹ David Hodgson, *Rationality + Consciousness = Free Will* (OUP, 2012). David Hodgson was formerly a judge of the New South Wales Court of Appeal. He was a former Rhodes Scholar, and obtained his DPhil at University College, Oxford, under the supervision of H.L.A. Hart.

about rationality (as he understands it), including that it “extends” to “all those capabilities that contribute to reasonable human decision-making”.²

The most important such capability—in terms of the work it does for Hodgson’s free will thesis—is something he calls “instinctive *informal* rationality” or our ability to engage in “plausible reasoning.” Plausible reasoning, too, is not really defined, but it appears to be a type of reasoning “in which” (a troublingly vague connector): “premises or data do not entail conclusions by virtue of applicable rules but rather support them as a matter of reasonable albeit fallible judgment”.³ Hodgson contends that we use reasoning of this variety *all the time*: it’s how we judge whether a painting is a good painting, for example—not an assessment that can be considered the mechanical output of formal logic operating over available data (in this case, the painting, or various features of the painting)—but one that is arrived at, by us human beings, *some way, some how*, nevertheless. The crux of Hodgson’s argument is that in order to cross the bridge from (on the one side) inconclusive evidence and other prior factors relevant to a given decision-making process, to (on the other side) an actual decision based upon those factors, we need, at least on some occasions, a little help from our *conscious experience*. What exactly the nature of this help is, it is a little hard to make out, but we’ll get to that concern in a moment.

Just as with “rationality”, “consciousness” is not strictly defined; but an awful lot of things are said *about* it. Its main feature—again, in terms of the work it does for Hodgson’s argument—is that it is something *experienced by a subject* in such a way that the subject is able to “grasp” various features of the world (or the world as represented by the experience) “all-at-once” or in a *gestalt* fashion. This is important because, as Hodgson would have us believe, a conscious experience consisting of, or containing, a “feature-rich gestalt” is able to (1) influence the judgments or decisions made by the subject and (2) do so in a way that is neither determined by any rule or law of any kind, nor by any random or indeterminate process neither. Hence conscious experiences “make a positive contribution to our decision-making”⁴ but are not *wholly* constrained by any fact or set of facts, nor any process or series of processes, existing or operating prior to the moment of “contribution.” *And that’s what free will is*: the non-obligatory “contribution” of our consciousness to an episode of “plausible reasoning.”

² Ibid 26.

³ Ibid 55.

⁴ Ibid 72.

Many questions arise. The biggest one, perhaps, is what is so special about a “feature-rich gestalt” that it can be said not to “engage” with “any” “applicable laws or rules”?⁵ Hodgson asks us to consider the melody to George Gershwin’s *The Man I Love*. He points out that “*the way that this particular melody sounds*”⁶ is, on a subject’s first encounter with it, a unique and unprecedented (subjective) experience. But since laws or rules can only govern “types” of occurrences, they can have no force over such one-of-a-kind, hitherto-unexperienced things as the sound of a bit of a song. Hence the gestalt-inconsciouness gives the subject a piece of information that’s neither determined by nor available to any other system or perspective, and opens the door for an “apposite response”⁷ by the subject in the form of a judgment or decision—in this case, an aesthetic one.

More questions arise. What is an “apposite” response? “Apposite” means something like suitable or appropriate, but surely there are a range of “suitable” judgments one could make on the basis of a gestalt encounter with a Gershwin tune. Since *it is* Gershwin we’re talking about, most (civilized) listeners would judge it to be pleasing, but what exactly is the “contribution” of the melody-gestalt to the decision-making process of the listener that “results in” this conclusion, i.e., that *The Man I Love* is indeed lovely and a composition fit to be praised?

Hodgson is decent enough to show his cards here: he really can’t say. He talks poetically about Picasso and Wagner for a bit (*aesthetic* judgments seem to be paradigmatic of the “consciously-influenced” sort), but winds up admitting that his “account of how conscious processes [actually] contribute to reasonable decision-making is far from complete”.⁸ *Very* far, one regrets to have to add. And so it is, that, after more than 100 pages of sometimes excruciating metaphysical step-by-stepping, the reader is left with little more than a sort of “free-will-of-the-gaps.” One is reminded of a very famous *New Yorker* cartoon by Sidney Harris. Two mathematicians, one senior, one junior, stand in front of a chalkboard. The younger mathematician has written an equation on the board whose beginning and end are staggeringly complex. The middle part, however, reads simply: “Then a miracle occurs.” Surveying the younger one’s work, the older mathematician remarks, with a straight face, and pointing at the board: “I think you need to be more explicit here in step two.”

⁵ Ibid 81.

⁶ Ibid 82.

⁷ Ibid 83.

⁸ Ibid 111.

By now we're only half-way through the book. What could be going on in the rest of it? It would prudent, here, actually, to skip to the end of Hodgson's argument, because by the time one gets to it, one begins to expect that it should have been back at the beginning, as a sort of premise. This will take a moment to explain. First, some background:

Hodgson is a jurist. According to his biography on the back flap, he is recently retired as a Judge of Appeal of the New South Wales Supreme Court. In his capacity as jurist, Hodgson is (or was) daily faced with the task of meting out *punishment* to other human beings, on the basis of actions they may have taken that ran afoul of legal (and presumably moral) norms. But in order punish someone justly, it must be the case that the action she took was somehow "up to her" or freely chosen in some meaningful way. If, by contrast, the action were completely determined by factors outside of her control, it would seem that punishment—*retributive* punishment, at least—would be grossly unfair, or even absurd.

There are a number of ways to deal with this issue. For people who deny free will, punishment must either be abolished—*because* it is unfair and/or absurd—or it must be considered a regrettable but necessary instrument of consequentialism: used to produce good overall outcomes for society, despite not being "deserved" in any metaphysical sense, in any particular instance of its use. But this is an outcome Hodgson rejects. Here I think he makes his most compelling argument—and it's the one that finally comes up in the concluding chapters of his work.

"Retribution," he writes, is "a foundation of human rights":⁹

In short I say that if we do not punish people *because they are guilty*, there is less reason to refrain from punishing people *if and because they are innocent*. If it is regarded as acceptable that government officials treat citizens in any such manner as appears to be most beneficial, irrespective of whether persons so treated have done anything to *deserve* that treatment, the way is left open for practices like putting political dissidents into prisons or mental asylums. Respect for human rights requires that, with limited exceptions, governments refrain from interfering with the freedom of citizens unless the citizens have acted in breach of a publicly stated law, in circumstances where they are *responsible* for the breach and can fairly be regarded as *deserving* punishment.¹⁰

⁹ These words come from the book's introduction, but as a preview of his argument's conclusion, not as the first steps in a long chain of reasoning. They just happen to constitute the best précis of the relevant ideas.

¹⁰ Ibid 4.

For reasons similar to these, some free will deniers have gone so far as to say that (what they see as) the *illusion* of free will must be kept up and promulgated in order for society to function. But chicanery does not suit Hodgson: he is plainly an honorable man. Accordingly, for him, human beings *must* be free—in *some* sense adequate to ground personal responsibility—and it becomes the work of his book to demonstrate how.

The premises he actually starts with, however, simply do not lead to the conclusion he would like us to draw. Or they don't without smuggling in a trainload of assumptions all along the way. Hodgson opens, for instance, with a chapter on “foundational beliefs” and engages in a Descartes-like “first meditation.” He asks whether he can be sure that he exists, and pretends to draw a conclusion even more conservative than Descartes' famously basic belief: namely that *thinking occurs*—and not even that there is a thinker to do it, as Descartes had settled on with his *cogito*. But—just as one finds with Descartes on his journey to prove the existence of God (and a range of other goodies)—it soon becomes clear that Hodgson believes all sorts of things: in this case, that language exists, that it exists in a community of users, that these users are humans (of which Hodgson himself is one), that humans are, in fact, a species of animal life, and so on. As laborious as the exercise is, very few of these “hard won” intermediary propositions are actually *demonstrated* by plain logical reasoning from previous steps. Many just “pop in”—one after another—until soon enough we find ourselves in a world with conscious, rational human subjects, a “real” external environment, the theory of evolution, and all manner of wonderful things that Hodgson might just as well have taken for granted in his quest to establish freedom of the will. *But these are not the real premises on which Hodgson's conclusion about free will seems to be based*; rather, as I suggested before, the starting point for Hodgson is his belief that punishment is necessary and that it must be rooted in genuine desert. Ergo (with the help of some “then a miracle occurs”-type reasoning): we are metaphysically free. At least that's how the book reads to me: it's not something I can demonstrate by formal logic, using Hodgson's text as my data; but rather it's a judgment I make through a process of “plausible reasoning.”

Hodgson's serious breadth of learning is apparent throughout each page and chapter of his admirable effort. From detailed explanations of quantum puzzles, through an extended discussion of Bayes' Theorem, to rapt operatic allusions, Hodgson's *Rationality + Consciousness = Free Will* offers much to tantalize any serious student of philosophy. His overall metaphysical argument, however, is unlikely to sway anyone who is not already disposed to his conclusion—too many steps do not follow, and too much poetic content is too thinly robed in legalese. Nevertheless, there are a number of specific

arguments that are quite convincing, and much more that is simply a pleasure to think about with the guidance of so potent a mind. Finally, Hodgson must be commended for bringing to a topic that has been hashed and rehashed for centuries without end, an unmistakable freshness and originality. Whatever its shortcomings, the book is worth the reading.

Book Review: *Why The Law Is So Perverse* Michael Phillis*

Leo Katz's recent book, *Why the Law is So Perverse*,¹ tries to accomplish an awful lot in just over two hundred pages. Katz' brief is to explain something about the nature of law using various bits and pieces from economics, psychology, and ethics.

It is more of a survey than an argument, at least in the earlier parts of the book, and the analysis moves between various social sciences (not to mention some rudimentary mathematics). It is worth noting that despite the book being about law, Katz draws almost nothing from major legal theorists, preferring tangentially related areas of economics and psychology in particular. This may sound like a negative, but it is deceptively clever: the book requires almost no legal knowledge, but its analysis can say something about law however much law and legal theory the reader brings to the table. At its best, this is an interesting way of drawing out some of the ways in which accountability might be felt in a system which speaks in the language of rationality, but struggles to deal with the complexity of human enterprise with the kind of certainty we might expect of an essentially coercive science.

The various parts of the book are related, but can feel a little disjointed, partly because of the structure of presentation, and partly because the level of specific content rises and falls quite a lot. For that reason it is worth reviewing each part separately.

In Part 1, Katz asks why the law spurns win-win transactions. At base, it is concerned with why the law does not allow certain consensual transactions. The broad argument made is that there are transactional rights which are relatively private so long as they concern authorised categories of property, and more intrinsic rights to property which do not themselves imply a comparable value with different property rights, but a series of justifications for collective recognition and protection of them. Consent is sunk by a third-party: this forms the "triage cycle", an example which demonstrates quite neatly rights to priority and spoilers of priority right transactions.

Some of the special kinds of property Katz discusses are tradeable emissions rights, protection from certain types of risk, sexual integrity, blood and organs, voluntary torture, and ownership of real property free from certain kinds of

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¹ Leo Katz, *Why the Law is So Perverse* (Chicago, 2011). Leo Katz is the Frank Carano Professor of Law at the University of Pennsylvania Law School.

encumbrance. His objections to these being traded fall into broad groups: they are too difficult to price, specific performance would be intuitively objectionable, and transactions would generate costly externalities, or devalue the costly efforts of external actors.

Katz effectively sinks the idea of a tradeable right to priority, but this misses the point somewhat. It seems quite obvious from the outset that priority is not an inherent right but the conclusion of a decision-making function by an authority – in this case the doctor. The error here is the assumption – and to be fair, Katz seems to build it up only as a straw man – that the doctor ought to view the conclusory “claim” as something which ought to feed back into the process of determination.

Katz' proofs hop between descriptive and normative; this is complicated by his habit of making a moral intuition that *something* is wrong with a transaction, then casting about various more or less convincing explanations for why someone might have a moral or functional objection to the transaction. Frequently this intuitive problem is generated by the terms of the example being set far too narrowly.

By stripping the initial enquiry of salient points, and then feeding them slowly back in, Katz may be continuing his intuitive enterprise. If this is all that is going on, then it would explain the confirmation bias that seems to factor in; once their terms are more fully understood, these “paradoxes” can seem more like arguments for changing certain things about the law than truths about the nature of the law. The closest this part of the book comes to a substantive argument is an attempt to alleviate the intuitive reaction against these simplified statements by elaborating some of their complexities.

In part 2, Katz asks why there are so many loopholes in the law. His broad argument is that there is an irreducible potential for gaps between a reasonable action in some case (e.g. perjuring oneself to save a friend one believes to be innocent, although the reasons for such belief are not possible to explain to others) and what a reasonable rule would demand of all transactions rather than a limited subset (e.g. consumer protection laws applying equally to sophisticated consumers, who may abuse them).

This potential for gaps seems to put the “loophole” in the position of being both reasonable and unreasonable; as such it may be left open even after being detected as a loophole. This he gives the working title of the “mismatch theory”. This set up seems to be a bit of a straw man: it is a little difficult to reconcile the first example, of a friend of the accused perjuring himself, with the idea that reasons can be explained; after all, if a reason is so intensely

subjective and personal that it cannot be understood by anyone except the person arguing for its moral relevance we may well have reason to be suspicious of it. Perhaps more concisely, it seems Katz would deny the relevance of respecting rules of reason-giving in a specific scenario, and identify the problem as being one of generality versus specificity. The relevance of differentiating factors between kinds of information is not discussed, although it might strike one as an immediate response.

In his explanation of the loopholes seemingly generated by exploiting various unusual features of voting rules, Katz changes pace. Rather than trying to merge series of intuitive experiments with economic devices and legal facts, he takes a simple example to explain a handful of voting theories which have the potential to generate counterintuitive results, and shows that the counterintuition is a direct result of the unexpected results when adding more relevant information. Perhaps it is because the voting rules are more technical than, say, voluntary torture, but the purpose of the book is far clearer here than in previous chapters. The transition from voting rules to social choice argues from reasons rather than from moral intuitions.

Katz also draws an interesting link between the apparent unpredictability of the form of multicriterial decision-making and the rationality of a judge in the face of lawyers framing an issue to provoke opposing responses to the same data; this is another kind of loophole exploitation, and is not equivalent to destroying evidence or promoting irrationality. The analogy to counterpreferential voting is probably the strongest in a line of interesting arguments, setting up an explanation of “nonmonotonicity” in law: at base, the absurdity that a choice may both reduce and increase a person’s moral standing in the same transaction.

In part 3, Katz asks why the law is so “either/or”. The starting point of his argument is that hard cases exist roughly equidistant from clear cases which have opposing outcomes (e.g. guilty vs not-guilty). If borderline cases exist, why not have a borderline punishment; in the case of a man kissing a sleeping woman without her knowledge, criminal battery, tort, or complete innocence. Katz points out that this is quite obviously not a good argument, as then we simply have three standards with vagueness in between, and so on.

He proposes explanations for the general habit of categorising things, combined with an argument that “either/or” is difficult to justify, no matter its psychological attractiveness, with a view to building an account of when and why the law rejects or embraces “split-the-difference” solutions. From there, he explains the heap (*sorites*) paradox, extending this back to his previous discussion of partial treatment of legal outcomes. Of course, “either/or” is

something of a straw man to be knocked down by the already-established arguments about multi-criterial decision-making, and Katz does so methodically.

Part 4 is shorter than any other part of the book, and asks why we criminalise only some of the conduct that we condemn. Katz has written previously on the morality of the criminal law, and it shows; this part is by far the most densely written, and falls back on the moral intuition arguments that the third part eschews. The connection of this part to the rest of the book is developed out as a generalised ranking of various differentiations made in criminal law. This part is primarily of interest to someone who is concerned, as Katz clearly is, with a much more specific application of the ideas he discusses in the rest of the book to the criminal law.

Why the Law is So Perverse is more of a survey than an argument, and the combination of the different discussions can be a little disjointed. Often the book reads as though it needs to build to a surprising conclusion in each case, which is itself not an absurd thing for a book about perversity and based on intuition to do, but this means that in setting the terms for his conclusions, Katz spends far too much time building up straw men as though they are actually going to be compelling. This is a pity, because for the most part this frustration could have been avoided by folding criticisms in at an early stage of discussion, and what sometimes seemed to be an overemphasis on economic tools and measurement.

It must be said that Katz' arguments can seem repetitive at times, perhaps because he assumes so little knowledge. This may be inevitable for a book attempting to make so many general arguments about such a broad area of interest without ever really getting stuck into specifics; at the very least, Katz writes clearly and with a good pace considering that the intended audience appears to be any sophisticated layman. The most rewarding parts of *Why the Law is So Perverse* are the compounding development of different issues using similar economic tools, in the service of explaining some problems with categorisation in the law which have already been attended by a large body of work from a different (legal) perspective. Where the book does this well, it makes a fine contribution to this field, and it is for these reasons that any reader with an interest in the structure of legal decision-making should enjoy Katz' work.

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