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*Papers on Parliament No. 33***

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## **The Influence of Parliamentary Location and Space on Australia's Political News Media\***

*Clem Lloyd AO*

I am pleased to be able to participate in this series of Senate lectures and thank the organisers for the invitation. Although most of my political work has been involved with the House of Representatives, I have had some contact with the senior chamber. When I joined the press gallery in the early 1960s my first tasks included covering Question Time in the Senate. It was not a highly prized assignment and in those days the pickings were pretty lean. The Senate was very much a subordinate arm of constitutional government with the press gallery mesmerised by the exhibition of powerful executive government daily in the House of Representatives chamber through the powerful political persona of Robert Gordon Menzies. The discrepancy between the naked use of the forms of Parliament to reinforce executive power in one chamber, and the moribund nature of the other, was only too evident. In the intervening forty years, the role and authority of the Senate has been transformed. The strength of the executive power, however, remains potently evident within the parliamentary building. A principal theme of this lecture is how the executive became so powerful within the parliamentary framework and how this has been reflected in the evolution of Australian political journalism.

Although the publicity for this lecture identifies me correctly as working with a group of senior Labor politicians, my first attempt to get a job on parliamentary staff was actually with a distinguished Senate leader, Sir William Spooner. It was during the credit squeeze of 1961 when there had been a flurry of what today would be called 'downsizing' in the Sydney press. Spooner was then Minister for National Development, a crucial portfolio in the major growth decades of the 1950s and 60s. The job promised plenty of travel, most of it to mines, irrigation works, and beef roads but anywhere seemed preferable to Sydney in a major credit squeeze.

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When I went for an interview with Sir William's office, I was startled to be questioned at some length about my military record. It was stressed very strongly that Spooner favoured a military background when selecting his male staff. I had been a rather undistinguished recruit minor in a national service battalion under the old call-up system, and found it hard to reconcile my own war-like capability with what Sir William expected.

Subsequently, my principal referee, a celebrated Australian war correspondent, threatened to knock my head off for posing, as he put it, as 'a war hero who had won a Military Cross wading ashore under heavy fire to establish the British beachhead at Salerno in the Sicily campaign.' Another Lloyd had actually applied for the Spooner job and we had both nominated the same referee. It was all sorted out eventually, the heroic Lloyd got the job, and I stayed on the dole. Sir William had an enviable reputation for intensive demands on his staff and, like Billy Hughes, he ran through a lot of press secretaries. The war hero did not last long with Spooner. He may have found the Salerno beach-head more congenial. Five years later I was recruited to work briefly as private secretary to another Senate leader, Don Willesee, so, in a sense, justice was done.

I have been asked today to pick up some of the themes I explored in a rather brisk study written ten years ago as part of a federal Parliament publishing program for the Australian bicentennial. The book's rather unambitious scope is indicated by its soporific title, *Parliament and the Press*, which doesn't give much away. One of the issues I considered was the impact of space and location on the functioning of the Australian Parliament, the government (or constitutional executive) and the press (now more accurately, the news media). My essential argument can be summarised as follows. British constitutional conventions, and Australia's written constitution, propose a constitutional dispensation based on a separation of powers between the three great institutions of Parliament, executive and judiciary. The press, which is neither dealt with specifically in the British constitutional conventions nor identified specifically in the Australian constitution, has mostly observed this separation in organising its resources to gather and present political news. As the Australian constitution has evolved, however, this traditional pattern has been distorted in the Australian experience by peculiar factors of location and space.

Except for the twenty-seven years when the Australian Parliament was based in Melbourne, Australia's executive government has been a tangible presence in the Parliament, as distinct from a constitutional presence, because of arrangements which accommodate it and its retinue within parliamentary space. In short, ministers have their personal offices in Parliament House and cabinet meets there. Initially, this was an arrangement of convenience to meet urgent necessities arising from the movement of Parliament, executive and press to the new capital of Canberra. Because the presumed temporary Parliament House at Canberra lasted for sixty years, the executive became so embedded in parliamentary space that it has proven impossible to extricate. Thus, the arrangement of what I have labelled the 'Executive in Parliament' has been perpetuated in this new, and hopefully permanent, Parliament House occupied in 1988.

When Australia's first Parliament assembled in full session in Melbourne in 1901, it inherited the splendid parliamentary building of the Victorian colonial parliament. This stately parliamentary edifice at the top of Bourke Street was restored to Victoria in 1927 after the Parliament moved to Canberra. It remains the state Parliament House of Victoria, an impressive building by any criteria and still maintaining the most elegant parliamentary space

in Australia. It is an interesting point of press gallery practice that for a time the press was actually accommodated on the floor of the House of Representatives chamber, a highly unusual procedure in the conventional Westminster format.

The practice and procedure of the federal Parliament in Melbourne were heavily influenced by the model established by the colonial Parliament. With the new federal press gallery, this meant the adoption of the rules and conventions of a powerful colonial state press gallery system. Perhaps the closest Australia has ever come to a genuinely political press, in the sense of a press ethos and practice largely shaped by its political coverage, particularly of Parliament, emerged through the combination of a strong and increasingly assertive Victorian state governance with powerful, politically oriented newspapers. By the time of federation the Melbourne press—particularly the *Age* and the *Argus*—exerted an influence which they were able to sustain, even enhance, in the new national Parliament. While the *Sydney Morning Herald* was predominant in New South Wales colonial politics, it was not able to match the logistical and location advantages of the Melbourne dailies. Indeed, it might be argued that these journals retained an ascendancy in national politics even after the Parliament left Melbourne, and in some degree until World War II.

These Melbourne dailies provided resources and facilities for the interstate press in Melbourne. Without technological support in particular, it would have been very difficult for the press in other states to maintain even a rudimentary daily coverage. The tyranny of communications logistics also facilitated the development of news agencies servicing particularly the non-daily and provincial press with federal political material. In terms of organisation and procedure, within the Parliament, however, the press gallery largely followed established colonial practice.

With the small scale of Australia's federal administration, at least until World War I, the executive was easy to cover relative to the Parliament, where the principal reporting effort was focussed. The executive was largely housed in accommodation near but separate from Parliament House, and the federal cabinet also convened there. In the foundation years, the Prime Minister usually held as well a major portfolio, invariably Treasury or External Affairs. Consequently, his personal office was attached to the relevant department.

Remarkably, the Prime Minister shared an office with his private secretary during this early period, an arrangement which must have put leaking to the press at a premium. In practice, this relative subjugation of the prime ministerial role meant that the Prime Minister got most of his press exposure through the parliamentary forum, as did the members of his cabinet. In short, national politics were represented and reported through the Parliament rather than through any specific executive structure. Not until 1911 were the rudiments of an independent Prime Minister's Department established, and the creation of executive publicity structures was essentially a function of the Great War and the years immediately following.

The ascendancy of Parliament as the overriding source of national political news also began to weaken during World War I. This was partly due to increasing executive power but also to the emergence of the military structure as a major news source. The turbulent party politics of the war, particularly the conscription split, and the defection of W.M. Hughes from Labor to head a new national government, were played out substantially in the parliamentary forum.

It is a fair conclusion that the Parliament still dominated the gathering of political news, despite the cumulative growth of the executive's newsworthiness. In particular, the projection

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of a political leadership persona through what we know today as ‘spin’ or ‘image-making’ was accomplished largely through parliamentary forms and spaces. This parliamentary news predominance was achieved in a context of strict separation of powers between parliamentary, executive and judicial functions, in accordance with the Westminster constitutional system. Indeed, this predominance of Parliament as a news source was typical of the Westminster system, at least until the late 1920s.

From the early 1920s, the balance of press power in Melbourne began to change with the emergence of Keith Murdoch’s *Melbourne Herald* group, extending to the morning press through the creation of what became the spectacularly successful *Sun Pictorial*. This was reflected to some degree in the press gallery through the substantial sales of both Murdoch papers, the evening *Herald* and the morning *Sun*, although in terms of overall political influence and persuasiveness the *Age* and *Argus* were still predominant. Murdoch was by far the most important and influential former member of the Melbourne gallery, partly through his journalistic abilities but also through the cultivation of close political links with the Labor prime ministers, Andrew Fisher and Billy Hughes.

Murdoch served as a *de facto* publicity adviser to both leaders, parlaying these contacts into familiar relationships with British politicians, military leaders and newspaper proprietors, particularly Lord Northcliffe, who fostered Murdoch’s early entrepreneurial development. Other notable journalists from the Melbourne gallery were Lloyd Dumas and W. Farmer White, both of whom moved from political journalism to play major roles in the establishment of prime ministerial and government press publicity and relations. Dumas later became head of the *Adelaide Advertiser* and one of Murdoch’s most trusted subordinates in the *Melbourne Herald* group. This imposition of a countervailing intermediary between the gallery and the executive developed gradually from 1919–20.

It is an interesting speculation what might have happened to Australian government and politics if the national capital had remained in Melbourne. In policy and administrative terms, it could be argued that the move to Canberra was made at the worst possible time. Very likely, the public policy of the Great Depression would have been conducted with greater competence because the Parliament and executive would have remained closely linked to the administration which mostly stayed in Melbourne, as did the headquarters of much of the nation’s corporate strength and the national trade union movement.

The political and financial controllers of the United Australia Party which largely dictated politics and public policy during the 1930s were also in Melbourne, which would have made an elegant capital in the memorial marble tradition. The move to Canberra split the close linkage between the executive and military command, ensuring that direction of the war was divided between the new capital and the old. The strains and inefficiencies caused to the war effort by this division were incalculable.

In terms of the actual move to Canberra, the impact on traditional relationships between Parliament, executive and press were serious enough. For the gallery there was some benefit in the levelling of the playing field by the removal of the substantial advantage the Melbourne Parliament had given to the great Melbourne newspapers and their allies. In theory, at least, all newspapers and the few news agencies covering federal politics in Canberra faced similar levels of comparative disadvantage. In short, they shared problems of distance, communication, space and location. This relative equality, however, was eroded by the rapid growth of Murdoch’s *Herald* and *Weekly Times* group, which annexed major newspapers in



all capital cities except Sydney. This concentration created a bloc of national political influence in the gallery matching the supplanted supremacy of the great Melbourne dailies.

The shift to Canberra had been planned on the basis that the spatial separation of government institutions would replicate that of Melbourne. The executive would have its own wings with the eventual expectation of moving to department offices as the public service trickled into Canberra. The Parliament would have the show-piece of a new but temporary Parliament House. While modest accommodation had been included for the press in the Parliament, it was tacitly accepted that the newspapers and agencies would hire or build offices in the few crude urban centres. Homes would be built for permanent journalists, and transients in for the parliamentary session would stay in government hostels. In short, the pattern of coverage and accommodation of executive, Parliament and press would largely maintain the patterns of Melbourne. Seemingly, some spirit of constitutional determinism would maintain the traditional balance. For a variety of reasons this failed to happen.

For a start, it proved impossible to get the executive government even as far from the parliamentary building as West and East Blocks adjoining the parliamentary building. Cabinet meetings in the nearby administrative buildings proved impracticable and were moved to Parliament House. This combination of executive and parliamentary function in one building meant that accommodation provided to ministers as parliamentarians was appropriated for executive purposes. Inevitably, the basic offices consumed additional space for public servants and staff. Most ministers had no departmental offices and the few that did found them inconvenient to use. The administration came to Parliament House and so also did the press. What were intended essentially as common rooms solely for press covering parliamentary proceedings were reorganised into offices in a manner not dissimilar to the British land enclosures.

This assumption of parliamentary space was encouraged by parliamentary policies which rejected any notion that the press should pay rental for the accommodation. This, it was argued, would give the press tenants' rights in Parliament. Such a principle was not applied to the executive offices, presumably because ministers also held rights as parliamentarians. With Canberra deficient in eating, drinking and diversionary facilities, much of the social life and entertainment were focussed on Parliament House. Essential services such as barbers and bookmakers appeared in the Parliamentary building. In short, a political culture emerged embracing all who worked in Parliament House, a culture that did not change materially over sixty years, whose elements were as discernible in 1988 as they had been in 1927.

What impact did this convergence of political social factors in the new capital have on the press? The tangible separation of Parliament and executive had allowed the press to apply established criteria of newsworthiness, or news value, to gauge the measure of coverage given to each institution. In Melbourne, the test of newsworthiness had mostly favoured the Parliament, although with a pronounced shift to the executive in the 1920s.

Very likely, this drift was maintained, perhaps even gathered momentum, after the transfer to Canberra. Changing news values would have partly dictated this. With changing styles of news presentation from the early 1920s, together with the gradual emergence of broadcast news, pressures were already on the old broadsheet dailies to transform their conventional news values. It is the extent of the shift in news value from Parliament to executive, rather than its occurrence, that is at issue in the Australian context. It has to be asked whether the conjunction of press and executive in Australia's Parliament House at Canberra distorted, and

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eventually stifled, the reporting of traditional parliamentary proceedings. In short, it is argued that the Australian press moved from predominantly reporting Parliament to overwhelmingly reporting what the executive said and did in the parliamentary building. Consequently, the Parliamentary institution diminished in prestige and newsworthiness because the executive was lodged squarely within its bounds.

The point may be amplified a little by comparison. In the United States, the constitution separates the institutions of executive, Congress and Supreme Court. The constitution gives considerably more discretionary power to the executive, through the elected President, than Westminster systems convey. It is reasonable to expect, then, that the President gets the greater share of press attention at the expense of the two other institutions. Yet the Congress and Supreme Court are not obliterated from media coverage and attention. They remain highly newsworthy. Each has its own institutional space and its own press gallery to cover it. Congress in fact has distinct sub-galleries performing specialist news media functions. This separation of constitutional and news media function guarantees that Congress and Court get a fair share of news media and attention, although less in proportion than space and broadcast time going to the President. Physical separation of space gives perhaps an even fairer balance in the United Kingdom, where the coverage given to Westminster in session is comparable to what Number Ten and Whitehall receive.

The exercise of permissive occupancy, even squatting rights, by the executive in Parliament House has been detrimental both to the Parliament and to the perceptions of Parliament as reflected by the news media. It has also, I suggest, been more directly harmful to the news media in the power it has given the executive government to manipulate news. Of course, there would have been executive manipulation of the press even if the institutions had maintained physical separation and a proprietary executive press corps had emerged. This would have been less damaging to the Parliament, however, because it would target journalists who did not cover Parliament. Manipulation by the executive would then have depended on the relative advantage of the executive in direct bargaining with journalists over the news agenda. This would have provided a basically fairer contest because the power of the executive would not have been reinforced by the traditional privileges of the parliamentary institution. Thus, the advantage that the executive already possesses is, in the Australian context, accentuated by the ancient privileges and conventions of the Parliament.

If this seems far-fetched, the sceptic need go no further than Sir Robert Menzies' second prime ministership (1949–65) for examples. Menzies' expertise in news media control lay in the combination of executive manipulation with parliamentary precept and precedent. For example, executive manipulation could be achieved by the technical device of not holding press conferences except in extreme circumstances, such as a close-run election. Conversely, Menzies could call on the precept that material related to important matters of state had first to be conveyed to the Parliament before it could be disclosed to the news media. Where this hoary, and somewhat dubious, tradition was applied when Parliament wasn't sitting, delays were inevitable, yet the fault lay with Parliament rather than the executive. Menzies had a very deft hand indeed when it suited him to sustain his executive fiat with the reinforcement of parliamentary tradition.

There were some bright spots for gallery journalists in the Menzies years, largely through the ingenuity of individual journalists in finding ways around the Menzies log-jam. In general, they were wretched years for the gallery's development as a responsible and responsive news media institution. So also had been the Depression years of the 1930s where, retrospectively,

gallery journalists conceded that, shackled by the conventions of objectivity generally accepted in that period, their coverage of the Great Depression had been grossly inadequate. These failures were balanced by periods of excellent journalism.

Unquestionably, press gallery journalists did a fine job with their reporting of government and administration during World War II, both in what they wrote and in what they concealed, the confidential material they knew but did not write because of national security. A significant part of the gallery work during World War II, however, was accomplished by a small group of senior journalists who worked as much in Melbourne, where the military headquarters were centred, and on the road with Prime Minister Curtin. It was not, therefore, primarily involved with either the Parliament or the executive in Canberra.

After Menzies retired in the mid '60s, the gallery had a period of vigorous renewal, a resurgence counterpointing in many ways the gradual decline of the long-entrenched Liberal government. Harold Holt and John Gorton were much more moderate in their approach to the news media, particularly the television and photojournalism elements. Many gallery members who had endured the Menzies dominance departed and their successors were younger and more innovative, prepared to try new forms of journalism such as satirical comment, a genre that would have been unthinkable under Menzies. Finance and economics journalism began to strengthen, originating with the establishment of the *Financial Review* gallery office in the early 1960s but spreading enthusiastically to other major newspapers. The television journalists began to conquer the daunting challenges of transmitting material to networks based in distant capital cities. It was an era of supreme newsworthiness, with the Vietnam War and the rejuvenation of the ALP, culminating with the election in 1972 of the Whitlam government. Overall, the period 1966–72 would rate highly in any review of gallery performance since 1927. By this time, however, the limitations of the Old Parliament House were increasingly manifest.

It is somewhat unclear just how long the temporary Parliament House was intended to last, but a reasonable estimate would probably be about twenty years. Its planners and builders would have been startled to learn that it staggered on for sixty years. Certainly the Depression and World War II delayed the transition to a permanent building, but there seems no reason why a new building should not have signified the development decade of the 1950s. It is surprising in retrospect that Menzies' love of the parliamentary institution should not have spurred him to invest in a new parliamentary space. Menzies was not impervious to the planning and development needs of the national capital, whose bounds he once boasted he could walk around each night before bed. It has been suggested that Menzies preferred the old building because of his easy mastery of it, but he would have been just as formidable a parliamentarian in any chamber.

Even when a firm decision had been taken to build a new Parliament House, squabbles over its site took more than a decade to resolve. Planning and construction took more than another decade as the old building withered. The transient building had never been envisaged as a work of elegance and splendour, but for much of its existence it had a genteel, gentleman's club ambience. Sustained over-use had reduced it by the early 1980s to what was effectively public squalor. Yet this decaying and increasingly unworkable monument has become etched in public memory as the landmark of a great period of Australian government, particularly for the news media.

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Earlier this year [1998], there was a remarkable effusion of public nostalgia for this constitutional artefact, as venue for the Constitutional Convention. Numerous veterans of Parliament, executive, news media and staff gathered for a final wallow in past glories. Much of the sentimentality from the news media appeared to be generated by journalists who had come to the parliamentary gallery mostly in its final decade. Reasonably perhaps, they concluded that Parliament had always reflected an exuberant tempo, easy proximity to the greats of the executive, and a relatively benign, even licentious, administration.

In practice, however, the parliamentary environment had invariably been strictly regulated, particularly during the Menzies era, with the authoritarian control of Speaker Archie Cameron complementing the more subtle manipulations of Menzies. This Parliamentary Dance to the Music of Time had a pronounced epochal quality to it, the heightened experience and frenetic quality of an era's passing.

The news media was also seduced by the impact of a political milieu which was decidedly to their professional advantage. It was the period when the relationship between the Parliament and the executive government was at its most distorted. The supremacy of the executive seemed absolute, even in matters which were properly the prerogative of the Parliament. An example is the executive response to an attempt by the Parliament to move the press gallery partly out of the parliamentary building to accommodate an influx of new members. A widely accepted version of this incident, largely confirmed by Anne Summers in her address to this forum last year, holds that the move was stopped by the Prime Minister, Bob Hawke, on the grounds that a press exodus from the Parliament would cost his government the next election. If this is correct then it reflects a sadly diminished Parliament, an institution historically at its lowest ebb.

Inevitably, the contempt of the executive for the parliamentary institution which had so generously housed it was reflected in press coverage which played down the parliamentary institution and elevated the executive. Even in a period when the Senate particularly was in a period of revival and committee systems were increasingly effective, the coverage and interpretation by the news media of the Australian Parliament was at its most feeble. While the executive dictated the political agenda, as it did ruthlessly through the 1970s and '80s, the significance of the parliamentary institution continued to waver.

By the late 1980s, the restoration of a proper balance between executive and Parliament in the parliamentary building, particularly as reflected in the news media, was long overdue. Fortuitously, it came in the new Parliament House. Despite the architectural quality of the building, its many fine spaces and superb internal light, it pleased few of the new occupants, but this antipathy soon faded. Despite an abiding affection for the old premises, the parliamentarians, the executive and their staff soon adjusted to the new building. Why wouldn't they? In terms of comfort, space, resources, facilities, and convenience, it was infinitely superior. Although the executive was still housed in the parliamentary building, in some splendour, a measure of parity was restored to its relationship with the Parliament. The quality of the parliamentary spaces, lobbies, offices, party and committee rooms did much to revive the prestige and self-esteem of the parliamentarians who were not in the executive. Significantly, the Parliament was able to affirm and entrench traditional curbs on access and movement of the news media within the parliamentary building.

Unquestionably, the ethos and structure of the Old Parliament House was more attuned to the practice of print and radio journalism than any other public building in Australia, perhaps

even the world. The resentment of journalists plucked from the centre of the action to a controlled periphery was a resentment not mollified by more space and facilities. A painful process of adjustment had to be made to the new ambience and amended conventions of parliamentary function. The change of parliamentary domicile also brought user-pays charges for the first time, still below market rentals but irksome for institutions and individuals used to a free ride. Where once the argument had been that press payment for space would produce tenants' rights, no additional rights accrued when payments were eventually applied.

Nor did the advantages of space and facilities last for long. The planners of the gallery had not anticipated the spectacular growth spiral in both number of institutions and journalists from the early 1990s. In part, a substantial increase in space created its own demand. The major newspaper offices, the ABC, and the television networks, doubled and in some cases tripled the size of their gallery staffs. The sprouting of a range of diversified news interests outside the mainstream sparked pressures for individual and small-unit representation which the gallery, to its credit, sought to accommodate. Space was also awarded to news agency services, mainly commercial and financial, which proliferated in the 1990s. A cursory look at the current gallery list is enough to confirm its formidable mass and growth. After less than ten years, the gallery has virtually filled the primary space allocated to last it in perpetuity. This raises the question of whether the gallery offices, as distinct from common accommodation for journalists covering Parliament, should be retained in Parliament at all.

The only firm proposals for relocating the press outside the Canberra Parliament were made by Sir Keith Murdoch in the late 1940s. Murdoch, whose attitudes were fashioned by his work in the Melbourne gallery, felt it appropriate that journalists should have an independent existence outside the conventions and limitations of parliamentary space. This would enable them in some degree to provide separate coverage of Parliament and executive, even though the two constitutional institutions still existed side by side. Murdoch received little support from his proprietorial colleagues or federal politicians and his proposal for a separate press building lapsed and never revived.

I was interested to read in Anne Summers' lecture here last year that she had advocated the removal of the *Financial Review* office from the gallery to space outside the Parliament. She felt that this was necessary to restore competitiveness among gallery journalists, and destroy an entrenched uniformity in professional attitudes to political journalism. It is a viewpoint for which I have much sympathy. As with Sir Keith Murdoch, there was a lack of interest from Dr Summers' superiors and colleagues. It seems increasingly likely, however, that the accumulating pressures on space and growing numbers of potential entrants will force such a resolution, whether wholly or in part, upon the gallery. Without the cosy propinquity between executive and gallery that defeated any proposal to vacate the old building, such a solution would possibly succeed.

This issue aside, how has the gallery adjusted to the more temperate and commodious environment of the new building? I stress here that I am not speaking from direct experience. I have not worked in the press gallery since 1964, and I have never worked in this building at all. I doubt that I have been inside its walls more than seven or eight times, including today. My judgements are based on tentative assessment of outcomes as reflected in news product.

Despite some grumbling to the contrary, I would rate the gallery quite highly in terms of ethical journalism. Of the 1000 or so adjudications of the Australian press gallery since 1976, few are relevant to unethical conduct by gallery journalists. The long-established judicial

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sanctions of the Media Alliance's Code of Ethics, to the best of my knowledge, have not been invoked against gallery journalists in recent years. Nor am I aware of any major disciplinary problems involving the gallery committee and its extended membership. The conduct of the crucial relationship between the gallery and the parliamentary officers in a difficult period of adjustment seems to have been sound, if not without tensions. I know of no major breaches by journalists of parliamentary privilege or gross misconduct within the new Parliament House. Nor am I aware of any recent major defamation or *sub judice* contempt actions against federal political journalists. There may be lapses I have missed, but overall it seems that the gallery's record for ethical journalism, conduct within the Parliament, and accurate journalism, at least in the legal sense, has been creditable.

I referred earlier to the fixation on the Old Parliament House, not only as the fulcrum of political news, but also as a principal place of entertainment and social activity for the hundreds of people who worked there. The shift to the new building broke this linkage forever. The developing cafe and boulevard life of areas close to the new building have delivered much more sophisticated diversionary options to the new generation of Parliament House workers, including journalists. Even a superficial look at the new entertainment areas of Manuka and Kingston late at night suggests a high patronage by parliamentarians, staff and journalists. This represents a maturity greatly to be welcomed, moving the incessant social activity welded to politicking out of the parliament institution.

The new building has been responsible for a blossoming of political and parliamentary television news. Television journalism was particularly ill-suited to the oddities and inconveniences of the old building, with poor studio spaces, shabby backgrounds, lack of natural light, and inadequate connections to network offices. Contrast, for example, the dim, dingy images from the Old Parliament House during the Constitutional Convention with the generally luminous pictures from the new chambers and lobbies. Indeed, the lighting in the current chambers often gives sharply defined frontal facial images distinctly unflattering to parliamentarians caught squarely on camera. The long-delayed access to sound and visual bites for broadcast journalism has been utilised to animate and vitalise television news in particular. Although not based on rigorous content analysis, my feeling is that newspaper coverage of parliamentary proceedings has increased, even without the big-bang occasions of uncertain Senate majorities.

Generally, assessments of gallery performance have missed what I consider the most encouraging development of recent years, the emerging of comprehensive background reporting across the spectrum of public policy. I would say that public policy can now justly be added to the conventional breakdown of political journalism into covering Parliament and covering the executive. This has not been confined to the voluminous coverage by specialist economics and business writers which has developed consistently over almost forty years. Rather it extends across a broad range of public policy areas which would have been very lightly covered, if at all. I cite particularly the communications area, where the quality of extended background and analysis has been of very high quality in recent years.

What about political comment? I am often surprised by the depth of ignorance even senior politicians display about the history of news media and its practice. Particularly irksome is the frequently quoted dictum that journalists should scrupulously separate fact and comment. There have been one or two well co-ordinated critiques on this subject in recent months. Presumably this separation applies only to print journalists. Television journalism is able to maintain a balance between fact and opinion because of program differentiation: a split

between news (fact) and current affairs (news and comment). For print journalism the issues are rather different.

While print was the dominant news medium, the reporting of news was dictated for many years by what was called the *objectivity principle*. Essentially, this provided that material should not be reported unless it could be confirmed by at least one identifiable source. There was even a fashionable doctrine of *triangulation*, the notion that news should not be reported unless it could be confirmed by three sources. Fact, under the objectivity canons, was confined to the news columns; comment or opinion to leaders or editorials.

All of this sounds perfectly reasonable, but in terms of getting at the truth of events rather than their superficial connotations, the objectivity principle is a hazard. If all you can report is only what you can source, without the freedom to interpret or comment, then what you present objectively may be a pack of lies. The reporting of Stalin and Hitler scrupulously adhered to the objectivity principle, with reporters replicating word for word what they were told or what they were given. US journalists who had long suffered under the shackles of strictly objective journalism finally got sick of it during the heyday of Senator Joe McCarthy. By reporting only what McCarthy said or released in press statements, they obscured the essential truth that the man was a dangerous demagogue. They turned against the conventions and exposed McCarthy by interpretative journalism and comment.

In Australia the news services of the ABC were wedded for many years to the objectivity canons. In 1971, its journalists in the press gallery found themselves in the ludicrous predicament of not being able to report the deposition of Prime Minister, John Gorton, in the 7pm news bulletin, because they could not source it. The ABC news journalists were scooped by the current affairs program *This Day Tonight* which followed the news at 7.30pm. Its journalists had no inhibitions about putting Gorton's overthrow to air, although there had been no formal political announcements.

Politicians who preach a pious separation of fact and comment seem to be basing their strictures on newspapers as journals of record, a concept that has been extinct at least since the 1920s. Even when the journals of record were at their peak, they published only a fraction of the news and information that was available. Many contemporary newspapers still do a creditable job of publishing a lot of material for the record. Already, however, the bulk of the task of providing any record has passed over to the Internet which does an incomparably better job than any newspaper could ever do. Why should a newspaper try to build up some sort of a record on, say, Wik, when there are thousands of pages easily accessible on the World Wide Web? Those who proclaim a rigid separation of fact and opinion in the news pages give the impression that their only news reading is back copies of the now-extinct Melbourne *Argus*.

The contemporary reality is that print news writing has moved decisively towards interpretative journalism, establishing comment and opinion on a firm basis of fact. In many ways, this follows the legal notion of fair comment as a defence for defamation, the writing of comment and opinion on the basis of accurate fact, which is clearly indicated in the story. A retreat to the strict canons of objectivity as advocated by some political pundits would be immensely damaging to good and truthful journalism.

Having largely avoided anecdote so far, let me end with a brief personal account of a consultancy I did some years ago for the planners of the Old Parliament House Museum. In particular, I was asked to make suggestions on what might be done to preserve areas which

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were relevant to the history of the press in Parliament House. Not many of my specific proposals were adopted, but the preservation of part of the old press gallery area was accomplished some years later.

With an official of the prospective museum, I made an extended tour of the deserted chambers and lobbies, arriving at last at the old Prime Minister's suite. I found to my astonishment that the office had not been touched since Bob Hawke left over two years before. Among the debris and artefacts remaining in his office was the blackboard on which the Prime Minister's daily appointments were chalked. The list was fairly typical: one or two early morning appointments; a sub-cabinet committee meeting, a full caucus meeting. The last item listed was a 12.30pm luncheon appointment which read simply: 'Lunch—Brian Bourke'. The spectacle of a successful Labor Prime Minister and a soon to be disgraced Labor Premier sharing a last supper in an increasingly deserted building epitomised for me in many ways the fugitive spirit of the place. I strongly urged that the board be kept in place as a significant historical memento but I imagine it has been erased. A pity! I hope the two old spectres shared a good lunch.



**Question** — You spoke about the influence of the three buildings on the gallery. As somebody who works in the gallery here and knows the Old Parliament House as well, I think you were a bit hard on the Old Parliament House and a bit soft on this place. I am one of those who regard this as a very neo-fascist building in design and intent in which democracy has been the loser. You do not have that wonderful Kings Hall mixture of politicians and people. Here everybody is quarantined, everybody has separate entrances, politicians are very much kept away from the people, the people kept away from the politicians and it is very much like a resort forever out of season for most of the year, with very long corridors.

But in regard to the press gallery, you did talk about the improvement in the ethical conduct, and I got the impression you suggested that was partly because of the transference to this building. In fact, that would have happened anyway, wouldn't it? Journalists are better educated, they have come from a different stream. The old journalist of your generation and my generation have drunk themselves to death or had their heart attacks and have gone.

You did not mention the other parliament house we might have had on the shore of the lake, the Holford parliament house, which obviously was inspired by Westminster and Thames-side location. I wonder whether that might have produced a more democratic sort of parliament house than this edifice that we are in today?

**Professor Lloyd** — I was a supporter of the parliament house on the lake, I think it was a terrible tragedy that it was not there. I have always been extremely dirty on the processes that put it up here where it was never intended to be.

I note all your comments about this building. As I say, I have never worked here and that might produce a totally different attitude to it. I am essentially looking at outcomes, trying to judge from my approach to reading newspapers and other news material. What I am really saying, is that this new Parliament House is producing, I think, a better balance between the



executive and the Parliament. Now whether that is based on the sort of sterility and separatism that you are talking about, I do not know. I am also saying that it is reflected in press coverage which has improved and also is giving a fairer balance of the elements of the constitutional system; in particular, putting a better perspective on the two chambers of the Parliament, and also now improving public policy journalism. I am looking at outcomes rather than individual discomforts or the impact on, I suppose, the 'things ain't what they used to be' kind of syndrome.

With regard to the press gallery, I understand it is almost now back to being very close to its peak accommodation capacity, and I do think that ultimately the problems will have to be faced, with the press moving out of this building, either wholly or in part. Sir Keith Murdoch did suggest that in the late 1940s, but it was never done. So, basically I am sympathetic to what you are saying, but it was inevitable at some time or other that the problem would have to be faced, and that we would have to go back to a system where the parliamentary officers have the final control. They lost it completely down in the other place, not surprisingly. They just could not contain it.

**Question** — Professor Lloyd, I am wondering to what extent you think the press or the media, electronic and print, has contributed and perhaps is contributing, to the decline in the public respect for the Parliament as an institution and what do you see as the role of the media in perhaps trying to redress this situation?

**Professor Lloyd** — I find that a fairly difficult question to answer. It is something I have never given a great deal of thought to. I suppose my concern has really been with news media practice and news media content. If anything, I would feel the revival of parliamentary reporting, and the spread of good public policy reporting, as well as the factors mentioned of better educated journalists, more ethical conduct, and the disappearance of much of the worst of the tabloid traditions, would in themselves certainly improve the status of the press and the news media over time.

I do not think the decline in public respect for Parliament is really the fault of the news media. I think it is a reflection of very serious problems with the ethical conduct of parliamentarians. We have never had a worse era, I suggest, than in the last ten years. To suggest that Menzies would have had to spend a lot of his time checking on the financial interests of his ministers would be totally improbable. Similarly of Curtin, although there was a degree of ministerial corruption in the Labor government at the end of the war, which largely went unpunished. You just would not have got that to any degree in previous eras. It is now a major problem for every government in the country. The ceaseless, factual coverage of ICAC [Independent Commission Against Corruption] in Sydney seems to indicate a fairly disgraceful abuse on the facts given. Four or five ministers go out virtually every time there is a new government.

There is no doubt that there is a significant degree of public corruption involving politicians. I hate to put it in that way, but it is very difficult to reach any other interpretation and I think that really is what is dragging the reputation of Parliament and the politicians down. I do not see any immediate corrective to it.

**Question** — Can you please expand on this idea of public policy journalism? Does the gallery, in your mind, focus too much on the politics and too little on the policy?

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**Professor Lloyd** — What I'm referring to is the expansion of comment sections or interpretative sections in the major newspapers, particularly the *Age*, *Sydney Morning Herald*, and *Australian*. The introduction of big new sections such as 'Focus' in the *Sydney Morning Herald* means you now have much more scope there for this kind of reporting. Also there is the enhanced size of the Friday edition of the *Financial Review*, the introduction of the *Saturday Financial Review*, and some of the more serious Sunday papers. There is the scope for this and although I do not know the nuts and bolts of it, I would suggest that with more journalists in the gallery and the great increase in the size of most major offices, attention can be given to doing a lot of these public policy areas, which were neglected for many years, in some depth.

I have mentioned communications reporting, which I think has been quite outstanding in recent years, and would also include subjects like transport or social welfare areas, which in the past, in terms of newsworthiness, would have been dismissed as having no audience interest. There obviously is audience interest in policy. I think there probably is still the overemphasis on politicking, but I do not know that that is ever going to change, it is deeply embedded in news media practice. We are getting a focus on policy to some degree on television, but I would like to see rather more. The current affairs programs seem to be back in the doldrums again, although the Sunday program maintains its very high quality. I would like to see more of that in electronic broadcasting, given that except for the ABC the rest of the radio in Australia is a national basket case in terms of serious content.

**Question** — I would like to ask you to comment on this please. If you accept the folklore of the old building and the sentimentality and nostalgia that often is referred to there, it was a very information and source-rich place for journalists to work. If you accept the folklore as it is emerging in this building, then it is a somewhat isolated, removed place where access to sources of information is not as cosy or as readily available as down in the other building. If you accept those two points, I am not quite sure that I understand why you are saying that this building is a much better place for the press and the media. If you accept that there is the reality of the distances and the isolation in this building, what then is the media doing, or what have other people done that has overcome that problem?

**Professor Lloyd** — I think there is a bit of a fallacy about the Old Parliament House. What I am suggesting is there was only this kind of open slather as the building got out of control in its last fifteen years. As you say, it was a superb place for journalists to operate in terms of covering politics, in terms of covering the national executive. But that was really only a transitional phase. A lot of the journalists who evoke this nostalgia, I think, were people who came there in that last period when all the rules were being broken. There was virtually no effective parliamentary oversight of what the executive was doing, what journalists were doing, what anyone else was doing. Now that may be a little unfair to the parliamentary officers, it may be a little exaggerated, but I think that was the general focus.

Of course, those with a longer experience of the old building would know that through much of its existence it was as tightly controlled as this Parliament House. Under Menzies as Prime Minister, it would be unthinkable that anyone would approach a minister in Kings Hall, or that anyone would go into his parliamentary space. Because the building was smaller, and it was much less densely populated, the general principles of Westminster parliaments prevailed, and there was a fairly tight restriction on press access. So I think it is wrong to assume that it was always the case that the old building was this hive of sources and buzz of activity, pure chaos, if you like to put it that way. I think that is a fallacy, perpetuated by those

who had their experience only in that final mad frenzy. If you look back further, control of the press in the Westminster parliaments has always been substantially the same control that is now imposed here. It was, of course, very irksome when gallery journalists, used to the relative licentiousness of the old place, came up here and found it was back to the age of austerity.



## **Red Tape and the Ombudsman\***

*Philippa Smith AM*

The Ombudsman Office celebrated its 21st birthday last March. It is timely, therefore, to reflect on the Office's role and its ongoing viability. Is there a need for the Office? Does it have the appropriate powers and teeth? Is it effective?

The Office of the Commonwealth Ombudsman was established in the 1970s. It was introduced at a time of expansion of government regulation and intervention in ordinary lives. The Ombudsman was part of a package of reforms (and administrative review mechanisms) to help promote and ensure the fairness and transparency in the way the bureaucracy went about its business and treated individuals.

At the time of the Ombudsman's establishment the Prime Minister of the day, Malcolm Fraser, said: 'The establishment of the Office is directed towards ensuring that departments and authorities are responsive, adaptive and sensitive to the needs of citizens.'

That same 'sensitivity' and watch is needed today. The new and complicated ways in which government is structuring its relations with citizens mean that the Ombudsman's role and the checks and balances it provides on the use of statutory and other powers is essential. Parliament also needs independent feedback as to what is happening to service standards on the ground.

### **The role of the Ombudsman**

During the last four or so years the number of complaints to the Ombudsman's Office escalated by some sixty percent. Last financial year the office received about 25,000 complaints and another 25,000 inquiries. That's a huge volume of complaints, and it makes

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\* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 17 April 1998.

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the Australian Ombudsman the second busiest in the world. The only office that has a bigger number of complaints is the Pakistan Ombudsman.

Many complaints reflected a feeling of powerlessness. They also reflected the expectation for reasons or an explanation as to how and why certain decisions were made. This confusion was exacerbated where a number of agencies were responsible and/or third parties became involved. People were sometimes faced with conflicting messages, excessive red tape and administrative processes where they found it was up to them to ask the right questions and to know the rules even in situations that were very complex even to the experts. From the citizen's perspective the Ombudsman is often needed to cut through this red tape and officiation.

Against this has been the mantra by some in government to reduce red tape and what is seen to be unnecessary scrutiny. Administrative review and the Ombudsman have on occasions been the target of such comment. It is true that the Ombudsman sometimes focuses on the reasonableness, transparency and ethics of *the process*. Some find this irritating.

In my view commonsense needs to prevail. Public service functions cannot be equated with selling another hamburger. We need to articulate why transparency and the maintenance of certain steps and procedures are important when we are dealing with the use of statutory powers and/or the allocation of government monies, tenders or licences.

It is easy for a culture to develop where doing things the easy or quick way can create an unfair or discriminatory allocation of resources, the inconsistent application of rules, conflicts of interest—or worse. Being called into account can be irritating but a re-enforcement of values is—I believe—critical.

Take for example the increased use of contractors and the associated allocation of tenders. I found that the combination of naivety and trying to cut corners could create the real risk of government paying *more for less* or in a dubious context. One tender process we investigated was worth over a million dollars per annum and related to courier services. It was for a three year term. The department concerned decided that for expediency they would not go to open tender but would invite four selected companies to tender. We received a complaint from one company that had been excluded from the process. We investigated the matter. I should make it clear I am not against selective tenders in situations where smaller amounts or specialist expertise are required. This was not the case here. Further we found that the so-called expert group organising the tender had not been aware that the Australian Competition and Consumer Commission had the previous week named the very same four invited groups as being involved in a collusive tendering arrangement.

The agency involved at the time complained about the inconvenience caused by the Ombudsman's investigation. I should add however that the managing director later thanked us for our assistance and noted that their tender procedures had improved, that they had become more efficient and that they had even made significant savings in the particular contract at hand. That example, I believe, highlights the fact that transparency and good practices can go hand in hand with public interest and value for money.

Justice Wood, in the final report of the Royal Commission into the New South Wales Police Service talked about 'process corruption' and how changes in culture which overlook due process can become corrosive over time. The importance of checks and balances can range

from probity issues of misallocation and the possibility of corruption, to the more day-to-day issues directly affecting individuals, such as their responsibilities and entitlements in their dealings with the Australian Taxation Office, the Department of Social Security, or the Child Support Agency.

From a citizen's perspective this is *good* red tape. *Bad* red tape is that which has been born out of habit, or is designed for the convenience or protection of an agency. Examples of bad red tape in my mind include recorded messages where humans never seem to be available. Another example was the Austudy Actual Means Test Review, which required 280–320 questions on its application form.

I would argue that it is an important part of our democratic society that citizens can 'challenge' the state by asking questions about the standards of service review and demand transparency in how the bureaucracy treats them or how decisions are made. The Ombudsman's Office has the necessary powers and becomes a mechanism by which they can do this.

A repeated criticism of this process is that administrative review has become too expensive.

I compared total Commonwealth outlays for 1995/96 to outlays on the quality control agencies such as the Administrative Appeals Tribunal, the Social Security Appeals Tribunal, the Industrial Relations Tribunal, the Refugee Review Tribunal and the Australian National Audit Office. The bottom line was that about one tenth of one percent of total outlays is spent on such watchdog and review agencies. A small investment, I would argue, for quality control.

It is also in this context that I expressed concern that the budget of the Ombudsman was cut back by some nineteen percent. This was at a time when the office faced a sixty percent increase in demand. As already noted, it is at times of great change in administrative policy and service delivery that the citizen needs a strong ombudsman.

### **Priorities of an Ombudsman**

I would like now to turn to some of the priorities and practical features of the Ombudsman's Office.

The *primary focus* of the office relates to individual complaints. The office acts as 'agency of last resort'. This has always been the case. That is, the office expects people and agencies to try to fix problems directly in the first instance. It provides advice to all complainants but only actively become involved in matters that can't be resolved through internal complaint procedures.

However, the increased volume of complaints meant that the Office's discretion rate to *not* investigate increased from forty to sixty percent while I was Ombudsman. Said another way—the office could only actively investigate forty percent of the complaints coming to it. Our client satisfaction surveys showed that this high discretion rate was starting to undermine the confidence of people coming to the office. If the Ombudsman can't deal with a significant range of matters and is seen to be just part of the system, this reduces the credibility of the Ombudsman's Office. They wanted an *independent* investigation, not just advice and assistance and referral back to say the Australian Taxation Office's internal complaint

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mechanisms. Further, our preliminary research indicated that despite our encouragement probably only about fifty percent of people actually did go back to internal complaint structures.

That is of great concern. Internal complaint procedures have a role but they also have the potential of hiding the level of citizen concerns. The standards of such internal complaint procedures are also vital here. In a survey of internal complaints procedures, only twenty percent of agencies had internal complaint handling arrangements which met the Australian standard, and the Ombudsman's Office has been working with agencies to improve complaint handling.

### **Systemic issues**

Apart from the realities of dealing with specific complaints, as Ombudsman I always took the view that complaint prevention should be the priority.

By looking beyond individual complaints, to the pattern of complaints, it is possible to identify the systemic problems causing many complaints. It is also a pragmatic way of dealing with the increasing volume of complaints and the particular access and equity issues raised. Research indicates that for every complaint made perhaps as many as twelve to twenty other people experienced the same problem. The ratio is worse for the disadvantaged or inarticulate who tend not to lodge complaints.

I was particularly proud of our achievements through these systemic investigations and reporting. It was through this work that we made the greatest changes and were able to trigger debate about service standards and administrative procedures. Such debate about what standards should apply is constructive for agencies and citizens alike. Just some of our own motion investigations reports have included:

- *Treatment of whistleblowers in the Australian Federal Police*—Complaints from Australian Federal Police whistleblowers prompted an investigation which recommended a series of improvements to the management and treatment of whistleblowers.
- *Department of Social Security service to Alice Springs Town Camps*—After learning that a large proportion of Aborigines in and around Alice Springs were not receiving benefits, the Ombudsman investigated and recommended a series of changes to DSS procedures.
- *Oral advice*—The Ombudsman investigated a series of complaints from people who received incorrect advice and recommended changes to procedures for delivering and recording advice and new compensation measures for disadvantaged clients.
- *How the Australian Defence Force responds to allegations of serious incidents*—The Chief of the Defence Force asked the Ombudsman to investigate and recommend improvements to Defence investigations.
- *Contracting out in the public sector*—The Ombudsman initiated debate and investigated the public accountability aspects of government services contracted out to the private sector. The debate is still continuing.



The Ombudsman's own motion work is critical if the office is to have more than a bandaid role in complaint resolution, because this work can actually prevent further problems. To my mind, attention to these systemic issues is an important—and cost effective—feature of the Ombudsman's Office.

This major project and policy work represented between ten and twenty percent of the Ombudsman's overall activity. I estimate that through major projects and policy work alone, the Ombudsman's Office has delivered around \$35 million worth of investigations to the Government—this has happened with a current appropriation of only \$7.5 million.

### **Other accountability structures**

As previously mentioned the Ombudsman's Office was established as part of a package including the *Administrative Appeals Tribunal Act 1975*, the *Freedom of Information Act 1982* and the *Administrative Decisions (Judicial Review) Act 1976*. Its role supplemented each of these.

The Administrative Appeals Tribunal (AAT) is a merits review tribunal with determinative powers. Its brief is to look at what is lawful. The Ombudsman does not have determinative powers but has a broader brief to make recommendations as to what is 'fair and reasonable' in all circumstances and to look at broader practices and procedures. A synergy or working relationship between the two can be useful, for example in the matter of departure certificates and the 'own motion' investigation we undertook after a repeated number of cases before the AAT where the AAT found the administration relating to these 'departure certificates' (and eligibility for the age pension) was 'legal' but harsh and unfair in its application. They referred the issues to the Ombudsman's office for a broader review. Our 'own motion' investigation resulted in policy and administrative changes that will help about 1,000 citizens a year, plus exgratia/compensation for some seventy individuals.

The Auditor-General and Parliamentary Ombudsman can also supplement each other. The Ombudsman starts with individual cases and personal experiences and then looks more broadly at the underlying practices and procedures. The Auditor-General starts with broader probity and efficiency issues and more recently has tested these against issues of service quality. On some issues, such as oral advice, the two agencies usefully exchange information and work together.

### **Independence**

For the Ombudsman, independence as to what issues to pursue is critical.

Some tension between the external review body such as the Ombudsman, and the agency, and the government of the day needs to be expected. It is the Ombudsman's job to throw light onto defective administration and the problems it can cause for citizens. However, an Ombudsman investigation is often not welcomed by an agency or the government of the day. This is precisely why the independence of the Ombudsman's Office must be assured. This relates to both the Ombudsman's funding and reporting arrangements and the appointment procedures for the Ombudsman.

The Ombudsman must be independent of those being investigated. The Ombudsman needs to be able to withstand the 'hurt feelings' of department heads, or responses that, by reporting on

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an issue, you are somehow a traitor to the tribe. The pressures can be very real. The importance of independence cannot be stressed enough. It also needs to be put into context.

I've already talked about the volume of complaints; 25,000 in the last financial year. Most of these could be resolved quickly and cooperatively with the agency behind closed doors. But it is the threat of embarrassment, and willingness to expose that often facilitates this process. It is also the public reports and demonstration cases that generate a public debate and discussion about appropriate standards and that alerts the citizen to what they can do, and what they *should* expect.

In my last year as Ombudsman I think I released something like twenty-five reports. That is against 25,000 complaints. Yet I was branded by some department heads as being aggressive in my disclosure and reporting habits! As I said, the power of an Ombudsman in reality comes from the potential power of embarrassment and the credibility and thoroughness of the work done.

These tensions as to how independent and what sort of profile an Ombudsman should have are not new. Jack Richardson, the first Ombudsman, made shock waves within the bureaucracy by his milk carton campaign which asked 'Bamboozled by the bureaucracy? Call the Ombudsman.' Apparently the campaign put more than one senior official off his Weetbix. Indeed, so strongly was this 'rampant promotion' remembered that it was a key question at my own interview some ten years later. Could I assure them that I wouldn't use a milk carton campaign?

### **Reforms to ensure the effectiveness of the Ombudsman**

I would like now to turn to some of the reforms I see as being necessary to ensure that the Ombudsman is effective into the future.

#### *1. Funding*

I have already mentioned the question of adequate funding.

#### *2. Jurisdiction*

When the Ombudsman and Freedom of Information Acts were introduced, contracting out and the use of third parties was not considered.

From where I sit, logic dictates that the Ombudsman should be able to cover government services, even where these services are provided by third parties. It is merely a new mechanism of service delivery. The government department or agency is still the principal. They are responsible for the service standards, the choice of contractor and monitoring of standards.

A range of examples, however, indicates that this is not always clear cut and the clients of the services have sometimes been sent from the department, contractor, insurer and back again in a vain hope of determining who is responsible. These issues need to be put beyond doubt and the Ombudsman's jurisdiction needs to be expressly widened to cover core government services and functions provided through third parties.

### *3. Privatisation of Accountability*

There are some other important features and points to be maintained if the government is to effectively use contractors and retain accountability to its citizens:

- Contracts should include provision for the Department to reclaim/negotiate compensation if contractors have caused damage or been negligent in their performance (eg. Australia Post).
- Contracts should require that departments are able to gain and use information gathered by such third parties on their behalf.
- Details of the contract, such as service standards, should become publicly available once the tender process has been concluded.
- The contract may *also* require the third party to provide its own internal complaint procedures. A word of warning is however required in how far we want to go down the path of privatisation of complaint procedures and oversight of citizen concerns. First, a small business will not have the experience or infrastructure. It will add considerably to costs. Second, the proliferation of complaint procedures is confusing to the individual consumers. Third, and probably most importantly, the proliferation of complaint structures or arbitration arrangements means that government loses the oversight and intelligence as to what is happening on the ground in its services delivery.

In summary I recommended the following changes to ensure that the Ombudsman's Office could be effective in the new environment:

- affirmation of legislative powers for the Ombudsman to cover government services provided by third parties.
- establishment of a specialist team within the Ombudsman's Office to deal with tenders and contract issues.
- the Ombudsman be given determinative powers in contract disputes commensurate with industry Ombudsman schemes.

This is more cost effective than establishing a range of new complaint bodies; such an approach is not cost effective, creates gaps and anomalies and is confusing to the punter.

### *4. Powers*

Most industry Ombudsman schemes do have determinative schemes up to certain limits. These are agreed to as part of the accreditation or contract arrangements with members. This is one power or enhancement that may be a useful addition to the Ombudsman in a particular range of matters, say where property compensation is involved (for example, the Australia Post case).

In most other matters however the combination of the Ombudsman's strong investigatory powers (including the power to subpoena and interview on oath), coupled with the power to *recommend*, are, I believe, generally effective and appropriate in most cases.

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The Ombudsman's brief is also to look beyond the law and discuss what is morally right in 'all the circumstances' and what service standards should be met. These are not easy issues and are not as black and white as the law. If they can't be resolved co-operatively, I believe that they *should* be discussed by Parliament and/or the public to determine what standards should apply.

### *5. Time limits*

Timing and cost have become impediments to the Ombudsman's effectiveness.

To overcome these impediments I would suggest that a three month time limit should be placed on the Prime Minister and Parliament to respond to an Ombudsman's recommendation. Shorter time limits should be placed on departments to respond to section 15 reports.

The reporting process of the Ombudsman is somewhat elaborate, as set out in sections 15–17 and 19 of the Ombudsman Act. For example, the Departure Certificate report was given in 1995 and legislative change was achieved. However, act of grace compensation for about 100 individuals was still outstanding. A section 16 report on this was provided to the Prime Minister in March 1997, with recommendations relating to compensation. The final decision was only handed down on the day I retired as Ombudsman in February 1998—some ten months later. The introduction of a three months disallowable instrument would probably concentrate the minds immeasurably.

Another barrier for the Ombudsman relates to the cost of publishing reports. Section 17 or section 19 reports require the Ombudsman to distribute reports to every member of Parliament. I contemplated this for at least one report, but realised it was not possible, given the cost involved (\$1,300). The issue of budgets and resources therefore raises its ugly head again. An alternative would be for Parliament to take over the publishing of these special reports and, as in New South Wales, table the report within forty-eight hours of the Ombudsman giving the report to Parliament.

*6. The reporting relationship of the Ombudsman to Parliament.*

The Ombudsman is an independent statutory officer. The role is separate and different from the executive and the reporting role to Parliament needs to be reinforced.

Currently, although the Ombudsman is a statutory officer, the Office's budget is regarded as an 'outrider' division of the Department of the Prime Minister and Cabinet.

This in practice controls or compromises the ability of the Office to be as independent as it should. The Department of the Prime Minister and Cabinet, as an executive department has not always been an enthusiastic advocate for increased resources and increased scrutiny by the Ombudsman. The Ombudsman's situation is often lost or overlooked as a single line item amongst many within the Prime Minister and Cabinet portfolio.

The New Zealand model stands as a useful precedent. There the Ombudsman reports to a Parliamentary Committee. That Committee makes recommendations as to the annual budget required by the Ombudsman. The executive departments of Finance and Prime Minister and Cabinet can still comment on the appropriateness of this compared to other allocations but the government of the day would need to respond to the parliamentary committee as to whether its recommendations would or would not be followed. The process and procedure provides a transparency that is not currently in the Australian system.

The independence and the special reporting responsibility of the Ombudsman and Auditor-General to Parliament and the citizen needs to be re-enforced and supported.

**Work in progress**

Since the Ombudsman's establishment in 1977 the Ombudsman's Office has dealt with over 300,000 citizen complaints. These have ranged from issues of major impropriety to smaller issues that are nevertheless of critical importance to the individual.

During my term I felt particularly proud of our work in identifying the causes of complaints. My experiences have deepened my commitment to and belief in the importance of the Ombudsman's role.

It was a privilege to have been Ombudsman for almost five years.



**Question** — Have you heard about the new proposals for combining the Administrative Appeals Tribunal and all the specialist tribunals like the Social Security Appeals Tribunal etcetera into one mega tribunal?

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**Philippa Smith** — Yes. I guess it depends on how it is done and I think there are some merits, from a consumer perspective, in having a one-stop shop. I am, though, very nervous about some of the proposals that I have seen floating around which would severely limit the capacity and thoroughness by which those complaints are dealt with. Some of the proposals, for example, would really limit the appeal rights for people going to the Administrative Appeals Tribunal to just questions of law. So what then is left is a lower level thing, as I understand it, generally reviewed by just one person without written decisions being made. Now that is a real ‘no frills’ form of review. It is a quick throughput, but the difficulty is, there is no chance of checks and balances in the way it is done, no written decisions also, so that things could be referred to the Ombudsman’s Office, for example, if there were other broader practices. So, in principal, yes, I think there is some merit in the proposals, if done properly, but I am very nervous about some of the practical bits and pieces that I have seen being discussed. I think that synergy that I was talking about between the Administrative Appeals Tribunal and the other parts, like the Ombudsman, should be thought through very carefully. If I was the current Ombudsman, I would be very worried about the overflow of increased complaints to the Ombudsman’s Office.

**Question** — Particularly at the present time I see a need for much more public awareness for the Ombudsman and its role. Is it on the web? I never hear much about the Ombudsman on the parliamentary radio or very much on the ABC or SBS and so on.

**Philippa Smith** — The Ombudsman’s office is on the web. There was a survey done once about how many people in the community knew about the Ombudsman’s Office. About fifty percent of the community knew about the Office. That is pretty good, actually. But that being said, that same survey showed that the people who needed it most, knew about it least. So when I first became Ombudsman I did in fact start up a targeted outreach program to the groups which we knew were under-represented. Non-English speaking people, indigenous people, students and some groupings of profile women’s groups. Sad to say, in the cuts that occurred, that was one of the things that went. And I think it is a real problem, because I am with you, there is not much point in having an Ombudsman unless people know about it.

**Question** — Can you comment on the role of the Ombudsman in relation to complaint procedures in non-government organisations?

**Philippa Smith** — Well I think it is a networking role and the role I tried to develop when I was Ombudsman was talking to as many of those non-government organisations as possible and saying, ‘Our role is not to take over your role, you deal with as many as possible, but please tell us what the underlying issues are affecting the groups that you deal with and give us your too hard basket ones.’ And I think that sort of outreach can be very effective if it is maintained. It takes a lot of work, though.

**Question** — Have there been many instances of people trying to pressure you to not report your investigations?

**Philippa Smith** — There are a couple of occasions where the investigation was finalised and there were not too subtle pressures in saying it would not be good for you or the Ombudsman’s Office if you release this. The most public example obviously was the investigation we did of New Burnt Bridge community and the Aboriginal and Torres Strait Islander Commission. It was actually a complaint which came to us from a very remote

Aboriginal community and dealt with conflicts of interest, or apparent conflicts of interest by the white bureaucrats in the Commission. We were taken to the High Court on that, about our ability to release a report.

**Question** — To whom does one complain if one is not satisfied about the way the Ombudsman's Office executes its role. Particularly in its discretionary functions, but in other parts as well?

**Philippa Smith** — It is Parliament and the Prime Minister. If it was specific breaches of due process, then we are accountable under the Administrative Decisions (Judicial Review) Act like other review bodies.

**Question** — Can you tell me about outcomes you were able to achieve and what proportion received some form of satisfaction/redress?

**Philippa Smith** — Of those we investigated—there is a certain level of subjective interpretation in this—we estimated that about seventy percent received a positive outcome. Those outcomes varied from a change in the decision, to getting a reason or information, or a small level of compensation, or sometimes an apology. Using that broad brief of those we investigated, about seventy percent received some level of outcome.

**Question** — I would like to ask a question about your views on the current state of use of the Commonwealth Freedom of Information Act and departmental responses to that; in particular, just how you see the status of it at the moment, in relation to access fees, and also the application of exemptions.

**Philippa Smith** — Since the Freedom of Information Act was introduced, we are now operating at a different value base than would have been the case prior to the introduction of that Act. I regard it as having been a very useful mechanism in changing culture, and indeed changing the expectations of citizens that they should be able to ask for information. In practice, what has happened is it has become a tool largely for individuals asking about their individual files, rather than for the broader information about the operation of government. In the last couple of annual reports of the Ombudsman, we also reported on what we saw as a slackening of departments' knowledge, and having fewer skilled people in departments to operate them. Mistakes were being made where the awareness of freedom of information was going down, and the propensity to try to use exemptions like commercial-in-confidence or cabinet-in-confidence were increasing. So in summary it has changed the fabric that we are living in, but it really is time for a catalyst in terms of the use and knowledge about freedom of information, and the value of it.

**Question** — One topic you did not mention was that of trivial and vexatious complaints. Is there a threshold test? If so, and 300,000 got through it, how many were stopped at it? If there isn't, what proportion of the 300,000 were vexatious?

**Philippa Smith** — The Ombudsman has a discretion not to investigate. We had our share of repeat complainers. Actually, the percentage of people who I would call nuisance or vexatious, is extraordinarily small. There are a small number that can eat up enormous amounts of your time, but I would say that it is less than three percent.

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**Question** — Do you believe the bulk of them are dismissed by the inquiries in the initial stages?

**Philippa Smith** — Yes. A lot of things can be resolved by explanation, putting things in a frame, getting information, or putting people on the right path for themselves. But I would not call them vexatious; that is confused.

**Question** — This whole administrative structure, as you said, came about under Malcolm Fraser, when small-l liberalism and the fear of big government seemed to be at its apex. In the current ideology, it seems there is a retreat from that by the Liberal Party, and as you said, a sense that this is all impeding efficiency. What is your view about the current trend in this philosophy and what impact, if any, globalisation is having on it? Secondly, do you fear that the current climate could develop to an extent where the Ombudsman faces being abolished?

**Philippa Smith** — It would be hard to abolish. It can be starved, but it would be hard to abolish. I was trying to make the distinction between good red tape and bad red tape because I think that as a consequence of the philosophy of the current government it should be shoring up mechanisms which help individuals resolve their dealings with large bureaucracies, so I do not understand why they think mechanisms like the Ombudsman are somehow old-fashioned. The other thing I find curious is that if you look to the private sector, it has in fact adopted many of the administrative review mechanisms in private settings—like industry ombudsman schemes. They can see the worth of putting into play accountability mechanisms and they see the connection between accountability and credibility. So in many ways the private sector is now adopting those standards that were put in place in the 1970s by the government. It would be a real irony, I think, if the private sector was shoring it up and the public sector was letting it drift. If you look at the nature of services being provided by the public sector, there are good reasons why it always needs to be the leader in terms of ensuring standards and mechanisms to ensure accountability, sensitivity, probity, whatever you like to call it, in the way that administration operates or the government operates and the way it treats individuals.



## **Meeting Universal Human Rights Standards: the Australian Experience \***

*Elizabeth Evatt AC*

### **The International Bill of Human Rights**

It is almost fifty years since the Universal Declaration of Human Rights was adopted by the UN General Assembly, without dissent, on 10 December 1948.<sup>1</sup> The Universal Declaration will stand forever as the first international and universal statement of human rights principles. It expresses the essence of humanity and reflects the need of each individual for freedom, equality, minimum standards of living and a social and international order in which rights and freedoms can be realised.

The Universal Declaration, though it has not the status of a treaty, is now considered by many to have the force of customary international law.<sup>2</sup> It is drawn upon by the International Court of Justice<sup>3</sup> and by national courts, including the High Court of Australia.<sup>4</sup> It has been the inspiration for the whole United Nations human rights system,

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\* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 22 May 1998.

<sup>1</sup> 48 in favour, and eight abstentions. Australia was a member of the drafting committee.

<sup>2</sup> See Simma and Alston, 'The Source of Human Rights Law: Custom, *Jus cogens* and General Principles' (1992) 12 *Australian Yearbook of International Law* 82.

<sup>3</sup> *South West Africa cases* [1962] ICJ Rep 319, 323; [1966] ICJ Rep 288.

<sup>4</sup> See observations of Brennan, Toohey and Gaudron JJ and Deane J in *Mabo v Queensland* (1988) 63 ALJR 84, 95, 101, and Kirby, J in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 71 ALJR 1346, 1424 (in both cases the reference was to property, article 17).

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for the European and other regional human rights systems and for many national constitutions.

Many principles of the Universal Declaration have become legally binding on States by their incorporation into human rights treaties and conventions. In particular, they are the basis of the two major human rights covenants which, together with the Universal Declaration, form the International Bill of Human Rights:

The International Covenant on Civil and Political Rights<sup>5</sup>  
The International Covenant on Economic Social and Cultural Rights<sup>6</sup>.

The principles of the Universal Declaration are also reflected in the other major human rights instruments in the UN system:

The Convention on the Elimination of All Forms of Racial Discrimination<sup>7</sup>  
The Convention on the Elimination of All Forms of Discrimination Against Women<sup>8</sup>  
The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>9</sup>  
The Convention on the Rights of the Child.<sup>10</sup>

My theme is how Australia has fulfilled the obligations it has undertaken by becoming a party to these covenants and conventions. My focus is on the International Covenant on Civil and Political Rights (ICCPR; referred to as 'the Covenant').

### **Australia and the International Bill of Human Rights**

As a founding member and active supporter of the United Nations, Australia has participated in drafting many international human rights instruments. Australia is in fact a party to each of the six major UN instruments, though with some reservations. It has a legal obligation to give effect to those instruments. That obligation arises under international law, that is it is an obligation between states. But human rights treaties have a special character, since their purpose is not just to regulate relationships between states, but to endow individuals with rights. In the case of the Covenant, this purpose is reinforced by the Optional Protocol, which gives individuals a right to complain to the

<sup>5</sup> Adopted 1966, in force 23.3. 1976; ratified by Australia in 1982. See *Human Rights and Equal Opportunity Act 1986* (Cth).

<sup>6</sup> Adopted 1966, in force 3.1.1976; ratified by Australia.

<sup>7</sup> Adopted 1965, in force 4.1.1969; ratified by Australia in 1975. Implemented by the *Racial Discrimination Act, 1975* (Cth).

<sup>8</sup> Adopted 1979, in force 3.9.1981; ratified by Australia in 1983. See *Sex Discrimination Act 1984* (Cth).

<sup>9</sup> Adopted in 1984; in force 26.6.1987.

<sup>10</sup> Adopted 1989, in force 1990; ratified by Australia 17.12.1990, in force 16.1.91.

Human Rights Committee that their rights have been violated. Australia is a party to that Protocol.

The Covenant on Civil and Political Rights covers a wide range of rights and freedoms, such as equality rights, the right to life, liberty and security of person, fair trial, privacy, freedom of religion, opinion, expression assembly and association, protection of the family and children, democratic rights and minority rights. Under Australian law, however, neither the ratification of the Covenant, nor the Protocol, makes those rights and duties enforceable by individuals in Australian courts. How then does Australia fulfil its obligation to respect and ensure the rights protected by the Covenant?

*The Commonwealth has not used its legislative power*

There is no lack of legislative power to implement human rights treaties. The power of the Commonwealth to enact legislation to give effect to an international Convention, whatever its subject matter, was settled by the High Court in the *Koowarta* case in 1982<sup>11</sup> and in the *Franklin Dam* case in 1983.<sup>12</sup>

At issue in the *Koowarta* case was the *Racial Discrimination Act 1975*, which implemented the Convention on the Elimination of Racial Discrimination. That Act made racial discrimination unlawful and conferred enforceable rights on individuals. It occupies a significant place in Australian legal history. It was applied to prevent Queensland from extinguishing the land rights of Torres Strait Islanders by discriminatory legislation.<sup>13</sup> This left it open for Eddie Mabo to proceed with his claim in respect of his land on Murray Island, in a case which established the common law recognition of Aboriginal native title for the first time.<sup>14</sup> The Racial Discrimination Act was a powerful and effective implementation of the Convention.

The Women's Convention was implemented in part by the *Sex Discrimination Act 1984*. Both the Racial Discrimination Act and the Sex Discrimination Act set up machinery to enable individuals to claim remedies for violation of rights. But there has been no equivalent implementation of the Covenant on Civil and Political Rights.<sup>15</sup> At the time of its ratification in 1980, the view was taken that there were sufficient safeguards of rights in our legal system.<sup>16</sup> In addition, many of the rights under the Covenant fall under state laws.

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<sup>11</sup> *Koowarta v Bjelke-Petersen*, 1982, 153 CLR, p. 168.

<sup>12</sup> *Commonwealth v Tasmania* (1983) 46 ALR 625. The case concerned the *World Heritage Properties Conservation Act 1983*, implementing the UNESCO World Heritage Convention 1972 which had been ratified by Australia in 1974. See also *Richardson v Forestry Commissioner*, 1988; *Polyukovich v Commonwealth* (1991); *Victoria v Commonwealth* (1996) (Industrial Relations Act).

<sup>13</sup> The Racial Discrimination Convention prohibits discrimination in regard to the right to own and inherit property, s 5 (d)(v) and (vi).

<sup>14</sup> *Mabo v Queensland* (1988) 63 ALJR 84.

<sup>15</sup> See Charlesworth, 'The Australian reluctance about rights' in Philip Alston (ed.) *Towards an Australian Bill of Rights*, Canberra, Centre for International and Public Law, 1994.

<sup>16</sup> These safeguards included responsible government, the rule of law, and independent judiciary etc.

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The Covenant is annexed as a Schedule to the *Human Rights and Equal Opportunity Act 1986* (Cth).<sup>17</sup> However, this does not confer enforceable rights on individuals.<sup>18</sup>

*The Court can apply Covenant rights only in a limited sense*

Australian Courts, and in particular the High Court, have taken notice of the Covenant and have sometimes drawn upon its principles and those of other human rights instruments. In *Mabo*<sup>19</sup> Brennan J observed that the opening up of international remedies pursuant to Australia's accession to the Optional Protocol to the ICCPR brought to bear on the common law the powerful influence of the Covenant and the international standards it imports. He regarded international law as a legitimate and important influence on the development of the common law, especially when it declares the existence of universal human rights. Consideration of those rights disposed his Honour to overturn earlier common law doctrine which did not recognise the rights and interests of the indigenous inhabitants of this country. In his Honour's view, a common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demanded reconsideration.

Some Justices of the High Court have been willing to have regard to human rights treaty obligations in order to remove any ambiguity in legislation, on the presumption that Parliament intended to legislate in accordance with its international obligations.<sup>20</sup> Some have joined Justice Brennan in accepting those obligations as an influence on the development of the common law.<sup>21</sup>

A new approach was taken by the High Court in the *Teoh* case.<sup>22</sup> The Convention on the Rights of the Child requires Governments to make the best interests of children a primary consideration in all actions concerning children. Mason CJ and Deane J held that Australia's ratification of the Convention gave rise to:

a legitimate expectation, absent statutory or executive indication to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration."  
[Convention art. 3]

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<sup>17</sup> The Covenant is also referred to in the *Law Reform Commission Act 1974* (Cth) and in the *Evidence Act 1995* (Cth).

<sup>18</sup> See observations of Mason CJ And McHugh J in *Dietrich v the Queen* (1993) 67 ALJR 1 at 6.

<sup>19</sup> *Mabo v Queensland* (1992) 66 ALJR 408, 422-423.

<sup>20</sup> *Chu Kheng Lim v Minister for Immigration, LG and Ethnic Affairs* (1992) 67 ALJR 125, 143; Brennan, Deane and Dawson JJ would favour a construction of a Commonwealth statute which accords with Australia's obligations under an international treaty, in case of ambiguity. *Polites v The Commonwealth* (1945) 70 CLR 60, 68-69. *Dietrich v The Queen* (1993) 67 ALJR 1, per Mason CJ and McHugh J at 6-7, Brennan J at 15, Dawson J at 31, Toohey J at 37, Gaudron J at 44. *Teoh* at 430.

<sup>21</sup> *Dietrich v The Queen* (1993) 67 ALJR 1, per Brennan J at 15; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 69 ALJR 423 at 430 per Mason CJ and Deane J.

<sup>22</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 69 ALJR 423 (7 April 1995).

It followed that if a decision-maker proposed to make a decision inconsistent with that legitimate expectation, procedural fairness required that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.

This decision was far from bestowing on individuals a right to enforce the Convention directly. It recognised no more than a procedural right.<sup>23</sup> . But it caused panic in Canberra. Within a very short period the Attorney-General and the Minister for Foreign Affairs issued a statement on behalf of the government which said in part that:

entering into a treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law.

This statement was followed by the introduction of the Administrative Decisions (Effect of International Instruments) Bill 1995. It provides that the ratification of an international instrument by the executive imposes no obligation on that executive to respect the provisions of that instrument for the purposes of domestic law.

This comprehensive rejection by the government of any obligation to respect the principles of a treaty it has entered into puts it in a Janus-like position, promising the international community that it will comply, while telling the Australian people that they cannot count on it doing so. How much more satisfying was the view taken by the High Court that the ratification by the government of a treaty was a positive statement by the executive *to the world and to the Australian people* that the executive government and its agencies will act in accordance with the treaty. The latest version of the bill has not yet been passed, and so *Teoh* stands for the time being, subject to any effect of the ministerial statement. Meanwhile, in the *Kruger* case the High Court has drawn some boundaries around the extent of implied rights in the Constitution.<sup>24</sup>

The conclusion I draw is that, though recognition of human rights principles by the Courts is impressive and important, it falls short of providing comprehensive protection of Covenant rights and cannot be an effective way of implementing the obligations undertaken by Australia when ratifying human rights treaties. It is not the task of the High Court to determine whether Australia has in fact fulfilled its obligations under international instruments. How, then, are we to determine whether Australia has in fact fulfilled the obligations it assumed when it ratified the relevant instrument? Once again, the focus is on the Covenant on Civil and Political Rights.

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<sup>23</sup> See observations of Gaudron J in *Teoh*.

<sup>24</sup> *Kruger v The Commonwealth, Bray v The Commonwealth* (1997) 71 ALJR 991.

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## Have we complied with our obligations under the Covenant?

### *Internal mechanisms*

As mentioned, the Covenant is annexed as a Schedule to the *Human Rights and Equal Opportunity Act 1986* (Cth). The Human Rights and Equal Opportunity Commission (HREOC) has the function of inquiring into and reporting on any act or practice inconsistent with or contrary to human rights set out in the Covenant or other relevant instruments.<sup>25</sup> It has reported on many issues, and most recently on the stolen generation and on the detention of unauthorised arrivals, or ‘boat people’.<sup>26</sup> The reports of the Human Rights and Equal Opportunity Commission show where Covenant standards may not be met, but they result only in recommendations to the Commonwealth, and do not give remedies to individuals.

### *External mechanisms/ monitoring bodies*

The Covenant itself provides for a monitoring mechanism. Its implementation is supervised by the Human Rights Committee, an independent body of eighteen experts elected by the states parties (there are about 140 at present).<sup>27</sup> The members of the Human Rights Committee are legally trained, and have experience as academics, judges and legal counsel. Once elected, Committee members serve in their personal capacity and act according to conscience. They are not answerable to their own governments, but to the Covenant. The Committee, though independent, has neither the legal status nor the powers of a court.

### *Reporting procedures*

The Human Rights Committee monitors the progress of each state in giving effect to Covenant rights, primarily through the reporting process. States parties are obliged to submit written reports to the Committee every five years, explaining what they have done to give effect to Covenant rights and the progress made in the enjoyment of those rights.<sup>28</sup> The Committee examines the reports in the presence of representatives of the government concerned, over one or two days. The Committee members ask many questions of the government, probing into laws and practices to ascertain whether they comply with Covenant standards.

Non-governmental organisations, such as Amnesty International, Human Rights Watch and other international and national non-government organisations, assist in this process by providing the Committee with written information about laws and practices from their own point of view. Sometimes the Committee is sent an alternative NGO report, presenting a picture considerably less flattering to the state than the government report.

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<sup>25</sup> s 11 of the HREOC Act 1986.

<sup>26</sup> HREOC, *Those Who've Come Across the Seas; Detention of Unauthorised Arrivals*, Sydney, 1998.

<sup>27</sup> ICCPR, arts 28, 40, 41 and First Optional Protocol.

<sup>28</sup> Article 40. The reporting period may be varied by the Committee.

After its dialogue with government representatives, the Committee prepares a written assessment, or 'Concluding observations' about the state, with recommendations to revise those aspects of law and practice which appear to fall short of Covenant standards.<sup>29</sup> These observations are not legally binding, but they are important indicators to domestic law makers and human rights advocates as to areas where standards are not being met. They provide a bench mark for the next periodic report. The Committee expects that states such as Australia will consider their observations in good faith and respond in a positive way to the Committee's concerns.

Each of the six principal UN human rights instruments has a comparable monitoring body operating in a similar way to the Human Rights Committee. Undoubtedly the six instruments create a burden of reporting for states; a reform process is under way in an attempt to reduce these burdens. But that does not excuse individual States from compliance.

#### *Australia's failure to report to the Human Rights Committee*

The Australian government, and I do not distinguish between the major parties here, has disregarded its reporting obligations under the Covenant. Australia's second report was considered by the Committee in 1988. The third report should have been submitted in 1991, and the fourth in 1996. Neither has been submitted. Delays of a year or two are not uncommon, though some countries manage to report on time. But Australia has not reported for ten years; it is near the bottom of the class. It has been named by the Committee as one of about 20 States that have failed to co-operate in the reporting process. It is in such excellent company as North Korea, Syria and Somalia. Australia is also late in preparing reports for other treaty bodies.<sup>30</sup>

Australia's usual answer to the reminders of the Committee is that the report is nearly ready; this has become a rather bad joke. The failure to report represents a serious failure to comply with article 40 of the Covenant. As a result, Australians have lost the benefit of having our record of implementation of the Covenant scrutinised by an independent and impartial Committee.

#### *Communications under the Optional Protocol*

A further accountability mechanism under the Covenant is the individual complaints procedure established by the first Optional Protocol. The Protocol is 'Optional' in the sense that States who ratify the Covenant choose whether or not to ratify the Protocol and allow individuals to take cases to the Human Rights Committee. Out of 140 parties to the Covenant, 90 have ratified the Optional Protocol. Australia did so in 1991.

The Optional Protocol procedure is of special importance to Australia in the absence of any way to enforce Covenant rights directly in the courts. There have been about 100 initial letters of complaint from Australia so far. Of these about 19 have become registered

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<sup>29</sup> This also provides an opportunity to interpret Covenant principles.

<sup>30</sup> First report under Convention on the Rights of the Child was due Jan 93. It was submitted in Jan 96, three years late.

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communications under the Optional Protocol. Eight were found by the Committee to be inadmissible and one was discontinued. Violations have been found in two cases. It is significant to note that in neither case could the complainant have taken the issues arising under the Covenant to the Australian courts.

### *Toonen*

The first case from Australia decided by the Committee was that of Toonen.<sup>31</sup> The author claimed that his right to privacy was violated by Tasmanian laws which criminalised consenting homosexual conduct between adults. The Human Rights Committee found that there was indeed a violation of Mr Toonen's right to privacy under article 17 of the Covenant. This decision was fully consistent with decisions under the European Convention on Human Rights.<sup>32</sup>

The reaction of the Australian government to the Toonen decision was to pass the *Human Rights (Sexual Conduct) Act 1994*, to provide a remedy for any arbitrary interference with the privacy of sexual conduct between consenting adults.<sup>33</sup> Had a remedy been available under Australian law in the first place, as one might reasonably expect, the Human Rights Committee might not have needed to consider Mr Toonen's case, and the Australian Government could have avoided a finding that Australia had violated his rights under the Covenant. The issues concerning Tasmanian laws had been drawn to the attention of the Government by a report from the HREOC.

The legislation was accepted as a satisfactory outcome by the Committee. It can be observed, however, that it did not create a general remedy for violation of the right to privacy within the terms of the Covenant, only for one particular aspect of privacy. The Covenant requires that an effective remedy be provided for every violation of Covenant rights. So that the *Human Rights (Sexual Conduct) Act 1994* stands as a unique and rather limited piece of legislation, a single issue Bill of Rights.

### *The case of A, a Cambodian asylum seeker*

The second case from Australia was the case of 'A',<sup>34</sup> one of a group of Cambodian boat people. He had been detained by the Australian authorities for more than four years while lengthy procedures were gone through in relation to his application for asylum. He complained that his detention was arbitrary and in violation of article 9 (1) of the Covenant, which protects against unlawful or arbitrary detention. He also complained that he had been denied the right to judicial review of the lawfulness of his detention, contrary to article 9 (4) of the Covenant.

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<sup>31</sup> *Toonen v Australia*, 488/1992, views adopted March 1994, Human Rights Committee Annual Report for 1994, A/49/40, vol II, p 226.

<sup>32</sup> *Dudgeon v UK*, *European Court of Human Rights* 1981 4 EHRR 149.

<sup>33</sup> Through the *Human Rights (Sexual Conduct) Act 1994*.

<sup>34</sup> *A v Australia* 560/1993, decided April 1997.



The Committee's view was that to comply with the Covenant every decision to keep a person such as the complainant in detention should be open to review by the court periodically, so that the grounds justifying the detention of that person can be assessed. For example, there may be a need to investigate, a real fear that the person will abscond, or a lack of co-operation. The detention of an individual should not continue beyond the period for which the government can provide appropriate justification. In regard to 'A', however, Australia did not advance any grounds particular to him, which would justify his continued detention for a period of four years, other than the fact of illegal entry. The Committee concluded that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph (1).

On the second point, the Committee's view was that the right of a person to have a court review of the lawfulness of detention is not limited to the question whether the detention is lawful according to domestic law. The review must, according to the Committee, also include the possibility of ordering release if the detention is incompatible with the Covenant itself, such as where it is arbitrary. As the court review available to 'A' was limited to a formal assessment of the self-evident fact that he was indeed a 'designated person' within the meaning of the Migration Amendment Act, the Committee concluded that there had been a violation of the author's right, under article 9, paragraph 4, to have the lawfulness of his detention reviewed by a court.

The Australian government did not welcome this decision. In fact, it rejected the views of the Committee in a formal response which will be considered by the Committee in due course. I will take no part in that discussion and my observations at this point are purely personal. The Australian government's opinion is that it is justified in having a policy of blanket detention for a category of aliens who have not established any right to remain here, regardless of individual circumstances. It does not accept that there should be a judicial remedy in respect of detention which is arbitrary and thus contrary to the Covenant.

My concern is that the government has failed to respect the views of the Human Rights Committee as to the proper application of the Covenant and has preferred its own interpretation. I accept that the views of the Committee under the Optional Protocol are not legally binding as such. Nevertheless, they are part of the framework of obligations under the Covenant, which *is* binding as a matter of international law.<sup>35</sup> In ratifying the Protocol, Australia has, in the words of the Protocol itself, recognised the competence of the Committee to receive and consider communications from individuals and to express its views as to whether there has been a violation of the rights set forth in the Covenant.<sup>36</sup> It should follow from this that the State will not only co-operate with the Committee, but also respect its views. Australia is obliged under the Covenant to ensure that any person whose rights or freedoms are violated shall have an effective remedy. If the Committee, as the body recognised as competent to do so, forms the view that there has been a violation,

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<sup>35</sup> Ratification of the Optional Protocol is a recognition of the competence of the Committee to reach a view on the question of violation; article 2 (3) of the Covenant imposes an obligation to provide remedies in case of violation.

<sup>36</sup> Optional Protocol articles 1 and 5.

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then Australia should give serious consideration to providing a remedy.<sup>37</sup> The Committee is competent, where the issue arises, to determine whether a particular remedy is effective within the meaning of article 2 (3) of the Covenant.<sup>38</sup>

In showing itself unwilling to accept the umpire's opinion, Australia has assumed the role of interpreter of the Covenant over the views of the expert independent body whose competence it has already recognised in ratifying the Protocol. If this attitude were taken by other states, each could interpret the Covenant as it sees fit. The Committee considers, however, that the minimum standards of the Covenant must apply universally, in the same way to all states, and to all people.

The response of the Australian Government can be contrasted with its earlier response, and with that of other countries who have, as a result of Committee recommendations, released prisoners,<sup>39</sup> paid compensation<sup>40</sup> amended legislation or introduced new remedies.<sup>41</sup> Finland made legislative changes and accepted the obligation to pay compensation in a similar case.<sup>42</sup> Once again, Australia has aligned itself with countries whose records are less than satisfactory.

### **Does Australia meet Covenant standards?**

Australia's failure to report, and its rejection of the Committee's views are significant failings. One would like to think that they are offset by the fact that Australia is generally in compliance with its obligations. Certainly Australia is, by and large, a rule of law country,<sup>43</sup> we have a strong democracy, and independent judiciary and a robust media. We

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<sup>37</sup> The Committee engages in an extensive follow-up procedure to ascertain the level of compliance with its decisions.

<sup>38</sup> Art 4(2) of the Optional Protocol authorises the Committee to establish whether an alleged violation has been effectively remedied. There is no violation if a remedy has already been provided.

<sup>39</sup> Eg, in *Bolanos v Ecuador*, the author had been kept in pre-trial custody for six years. Upon the Committee finding a violation, he was released from custody and the state assisted him to find employment. 238/1987, 26 July 1989. See also *Vasilikis v Uruguay* 80/1980, 31 March 1983; *Marais v Madagascar* 49/1979, 24 March 1983.

<sup>40</sup> *Van Alphen v Netherlands* 305/1988; ex gratia compensation was provided for keeping the author, a lawyer, in detention for nine weeks for refusal to co-operate in an investigation against his clients, violating article 9(1); HRC 1991 Annual Report, A/46/40 para 705. *Torres v Finland* 291/1988 38 Session. An alien had been arrested. He was subject to extradition, but he had been unable to challenge the legality of his detention before a court. This was found to violate his rights under article 9 (4) of the Covenant. He was later paid compensation, and the Aliens Act was revised in order to make the provisions governing detention compatible with the Covenant; Human rights Commission 1991 Annual Report, A/46/40 para 705.

<sup>41</sup> Eg, *Pauger v Austria* 415/1990, 26 March 1992. *Vuolame v Finland* 265/1987 7 April 1987. *Zwaan-de Vries v Netherlands* 182/1984 9 April 1987 and *Broeks v Netherlands* 172/1984 9 April 1987. *Aumeeruddy Ciffra v Mauritius* 35/1978 9 April 1981. Some recent positive results are set out in the 1996 report. GAOR Supp 40, A/51/40, 1996, para 455 ff.

<sup>42</sup> *Torres v Finland*, 291/1988, HRC Report for 1990, p 96. Finland Fourth Periodic Report under the ICCPR, CCPR/C/95/Add. 6, para 45.

<sup>43</sup> Dixon J, *ACP v Commonwealth*, 1951, 83 CLR 193.

have anti-discrimination laws, and certain rights are protected by the Constitution and the High Court.<sup>44</sup> But this is not enough. The Covenant requires that remedies be available in every situation where the rights it protects may have been violated.

Some may think that we have few human rights problems. The Prime Minister is reported to have said that our human rights record is outstanding.<sup>45</sup> But I wonder how many people would agree? Would indigenous people, minority ethnic groups, the disabled or prisoners on remand agree? International experience over the last 13 years tells me that neither Australia nor any other country has a completely clean human rights record. We are not perfect. Even if we were close to perfection, to maintain the highest standard of human rights requires constant vigilance.

To illustrate this point, I will mention briefly some issues of human rights in Australia, particularly those that may raise questions about our compliance with the ICCPR.<sup>46</sup> My intention is to show that there are human rights issues arising on a daily basis and that there is a need to ensure that there is a means of recourse so that a remedy can be claimed where a violation is established.

*Equality and discrimination, articles 2(1), 3, 14 and 26*

Equality is one of the most important of human rights. The proper protection of minorities and disadvantaged groups is an essential counterweight to the power of democratic majorities. The right to equality before the courts, equality before the law, equal protection of the law and to protection from discrimination is protected by the Covenant. The proscribed grounds of discrimination under the Covenant include: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*. States are required to prohibit discrimination in all areas regulated and protected by public authorities. States must ensure that *all* legislation and programs are non-discriminatory, whatever their subject matter—that is whether or not they relate to the specific rights recognised in the Covenant or to other matters, such as social security, which are not provided for or protected under the Covenant. The Covenant thus creates an independent right to non-discriminatory treatment by the State.<sup>47</sup> The Human Rights Committee has prepared a General Comment on the nature of equality and non-discrimination under the Covenant and has applied the principles to the social security laws of the Netherlands and to the restitution laws of the Czech Republic.

Here in Australia, however, the High Court has rejected an interpretation of the Constitution which would require substantive equality in the application of

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<sup>44</sup> Freedom of religion, participation in elections, compensation for acquisition of property, equality of treatment for interstate residents, s 117.

<sup>45</sup> *Commonwealth Parliamentary Debates* (H. of R.), 10 December 1996, p. 8111.

<sup>46</sup> See, too, *The Australian Human Rights Register*, compiled by the Catholic Commission for Justice, Development and Peace, Melbourne Archdiocese, May 1998.

<sup>47</sup> See *S.W.M. Broeks v The Netherlands*, 172/1984, views adopted 9 April 1987. *F.H. Zwaan-de Vries v the Netherlands*, 182/1984, views adopted 9 April 1987. General Comment No 18 on Equality and non-discrimination.

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Commonwealth laws.<sup>48</sup> There may be some lingering support for a requirement of equality in the exercise of judicial power. But, by and large, we are left without a general protection of equality, only an incomplete set of laws against discrimination. Not all grounds of discrimination and not all areas of activity are covered.<sup>49</sup> There are exceptions and exemptions. If the Covenant were fully implemented a general guarantee of equality would be available.

### *The right to life, article 6*

Article 6 of the Covenant protects the right to life and provides that no one shall be arbitrarily deprived of life. This provision requires that measures be taken to prevent and punish arbitrary killing by police and security forces. States must also take positive measures to protect life, such as those in respect of HIV/AIDS or, where necessary, to reduce infant mortality and to increase life expectancy.<sup>50</sup> Such measures are clearly necessary, even mandatory, when one particular group, defined by race, that is the indigenous people of this country, have a life expectancy well below that of the general population and do not enjoy the right to life on equal terms. The right to life of indigenous people is also devalued by their exceptionally high rate of deaths in custody.<sup>51</sup> In fact, many of the most glaring human rights failures concern Australia's indigenous people.

### *Asylum seekers, Refugees, articles 7, 9 and 10*

The right to liberty and security of person is in question in regard to the detention of unauthorised arrivals. The Human Rights and Equal Opportunity Commission reported in May 1998 that the detention policies of Australia breach international human rights standards for handling refugees, first because they result in mandatory and prolonged detention, and secondly because of the conditions at different centres. The Report concludes that the conditions in which many asylum seekers are held are inadequate and that this contributes to a violation of rights when people, and especially children and other vulnerable people are detained for prolonged periods.<sup>52</sup> The government has rejected the HREOC findings. One reason for this apparently was that HREOC ignored advice from the Attorney-General's Department that there was no breach of international standards.<sup>53</sup>

### *The stolen generation*

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<sup>48</sup> *Kruger v The Commonwealth, Bray v The Commonwealth* (1997) 71 ALJR 991; *Leeth v The Commonwealth* (1992) 66 ALJR 529.

<sup>49</sup> As to the *Sex Discrimination Act 1984*, See *Equality before the Law: Womens' Equality*, Sydney, Australian Law Reform Commission, 1994, Part II, p. 69.

<sup>50</sup> Human Rights Committee, General Comment 6, Article 6, (Sixteenth session, 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN. Doc. HRI/GEN/1/Rev.1 at 6 (1994).

<sup>51</sup> See, eg, Chris Cunneen and David McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, Canberra, ATSIC, 1997.

<sup>52</sup> *Those Who've Come Across the Seas*, op. cit.

<sup>53</sup> *Sydney Morning Herald*, 15 May 1998.

The Covenant protects the family and children, the right to equality, to liberty and security of person and freedom of movement. These rights are also found in the Universal Declaration of Human Rights, dating back to 1948. The experiences of the stolen generation involved numerous violations of these principles,<sup>54</sup> violations which have been compounded by the absence of an official apology. It is now almost a year since the report was published, and the anniversary would be a good time for a change of heart on this issue. National Sorry Day is less than a week away.

Australia should pay attention to the experience of South Africa and of those Latin American countries which are trying to confront the appalling violations of the past openly, and often painfully, as a way of ensuring that the future will be built on truth and understanding. An apology alone is not an effective remedy, but it is a step towards forgiveness and reconciliation.

### **Need for new responses**

The few examples I have given reinforce my regret that eighteen years after ratifying the Covenant, and more than six years since ratifying the Optional Protocol, Australia has not yet found a way to give full effect to all Covenant rights or to provide the remedies which the Covenant requires for all violations of those rights.

It is clear that neither the common law nor the Constitution can adequately protect individual rights against the encroachment of legislation or governmental powers or deal with pervasive discrimination. The case of *A*, mentioned earlier, is an example.

Why has Australia moved so slowly in this area? The human rights of the Covenant are not alien or hostile influences forced on Australia to diminish our sovereign rights. The Covenant, and most other human rights instruments, were drafted by representatives of the governments, including Australia, who later agreed to be bound by their provisions. Those instruments reflect the experience and/or the law of States from all regions of the world combined into a consensus view as to the minimum standards that should apply at national level.

There is a credibility gap here. It is very difficult to understand or to explain to colleagues who work in human rights that Australians who consider that their rights under the Covenant have been violated can take their case to the Human Rights Committee, but cannot challenge those violations in the Australian courts. Members of the High Court commented on this anomalous situation.<sup>55</sup>

### *A Bill of Rights for Australia?*

It is time to fulfil our obligations under the Covenant by ensuring that Australian courts have jurisdiction to determine whether the rights of Australian people have been infringed and to provide remedies where a violation of rights is established. Rights would be better protected if Australian courts had power to apply international standards directly.

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<sup>54</sup> *Bringing Them Home*, Sydney, Human Rights and Equal Opportunity Commission, 1997, CCJ 16.

<sup>55</sup> *Dietrich v the Queen* [1993] 67 ALJR 1, 6 Mason CJ and McHugh J.

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Countries with backgrounds and legal systems comparable to Australia, such as the US and Canada have entrenched constitutional bills of rights. New Zealand has a legislative bill of rights, based on the International Covenant on Civil and Political Rights. This has given the Court the opportunity to develop the concept of rights for New Zealanders.

Many European countries have incorporated the European Convention on Human Rights into their legal systems. An exception, until recently, was the UK. It has been, for a long time, the country most likely to be found in violation of the European Convention on Human Rights. For many years, British lawyers have had to take their cases to Strasbourg because their own courts could not enforce the rights which the UK had undertaken to respect. The British judges, though increasingly aware of the requirements of the European Convention, were powerless to apply its provisions directly. The Human Rights Committee has expressed concern that the legal system of the United Kingdom does not fully ensure that effective remedies are available for violation of rights.<sup>56</sup>

Late last year the Blair government introduced a Bill of Rights, based on the European Convention. Under this Bill, legislation must be read and given effect to in a way compatible with Convention rights whenever possible. The UK courts may make a declaration of incompatibility where legislation is incompatible with the Convention. It will be unlawful for public authorities, including courts, to act in a way which is incompatible with Convention rights.

Australia is beginning to look rather lonely. The enactment of the UK Bill of Rights Act will leave Australia as the only country of similar background and legal system not to provide a general right of recourse to the courts when human rights are under threat or have been violated.

The question of a Bill of Rights for Australia is by no means a new issue.<sup>57</sup> There have been some failed attempts in the past. They have left us with a good supply of models for the implementation of the Covenant. For example, the Australian Human Rights Bill 1985, incorporated many provisions of the ICCPR in a legislative Bill of Rights. The Constitutional Commission recommended in 1988 that the Constitution be amended to include guarantees of rights and freedoms, based on the ICCPR and the Canadian Charter.<sup>58</sup> Those recommendations are fully supported by draft provisions.

All models for an Australian Bill of Rights give the Court a role in determining the scope and application of rights. That is necessary to make Covenant rights real for Australians. No one can pretend it would be an easy or even a popular task. But it is a task which the High Court is well equipped to perform, in light of its constitutional experience and its already awesome understanding of human rights principles, even those it cannot apply itself. A Bill of Rights, constitutional or legislative, would establish clear principles under which the High Court could restrain the use of power which infringes the rights of the

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<sup>56</sup> Human Rights Committee, Annual Report 1995, A/50/40, para 416.

<sup>57</sup> Hilary Charlesworth, 'The Australian reluctance about rights' in Philip Alston, (ed.) *Towards an Australian Bill of Rights*, op. cit., Murray Wilcox, *An Australian Charter of Rights?* Sydney, Law Book Company, 1993.

<sup>58</sup> *Report of the Constitutional Commission 1988*, pp. 536 ff.

individual. It would achieve a satisfactory diffusion of power and be a counter-balance to majoritarian rule, and the burgeoning power of the executive.

The process which began with the adoption of the Universal Declaration fifty years ago is as yet incomplete. Rights have to be turned into realities. For this we need to make provision for our courts, and in particular the High Court to determine whether our laws, policies and practices comply with our obligations under the Covenant.



**Question** — I would like you to comment on the discrimination practised by the Roman Catholic Church. In Sydney, a homosexual mathematics teacher was dismissed from his employment on the grounds that he was a homosexual. Now there were no complaints about this man's teaching, he had given some twenty years of service to the Roman Catholic teaching service. He told me that the principal of the school said he was dirty and immoral.

The second question concerns two young schoolteachers in Queensland, Toby and Mary. They were young people, nineteen and twenty. They were teachers there. They were in love. Unfortunately they were sleeping together and they did not have a marriage licence. Get that licence or get out.

Again, a young man took part in the gay and lesbian mardi gras here in Sydney. The Catholic Church authorities hauled him up and said 'you are doing the wrong thing, you run the risk of being dismissed.'

As far as I can see this is discrimination. If, for example, Elizabeth Evatt put an ad in the paper for a home to let, saying no homosexuals, lesbians or Roman Catholics need apply, she would find herself before the courts, she would be breaking the law. The Catholic Church gets away with it scot-free.

My second question concerns the charge of sedition. In 1950 a man called Lance Sharkey was charged with making a seditious utterance. He was charged and convicted and sentenced to three years imprisonment for expressing a particular political view. It seems to me that that is a violation of human rights. When I asked Sir Anthony Mason about this conviction of Mr Lance Sharkey, he refused to even comment about it.

Again, I would like to ask you about the case of Mr Albert Langer. He broke some rules of the Australian Electoral Act. Now it is perfectly legal under the electoral system for people, in the privacy of their own homes, to say 'vote one, two, three under a preferential system', but the moment you go outside and advocate that, you can find yourself in prison and Mr Langer found himself in prison. I would like you to comment on those three points please.

**Elizabeth Evatt** — I will comment on the second and third first, because they are somewhat easier. Article 19 of the Covenant protects freedom of expression, but it also allows for restrictions, provided they are imposed by law and are necessary to respect

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rights or reputations to protect national security or public order, public health or morals. The Human Rights Committee tends to take a very narrow view of what restrictions are permissible. Without expressing any concluded view about the sedition laws that you are referring to, the Committee has, on more than one occasion, commented adversely on sedition laws which impose restrictions which go beyond those permitted under the Covenant. The same principles would apply in regard to the Langer case. A state would have to justify the restriction on freedom of expression on the ground that it was necessary to protect public order, public health or morals, or security. There again, one imagines that a case could be made out to say that it might go beyond that, no matter what justifies it under the Constitution.

Discrimination; again, there the Covenant has, in some ways, more to offer than national laws, because the grounds on which discrimination must be prohibited are wider than we find in national laws because they include the 'other status' ground which potentially allows many issues to come in as a ground of discrimination. Where it is not so clear, is whether the Covenant requires government to apply anti-discrimination laws to private activities, and in this case the question would be whether, in carrying out education functions, the Catholic Church was carrying out what could be regarded as a public function. That is an issue that would need debating and discussing. But the principles are there. Those are the principles that would be applied and obviously I cannot give a concluded view about it.

**Question** — Next week in Australia is schizophrenia awareness week. I address a question to you because you did not have the time in your address to address some issues relating to mental illness. One of the problems of many people who come before the courts and receive treatment orders and the like is to know what their rights are in terms of the treatments that may be provided. You may have had time to read the *Canberra Times* this morning about an elderly person who received electro-convulsive treatment, with their permission, and something went wrong. I have been interested to find out with regard to treatments, that the Royal Australian and New Zealand College of Psychiatrists has asked for clinical trials to test the efficacy and the ethical aspects of introducing a treatment called autonomic psychiatry, or some may prefer it as clinical ecology, or environmental medicine; basically, drug-free approaches to complement psychiatric drugs. I understand there are certain problems regarding the definition that has been given by the Royal Australian and New Zealand College of Psychiatry, and one doctor, Chris Ready, has had tremendous fights with the Royal College and with others about the misuse or abuse of his definition under the position statement 24 of the Royal Australian and New Zealand College of Psychiatrists. I mention that in the context of the rights of individuals to know what alternatives and treatments are available to them, and where that stands in relation to the United Nations, which has no legally binding Covenant upon the Australian government, states and territories and commonwealth.

**Elizabeth Evatt** — I am not quite sure what you are asking, but if you are asking whether the international Covenant provides any guidance here, the answer is probably not a great deal. It does provide that no one is to be subjected, without consent, to medical or scientific experimentation. No one is to be subjected to inhuman treatment. Those provisions are very important, as well as the right to liberty and security. Those provisions are most important for persons who may be mentally ill and detained on that account. I am afraid the question you are asking is a bit beyond me to deal with any detail. I am sorry.



**Question** — In the midst of perusing various UN covenants and bills of right and what have you, what would be the benefit of class actions in countries around the world, of people suing their country in courts internationally, for having violated UN covenants? I am interested in the ramifications of codification.

**Elizabeth Evatt** — There are not any international courts that individuals can sue their governments in, except perhaps the European Court of Human Rights. There are no courts in which you can sue a country, except your own national court. There are no international courts, where individuals or groups of individuals have standing; the European Court of Human Rights may be an exception there. The point I am trying to make here today is that the individual cannot, in general, sue the Australian government in Australia for violation of rights. If they could, then a group could act together to do that, and certainly if you wanted to take a case under the Covenant to the Human Rights Committee, a group of identified individuals can take such a case. It could be quite a large group, but they have to be individuals, which means they have to be identified. There is no class action as such under that. People who feel that rights are not respected, can certainly pursue that much of a remedy and hope that the outcome will be respected.

**Question** — The House of Representatives has twice passed the Native Title Amendment Bill and the Senate has twice rejected it. Ian Viner QC, a former Liberal Minister, has published, saying that the bill has constitutional problems. Would you care to comment on constitutional or international problems in that Native Title Amendment Bill?

**Elizabeth Evatt** — I do not feel that I can comment on constitutional problems. If there are international problems, it may be that there are discriminatory aspects of the bill which may fall foul of the Racial Discrimination Convention, and if they fall foul of that, they may indeed fall foul of the Covenant on Civil and Political Rights, which also protects against racial discrimination. I am not expressing a concluded view about that. I am sorry I cannot do that.

**Question** — I am interested in how the funding of the United Nations is impacting on the role of the United Nations Human Rights Committee. In particular, what sort of backlog is there on individuals coming to it with different human rights breaches of the twin covenants?

**Elizabeth Evatt** — I did not raise that in my address, but it is an extremely serious issue. The failure of countries like the US to pay their dues to the UN has led to quite a significant reduction in the resources available for the work of the Human Rights Committee. That, in turn, has contributed to an escalation in delay in dealing with cases under the Covenant, and delays of two to three years are normal. The committee has a number of urgent cases that involve application of the death penalty, particularly in the Caribbean countries. Priority has to be given to urgent cases; they have to jump the queue; which means cases that are not urgent can be two or three years delayed. The Australian government is supportive of the work of the treaty bodies, in principle. At least it says it is. The Human Rights Committee does not have the resources to do the job as we would like to do it. Whatever we can do to encourage the US to pay up, would be good.

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# Globalisation, the Law and Australian Sovereignty: Dangerous Liaisons\*

*Hilary Charlesworth*

## **Introduction**

Globalisation is a word on everybody's lips. It has been examined from every conceivable angle, from trade policies and economics to the environment and personal relations. Surprisingly, however, the global dimension is all too often ignored in discussion about Australian law.

In one sense, talk of globalisation and national legal systems may seem an oxymoron. Globalisation is all about the move to internationalism, interdependence and common links, the repudiation of national and local particularities, the meaninglessness of borders and the challenging of state sovereignty. Law, particularly public and constitutional law, is all about the structures of a national or local polity, specifying the institutions and doctrines that make up the framework of a country or state. It celebrates sovereignty, particularity, self-sufficiency and isolation. Globalisation could, thus, be seen to be the antithesis of public law or, indeed, its nemesis, sounding the end of peculiar, entrenched systems of governance and bringing some type of global uniformity to the way we are ruled.

But national legal systems can no longer be thought of in isolation from international developments, however hard some wish this were the case. The subtitle of this talk is 'Dangerous Liaisons'. I have used the title of the 18th century novel of Laclos (and the striking film by Stephen Frears) because it captures the idea of a series of dangers: the thrill of romance, the threat of seduction, the peril of rejection. There are connections between the corrupting figures of Valmont, the evil but charming seducer, and Mme de Merteuil, his sophisticated accomplice, and

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the way some critics of the increasing internationalisation of Australian public law present international law. Australian sovereignty is cast in the role of *Presidente de Tourvel*, the innocent and beautiful object of *Valmont's* seduction.

The dangerous aura that international law has acquired in Australia has produced in turn what I regard as a dangerous obsession with cutting Australia adrift from international law-making, particularly in the area of human rights. But I also want to suggest that the liaison between Australian public law and globalisation is dangerous in a more positive sense: it unsettles and challenges many of the rigidities and limitations of Australian law.

In a speech last year to the National Press Club, Mr Downer said that 'we all fall into one of two camps. You are either a globaphobe or a globophile.'<sup>1</sup> I think that this dichotomy is too stark to be accurate. At least in the arena I know best, the law, we see a complex and shifting attitude to globalisation, depending on the subject matter. My point is that we should neither embrace globalisation in a grand passion nor should we peremptorily spurn its advances. Rather we need to develop a mature and reflective relationship between the Australian legal system and the global order.

In this talk I want to explore some of the tensions in the relationship between globalisation and public law in an Australian context. I think that the tensions are becoming more and more acute and that much more attention should be devoted to this by both international and public lawyers. I will illustrate these tensions by looking at some examples of the High Court's and the Commonwealth Parliament's responses to legal globalisation and the way they move between romantic and licentious images of the international legal order. My conclusion is that, as we cannot avoid the pressures towards globalisation, we must develop creative ways of responding to and harnessing these forces. In other words, we must turn the liaison into a permanent and productive relationship.

Globalisation is one of those modern buzz words that is used in many different ways. It is most often used in an economic context, meaning that markets are sloughing off their attachment to national or regional boundaries. It is also often associated with technological advances in communications that make boundaries seem inconsequential. I am using it here in a different sense to refer to the effects of international law on national legal systems, in particular Australia.

At federation of course the relationship between international law and the Australian Constitution was not in issue. International law was then basically concerned with relations between countries in a fairly literal way: it dealt with principles of boundary drawing, of diplomatic relations, of war and peace. Moreover, at federation Australia was not considered a full international citizen—in George Reid's words, it was a 'colony within an empire'<sup>2</sup>—and most of its engagement with international law was vicariously conducted through the United Kingdom. The only point of engagement between the international and national contemplated in the Constitution was section 51 (xxix), which gives the Commonwealth government legislative power with respect to 'external affairs'.

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<sup>1</sup> 'Globalisation or globalophobia: does Australia have a choice?' *Foreign Affairs and Trade Record*, March 1998, p. 5.

<sup>2</sup> Quoted by J. Crawford in B. Opeskin & D. Rothwell (eds), *International Law and Australian Federalism*, Carlton, Vic., Melbourne University Press, 1997, p. 327.

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Over the last century there have been enormous changes in both Australian international status and in international law. Australia is now an active, independent member of the international community, and the focus of international law has been transformed from one on inter-state relations to (in Sir Ninian Stephen's words) 'penetrate[ ] formerly sacrosanct national borders [to] concern[ ] itself with domestic affairs and individual human rights within nation States.'<sup>3</sup>

These developments have forced an engagement between the national and international legal orders in Australia that has been full of suspense and drama. The liaison can be dated to the election of the Whitlam Labor government in 1972 when the new government generated a flurry of treaty signing, particularly of human rights treaties. The interest in international law has continued ever since, with some waxing and waning.<sup>4</sup>

### **Judicial responses to globalisation**

The domestic ramifications of this international activity became apparent when the Commonwealth government relied on the external affairs power in the Australian Constitution to translate the treaty obligations into law. In the early 1980s, the High Court had to deal in *Koowarta*<sup>5</sup> and *Tasmanian Dams*<sup>6</sup> with challenges to the use of this power to implement international agreements. Its response, by narrow majorities, was to read the external affairs power in a broad way, to include international agreements and also principles of customary international law.

How were images of the international constructed and employed in these cases? Members of the majorities typically painted international law in romantic terms. It was something every self-respecting nation would want to embrace. Fulfilling the matchmaker's adage that 'opposites attract', international law was presented as making up for some of the deficiencies in the Australian legal system. Thus in *Koowarta*, Justice Murphy referred to Australia's tradition of discrimination against the Aboriginal people and viewed the implementation of the international prohibition on racial discrimination as a necessary step in Australia's expiation of its history.<sup>7</sup>

There is also romance in the reference to international institutions engaging in a type of cosmopolitan democracy, identifying norms that have global legitimacy. For example, in *Koowarta* Justice Stephen quoted the stirring words of the preamble to the UN Charter, of 'we the peoples' ... faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women.'<sup>8</sup> Justice Mason talked of the community of nations' opposition to racial discrimination on idealistic and humanitarian grounds as well as the threat it

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<sup>3</sup> N. Stephen, 'Foreword' to B. Opeskin & D. Rothwell (eds), *International Law and Australian Federalism*, op. cit.

<sup>4</sup> James Crawford gives a useful overview of the relationship in *International Law and Australian Federalism*, op. cit.

<sup>5</sup> *Koowarta v Bjelke Peterson*, 1982, 153 CLR, p. 168.

<sup>6</sup> *The Commonwealth v Tasmania*, 1983, 158 CLR, p. 1.

<sup>7</sup> *Koowarta*, pp. 239-40.

<sup>8</sup> *ibid*, p. 218.

posed to friendly relations among nations.<sup>9</sup> Justice Murphy also presented the United Nations as a concerted international response to massive human rights violations: ‘there was an increasing consciousness ... that people had responsibility for the well-being of others everywhere, irrespective of national barriers which were unnaturally dividing humanity.’<sup>10</sup>

So, too, in *Tasmanian Dams*, Justice Murphy went into considerable detail about the establishment of UNESCO, and its work,<sup>11</sup> and he provided a select list of other world heritage properties around the world.<sup>12</sup> To give a full context, he also listed the seven wonders of the ancient world!<sup>13</sup> Overall, his view seemed to be that there was a natural marriage of international and domestic law which was being put asunder by an obsession with sovereignty.

Majority judges in High Court decisions on the external affairs power were also influenced by the need for Australia to be seen to be taking its international obligations seriously in order for it to be able to hold its head high on the international stage. Justice Murphy’s famous warning in the *Seas and Submerged Lands Act Case* that Australia would be seen as an ‘international cripple’ if it did not engage more at the international level<sup>14</sup> was repeated and endorsed by Justice Deane in *Tasmanian Dams*:

Australia would, in truth, be an ‘international cripple’ if it needed to explain to countries with different systems of law and completely different domestic rules governing the enforceability of agreements, that the ability of its national government to ensure performance of ‘obligations’ under an international convention would depend on whether those obligations were or were not held to be merely illusory.<sup>15</sup>

Similarly, Justice Mason said in *Koowarta*:

[i]t is important that the Commonwealth should retain its full capacity through the external affairs power to represent Australia, to commit it to participation in these developments when appropriate and to give effect to obligations thereby undertaken.<sup>16</sup>

The prospect of the Commonwealth being unable to legislate to implement its international obligations, said Justice Mason, was ‘altogether too disturbing to contemplate. [It would be] a

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<sup>9</sup> *ibid*, p. 235.

<sup>10</sup> *ibid*, p. 239.

<sup>11</sup> *Tasmanian Dams Case*, pp. 176–7.

<sup>12</sup> *ibid*, pp. 172–3.

<sup>13</sup> *ibid*, p. 174.

<sup>14</sup> *NSW v The Commonwealth*, 1975, 135 CLR, p. 503.

<sup>15</sup> *Tasmanian Dams Case*, at p. 262.

<sup>16</sup> *Koowarta*, at p. 229.

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certain recipe for indecision and confusion, seriously weakening Australia's stance and standing in international affairs.'<sup>17</sup>

The concern with the keeping of commitments and promises has echoes of the solemnity of marriage vows. The majority judges interpreted the Constitution to support Australia's international obligations, ensuring that the national sphere did not undermine these international vows.

The minorities' approach in *Koowarta* and *Tasmanian Dams* presented contradictory images of the international order. From one perspective, it was pale and wan, full of vague commitments that can have no punch in the Australian legal system. This is particularly evident in the discussion of whether the World Heritage Convention at issue in *Tasmanian Dams* contains binding obligations. Chief Justice Gibbs in particular dissected the provisions of the Convention to conclude that they imposed few binding obligations.<sup>18</sup> From yet another minority perspective, international law was a seductive influence that had the potential to corrupt the federal basis of the Australian polity. Thus Chief Justice Gibbs warned in *Koowarta* that if the protection of human rights qualifies as an external affair:

[t]he distribution of powers made by the Constitution could, in time, be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed.<sup>19</sup>

The image is of international law as predator, ravishing the pure federal fabric of the Australian Constitution.<sup>20</sup>

I will look briefly at two other cases where international law has encountered Australian law, generating predictions of great danger: the development of the common law on native title in *Mabo* and the interpretation of administrative law principles in *Teoh*.

In a much-quoted passage in *Mabo*, Justice Brennan said that:

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<sup>17</sup> *ibid*, p. 225.

<sup>18</sup> *Tasmanian Dams Case*, at pp. 79–96.

<sup>19</sup> *Koowarta*, at p. 198.

<sup>20</sup> By 1996, in *Victoria v. The Commonwealth*, a last ditch attempt by the states to challenge the use of the external affairs power to implement industrial relations reforms, the High Court upheld the broad understanding of 'external affairs' by a 6–1 majority. The Court rebuffed the argument that the meaning of 'external affairs' was limited by its meaning at federation:

It would be a serious error to construe para (xxix) as though the subject matter of those relations to which it applied in 1900 were not continually expanding. Rather, the external relations of the Australian colonies were in a condition of continuing evolution and, at that time, were regarded as such. Accordingly, it is difficult to see any justification for treating the content of the phrase 'external affairs' as crystallised at the commencement of federation or as denying it a particular application on the ground that the application was not foreseen or could not have been foreseen a century ago. *138 ALR*, 1996, p. 143.

The expectations of the international community accord in this respect [opposing racial discrimination] with the contemporary values of the Australian people. ...

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded in unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule.<sup>21</sup>

These are bold statements of a close relationship between international and domestic law. But Justice Brennan also said:

this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.<sup>22</sup>

It was not entirely clear what principles form part of the skeleton of Australian law, but Justice Brennan's concern with its preservation is a potentially significant limitation on *Mabo's* embrace of international law.

The *Mabo* view of international law is then a relatively coy one (and in any event it was not determinative of the issue). In some contexts (particularly human rights) international law can influence the development of the common law. It cannot, however, alter the fundamental structure of Australian law.

The 1995 *Teoh* case (discussed by Elizabeth Evatt in the last lecture in this series, a version of which is published in this issue) sparked alarm because of its account of the relationship between international and domestic law. At issue was the significance of Australia's ratification of the Convention on the Rights of the Child for administrative decision-makers. Australia has not implemented CROC in Australian law. As in *Mabo*, the majority of the High Court held that a ratified, non-implemented treaty could be used as a guide to the development of the common law. Although the decision has been attacked as radical and improper by various commentators, from an international lawyer's perspective, it is very modest. For example, Chief Justice Mason and Justice Deane said of the technique of relying on an unimplemented treaty to develop the common law:

A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials. Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international

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<sup>21</sup> 175 CLR, 1992, p. 42.

<sup>22</sup> *ibid*, p. 29.

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community, the purpose which it is intended to serve and its relationship to the existing principles.<sup>23</sup>

Since leaving the High Court, Sir Anthony Mason has commented that he sees a conservative approach to engaging with international law (as in *Teoh*) as the appropriate one.<sup>24</sup> This approach accepts international law, not to impose new, imported values on Australian law, but as an expression of existing common law principles or community values. This account reduces the dangers of the liaison of international and Australian law, by making the former subordinate to the latter.

The broadest judicial account of the relationship of international law to Australian law is then found in the cases on section 51 (xxix). This is unsurprising, perhaps, because this is the only clear constitutional recognition of the liaison. In other areas, the High Court has little romance about international law. International law is useful as an adjunct to the common law in some circumstances, but it is not an equal partner in the relationship. Indeed the majority of judges in the recent High Court decision in the *Hindmarsh Island Case* saw little scope for international law in interpreting constitutional provisions. An argument was made by Doreen Kartinyeri that section 51(xxvi) of the Constitution (the races power which allows Commonwealth to legislate with respect to people of a special race) should be read in light of international standards of non-discrimination. Only one judge, Justice Kirby, accepted this proposition. He referred to an interpretative principle that, where the Constitution is ambiguous, the High Court ‘should adopt the meaning which conforms to the principle of universal and fundamental rights rather than an interpretation which would involve a departure from such rights.’ He went on to say:

Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity. ... The Australian Constitution ... speaks to the people of Australia. But it also speaks to the international community as the basic law of the Australian nation which is a member of that community.<sup>25</sup>

For this reason Justice Kirby held that section 51 (xxvi) of the Constitution cannot be interpreted to permit detrimental and adverse discrimination in Australian law on the basis of race. The majority judges by contrast found that the meaning of section 51 (xxvi) was not ambiguous, and that therefore the principle did not apply. To a respectful observer, this is a very disappointing approach at the end of the twentieth century. Why should international principles be held at arms length? Why should we interpret our Constitution in light of what we now understand as racist assumptions made by the founding fathers? As the great American jurist, Erwin Griswold, once said, if we interpret our constitution like a last will and testament, it will become one.

In his 1997 Deakin lecture, my former colleague, Greg Craven, identified ‘internationalism’ as a profound influence on a constitutionally and ethically bankrupt High Court. He noted human rights treaties in particular as dangerous, prompting the High Court to insert similar guarantees into the Australian Constitution. Internationalism is used, in Craven’s view, as ‘an immensely

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<sup>23</sup> 183 CLR, 1995, p. 315.

<sup>24</sup> A. Mason, ‘International law as a source of domestic law’ in Opeskin & Rothwell (eds), op. cit., p. 210.

<sup>25</sup> *Kartinyeri v The Commonwealth*, 1 April, 1998: 166.



powerful rhetorical and moral weapon with which to justify judicial incursions into the content of the Constitution by way of the creation of individual rights.’ The seductions of the international, according to Greg Craven, have swept the High Court into illegitimate law-making, indeed into ‘judicial imperialism in a constitutional context.’ It is fair to say that this understanding is widely held also by politicians. For example, Mr Howard in one of his ‘Headland’ speeches in 1995 referred to the ‘illicit’ use of the external affairs power to implement international law into Australian law, implying some form of wanton behaviour by the High Court.

I think that the threat of international law to the Australian legal system is much exaggerated. As we have seen, the High Court has been very cautious in its embrace of international law; it has kept its gloves and hat on at all times. Greg Craven’s criticisms of internationalism are linked to his particular ‘originalist’ theory of constitutional interpretation: that the intentions of the Founding Fathers should be given primacy in interpreting the words they drafted almost a hundred years ago. Whatever power this theory may have with respect to other aspects of the Constitution, it can have none with respect to the place of international law. The events of this century have totally altered the scope and relevance of international law to the Australian legal system. To ignore international developments because the Founding Fathers did not contemplate them would make our Constitution lose its practical and moral force.

The view that the international legal order introduces undesirable principles into the Australian system, wantonly corrupting Australian federalism, is perhaps a natural response to change, a nostalgia for a simple, limited world. But it is not a useful or programmatic approach in that it offers no principle, except that of avoidance and abstention (just say ‘no’), to guide engagement with the international.

### **Legislative and executive responses to globalisation of law**

If the Australian High Court has offered a range of emotions—embrace, coyness, spurning—in accepting international law as part of Australian law, what of the overtly political arms of government, unconstrained by the need to provide principled reasons for their actions? What images of the international are invoked in Australian political discourse?

I will briefly examine two different aspects of the liaison between Australian and international law.

#### *i Anti-Teoh legislation*

The *Teoh* decision was greeted with dismay by the then Labor government, which quickly issued a statement repudiating its effect. The Evans/Lavarch statement, echoing Justice McHugh’s dissent, sounded very odd to the ears of an international lawyer:

Entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law.

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At international law, entry into a treaty raises precisely the expectation that it will be implemented and the 1995 Joint Statement seems to be announcing a divorce of the international and the Australian legal order in a quite disingenuous way. It seems to assume that international legal obligations are undertaken in a frivolous way, simply to impress the international community. Legislation was introduced to implement the message of the Joint Statement, it was reported on favourably by the Senate Legal and Constitutional Committee, but it was eventually allowed to lapse, partly because of a significant public outcry.

After some mixed messages, the content of the Evans/Lavarch statement was reiterated last year by Mr Downer and Mr Williams. A new version of draft legislation to undo *Teoh* was introduced, the Administrative Decisions (Effect of International Instruments) Bill 1997. It was referred to the Senate Legal and Constitutional Legislation Committee where it was supported by Coalition members. Interestingly, the Labor members of the Committee appeared to have lost their enthusiasm for the anti-*Teoh* legislation partly because the fears of administrative chaos post-*Teoh* had not been realised.

The Committee's report was short on analysis. It set out the many criticisms made in submissions on the draft legislation in some detail but then simply concluded without explanation that the criticisms were misplaced. The anti-*Teoh* legislation was presented as an aspect of the Coalition's law and justice policy which stated:

Australian laws, whether relating to human rights or other areas, should first and foremost be made by Australians, for Australians. ... [W]hen Australian laws are to be changed, Australians and the Australian political process should be at the beginning of the process, not at the end.<sup>26</sup>

The legislation was claimed to provide administrative certainty in the face of the doubt engendered by the *Teoh* importation of international law; and its role is also to 'maintain the proper role of parliament'—to allow it to act as the gatekeeper for the introduction of international legal principles. The substance of international law principles were not addressed. It seems that international law (particularly on human rights) has a suspect air—a rather threatening, dangerous flood of un-Australian values.

## *ii Direct recourse to human rights treaty bodies*

As Elizabeth Evatt noted in her speech, in 1991, Australia accepted the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and in 1993 parallel mechanisms for individual complaint under the Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture. These procedures allow individuals within Australian jurisdiction to make a complaint to the relevant treaty-monitoring body that Australian law breaches the provisions of the relevant treaty, if they have exhausted all available domestic remedies. The procedures impose the most direct potentially dangerous liaison between the Australian and international legal order. What has happened in practice?

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<sup>26</sup> Liberal and National Parties' Law and Justice Policy, February 1996, p. 25.

Only two cases against Australia have yet survived to be decided on their merits, *Toonen* (1994) and *Mr A* (1997). Elizabeth Evatt discussed these cases, and the Australian government's reaction to them, in her lecture and I will not cover this ground again. While I think that the outcomes of the cases,<sup>27</sup> particularly the terse and in my view inadequate Australian response to the *Mr A Case*, are very disappointing from an international human rights perspective, I want to deal more with the criticism of the processes themselves, to the effect that the right of individual communication undermines Australian sovereignty.

This criticism has been made by many politicians, particularly by Senator Rod Kemp<sup>28</sup> and by Mr Howard. In a speech in 1993 to the Samuel Griffith Society, Mr Howard said of Australia's acceptance of the right of individual communication to a UN treaty monitoring committee:

There can be no argument with proper redress for human rights infringements. But surely it is within our own wit, competence, dignity and self-respect as a nation to provide for the resolution of those matters once and for all within the borders of our own country. Such examples of sovereignty thrown away make a mockery of calls for Australia to become a republic in the name of achieving national independence.<sup>29</sup>

Two aspects of this type of criticism are worth noting. First it presents engagements with the international human rights treaty regime as dangerous in the sense of diminishing national dignity and self-respect. But this analysis does not take the fact that Australia has freely agreed to participate in the system into account, nor the fact that the right of individual communication is only available when national remedies are inadequate. Second, it is striking that those who are concerned about a diminution in Australian sovereignty by individuals having recourse to international human rights mechanisms are also those who are strongly opposed to Australia developing its own human rights mechanisms, such as a bill of rights. It seems that the real object of their anxieties may be more the implications of effective protection of human rights than the preservation of a pure Australian sovereignty.

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<sup>27</sup> The Australian government's response to the Human Rights Committee's decision in *Toonen* that Tasmania's criminalisation of homosexuality was a violation of article 17 of the ICCPR was to enact the *Human Rights (Sexual Conduct) Act 1994*. The HRC had recommended repeal of the Tasmanian law, but even when politely asked to do so, the Tasmanian government declined. The Commonwealth legislation is very limited. It singles out one aspect of article 17 for protection, indeed the narrowest possible definition raised on the particular facts of *Toonen*:

Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the ICCPR (section 4 (1)).

The legislation has also been criticised for not being directly inconsistent with the Tasmanian law—it would have required a court challenge to establish that the Tasmanian laws were 'an arbitrary interference with privacy'. In the event, of course, the Tasmanian Parliament eventually repealed the laws.

<sup>28</sup> See for example *The Bulletin*, 11 October 1994, p. 19.

<sup>29</sup> J. Howard, 'Mr Keating's mirage on the hill: how the republic, like the cheshire cat, came and went', in *Upholding the Australian Constitution: Proceedings of the Third Conference of the Samuel Griffith Society*, 1992, p. 133.

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## Conclusion

I have argued that the liaison between international law and Australian law has been dangerous in a number of senses. First, even the quite modest embrace of international law by the Australian High Court has attracted considerable wrath. Second, this false perception of danger has in turn caused a more real danger of a rather half-baked Australian chauvinism with respect to international developments, illustrated by the anti-Teoh legislation and the charges that use of human rights treaties threatens Australian sovereignty.

This argument may have some superficial appeal, and plausibility, but it does not survive thoughtful reflection. At international law, states are sovereign in the sense that they determine their own political and economic systems. But, the notion of absolute sovereignty has no purchase in a world of sovereign states. As Henry Burmester, the Acting Solicitor-General, has said:

States do not exist in splendid isolation. Just as individuals in a society are not completely free to act in whatever way they like, so states as members of the international community of nations are constrained by international law in the way they can behave. ...

[T]he very concept of the equality of states at least implies that sovereign rights of each state are limited by the equally sovereign rights of others. ... [S]overeignty in its original sense of 'supreme power' is not merely an absurdity but an impossibility in the world of states which pride themselves upon their independence from each other and concede to each other a status of equality before the law.<sup>30</sup>

There is of course broad acceptance of international law in many areas, such as international postal and aviation conventions. It is striking that the international appears particularly dangerous and threatening in the context of human rights. Many commentators and politicians who criticise the imposition of 'foreign' social and political rights through globalisation embrace its economic creeds and dogmas. It has been said that 'national sovereignty has long been a thing of the past when it comes to many areas of business regulation.'<sup>31</sup> My colleague Anne Orford has pointed this out, noting that governments tend to be attracted to internationalist discourse in the context of the world economy, indeed linking modernity to the international, but they often reject internationalist discourse in areas such as human rights which more radically challenge governmental power.<sup>32</sup> Indeed there is the paradox that, as international law increases in breadth, touching more aspects of our lives, the forces unleashed by globalisation within states—the move

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<sup>30</sup> H. Burmester, 'National sovereignty, independence and the impact of treaties and international standards', *Sydney Law Review*, vol. 17, 1995, pp. 127, 131.

<sup>31</sup> J. Braithwaite, 'Sovereignty and globalisation of business regulation' in P. Alston & M. Chiam (eds), *Treaty-Making and Australia*, Annandale, NSW, Federation Press, 1995, p. 115.

<sup>32</sup> A. Orford, 'Locating the international: military and monetary interventions after the Cold War', *Harvard International Law Journal*, vol. 38, 1997, p. 443.

to privatisation of public functions for example—provide a strong resistance to internationally based guarantees of rights.<sup>33</sup>

The current debates about the OECD's Multilateral Agreement on Investment (MAI) are a good example of the differing approaches to globalisation. While Mr Howard is concerned that human rights treaties may undermine Australian sovereignty, senior members of his government have supported the MAI, whose provisions are considerably more intrusive than human rights treaties. The MAI not only restricts the ability of governments to act in certain areas such as human rights and labour and environmental standards, but it also restricts action to favour local industries and to support areas such as health, social services and education. The Australian government has indicated that it will exclude some policy areas from the scope of the treaty for some time at least, but these 'reservations' will be subject to the 'roll back' requirements of the MAI. Opponents of the MAI have been derided for being 'globaphobes' and for wanting to turn the clock back. Whatever the particular merits or problems of the MAI, we need to ask our politicians for a principled basis for distinguishing between the danger levels of globalisation of human rights principles on the one hand and globalisation of trade and investment rules on the other. We cannot compartmentalise international trade and investment agreements from international human rights standards. If there is an MAI, we should have a parallel agreement requiring multi national corporations to observe human rights standards.

Critics of globalisation have pointed to the problems globalisation poses for the protection of human rights. Human rights is low on the agenda of global capitalism. But, as John Braithwaite has pointed out, 'there can be paradoxes of sovereignty where globalisation is associated with an increase rather than a decrease in sovereignty, properly conceived as the capacity of citizens to understand decisions that will affect their lives and to raise their voices in a way that influences those decisions.'<sup>34</sup> He encourages civil society to enhance the voices of weaker players in the world system, for example by building international movements of citizens concerned with the environment, health and human rights to create an enhanced citizen sovereignty.

One way to discriminate among the many senses of globalisation is suggested by Richard Falk's distinction between 'globalisation from above' and 'globalisation from below'.<sup>35</sup> 'Globalisation from above' means the expansion of the international division of labour, the growing influence of multinational corporations and the influence of Western dominated financial institutions, such as the World Bank and the World Trade Organisation. The aim of 'globalisation from below', by contrast, is the creation of a global civil society, giving priority to such values as human rights and environmental protection.

How can we make the dangerous liaison between international law and Australian law a more productive partnership? How can Australia usefully participate in 'globalisation from below'? One way to achieve this is through a clear statement of the relationship between international and Australian law. The new South Africa Constitution provides an interesting example. Section 232 states that:

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<sup>33</sup> P. Alston, 'The myopia of the handmaidens: international lawyers and globalization', *European Journal of International Law*, vol. 8, 1997, p. 435.

<sup>34</sup> Braithwaite, *op. cit.*, p. 125.

<sup>35</sup> R. Falk, 'The making of global citizenship' in J. Brecher et al (eds), *Global Visions: Beyond the New World Order*, Boston, South End Press, 1993, p. 39.

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Customary international law is law in the Republic unless it is inconsistent with the Constitution or an act of Parliament.

And section 233:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Another way to participate in globalisation from below would of course be the introduction of some form of bill of rights. This would 'take much of the heat out of the issue' of internationalisation 'by providing a set of equivalent standards which are likely to pre-empt international scrutiny.'<sup>36</sup> It is striking in Australia that the strongest critics of internationalisation tend also to provide the greatest resistance to the introduction of Australian guarantees of rights. Perhaps the introduction in February 1998 by the Blair government of a Human Rights Bill (launched under the rubric of 'Bringing Britain's Rights Home') will inspire Australian politicians. Or perhaps Australia needs, as the UK, to be found in breach of an international human rights instrument fifty times (the European Convention on Human Rights in the case of the UK) before it will act.<sup>37</sup>

The current debate about native title is an example of the problems of cutting ourselves off from international law. The government has been very critical of any appeal to international fora or to international law. And yet reference to international standards makes some of the flaws in the current proposals very clear.

I think that we can draw at least two important lessons from the international law relevant to indigenous peoples. The first is that we should respect cultural diversity and see it as an enrichment of our society, rather than a threat to homogeneity. Members of ethnic, religious and linguistic minority groups, and members of indigenous peoples in particular, have the right to develop their identity and institutions and these rights cannot be left to the mercy of the political majority of the day.

The second lesson is that the notions of equality and non-discrimination require substantive rather than merely formal or procedural equality. This means that simply treating everyone the same may not be adequate in particular contexts. As Ronald Dworkin has pointed out, equal treatment is not the same thing as treating everyone as equals. Treating everyone as equals involves a much more complex and nuanced approach than 'identical' treatment.

This requires, as international law reminds us, respect for the dignity and survival of minority cultural identity, for the indigenous relationship with land and for indigenous peoples' right and duty to develop their culture. As Tony Anghie has said, '[c]ulture is not merely some ornamental aspect of an individual's existence that can readily be dispensed with or displayed on ceremonial

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<sup>36</sup> J. Crawford, *op. cit.*, p. 335.

<sup>37</sup> In October 1997, the European Court of Human Rights found Britain in breach of the ECHR for the fiftieth time. *Guardian Weekly*, 2 November 1997, p. 10.

occasions, but [is] integral to the self-concept and social functioning of individuals and the communities of which they form a part.’<sup>38</sup>

I do not mean to suggest that international law provides all, or even the best, answers to complex issues of cultural diversity. My argument is rather that it provides a set of norms that have achieved some measure of international acceptance—a type of global vocabulary—that are a useful addition to fraught public debates on cultural difference. In this context, international law challenges the limitations of Australian law and political discourse in a dramatic and useful way.

In Laclos’ book, *Dangerous Liaisons*, the wicked seducer Valmont is killed in a duel and his accomplice, Mme de Merteuil, is condemned to a miserable life, her machinations exposed, disfigured by smallpox. One of the innocent objects of their machinations retires to a convent, the other dies of grief. The dangerous liaisons of international law and Australian law do not need to have such an unhappy fate. Close relationships always contain an element of danger. They make us vulnerable to one another and they expose our weaknesses. But at the same time, they can be a source of great strength and make us braver and wiser than we would otherwise be.

I am not suggesting that the relationship of international law and Australian law should be a takeover of the former by the latter. The substance of international standards needs to be debated—there may be many that, after discussion and reflection, we cannot accept. But we should not reject through the smokescreen of sovereignty the possibility of real engagement with global standards, particularly in the area of human rights.

In the next century, the international legal order will become more and more significant in our lives. Our public and constitutional law will be impoverished and undermined by isolation from international developments. We should embark on the liaison with international law with decorum rather than indiscriminate or blind passion and be prepared for a demanding but potentially fulfilling relationship.



**Question** — I guess I am going to make a statement of assumption before I ask you a question, if that is OK. My understanding of the Constitution is that to make law in Australia, a bill must go through both houses of Parliament, whereas with international law that does not seem to be a requirement; the government of the day can just sign up to it, which might be viewed by some as questionable under the Constitution. I wonder if it would be beneficial for Australia to have to have international treaties ratified by both houses of Parliament and therefore the High Court could feel more confident in its adoption of international law when going forward. Do you feel any tension in the way international law becomes law in Australia, compared to how our Constitution says laws should be made?

**Professor Charlesworth** — I need to take issue with one of your assumptions there. Under Section 61 of the Australian Constitution, strictly speaking, the executive has the power to enter into treaties. They do not become part of Australian law until they are enacted fully by

<sup>38</sup> A. Anghie, ‘Human rights and cultural identity: new hope for ethnic peace?’ *Harvard International Law Journal*, vol. 33, 1992, pp. 341, 352.

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Parliament. It is not as though, even in theory—and I will discuss the recent changes to the treaty-making process in a minute—even under the old status quo, international law ever became immediately part of Australian law. There are quite a number of international treaties that Australia has signed and ratified, which courts say we simply cannot look at because they have not been separately enacted as part of Australian law.

The Labor government commissioned a report, the *Trick or Treaty Report*, and a major initiative was announced by Mr Downer shortly after the Coalition came to power, that there were going to be changes to the Australian treaty-making process to address the so-called democratic deficit, even though, from a legal systems perspective, treaties did not automatically become part of Australian law. There was this sense, nevertheless, that we did not want the executive going off making treaties pell mell, signing us on to treaties even if they had no direct effect. Quite an elaborate system was put into place to try to alter this sense that it was up to the executive to do it. You may be aware that there are various processes now operating; the Senate Standing Committee on Treaties is one example of Parliament keeping a scrutinizing role on the executive's ability to enter into treaties. There is a Joint Standing Committee on Treaties where the states also have a role. So there are a significant number of developments in the last two years which have tried to democratise the process.

But, first of all, a review process is always there when the government puts through legislation to implement a treaty. Just take the Race Discrimination Act, for example. Gough Whitlam signed on to that very early in his time as Prime Minister. It was all very well for him to sign on to that but it was not part of Australian law, directly. So in order to get the Race Discrimination Act through, he had to get it through the House of Representatives, he then took it to the Senate and it was significantly amended by the Senate. So the Parliament is not excluded from the treaty-making process and the new treaty-making system actually enhances the role of the Senate in the scrutinizing process. To take the MAI for example; last week the Treaties Committee in its interim report on the MAI said we need more information, we are not really happy about this, we do not want to say whether or not we consider it in the national interest until we have got more information. So I think that there are mechanisms already in place to resolve a lot of those tensions that you have identified.

**Harry Evans** — Can I just add to that there is a bill in the Senate which was introduced by the Democrats to actually provide that treaties not be ratified until their ratification is approved by both houses of Parliament.

**Question** — You spoke about the requirement of article 2 of the Optional Protocol to the ICCPR, that is, that all domestic remedies should be exhausted or shown to be inadequate before an appeal or a communication can be made to the Human Rights Committee by an Australian individual. Using the example of the Toonen case, could you make any comment on any problems that you see and how that is evidenced, or how that is shown by the communicant, and also any comment on what remedies are considered to be appropriate to be considered by the communicant, for example, judicial, legislative, administrative or political remedies. As we discussed, a lot of what has happened in human rights law in Australia has been as a result of political pressure, or as a result of political actions. Would you have any opinion on the validity of political remedies such as suggesting that there was an effective remedy available to Mr Toonen in Tasmania, and that was to exert political pressure on his state Parliament to have the law changed, the other states in Australia having all changed their laws regarding sexual discrimination. Can you make any comment on why the Human Rights Committee may not have considered that to be an appropriate, effective or available remedy?



**Professor Charlesworth** — The Toonen case, for those of you who were not at Elizabeth Evatt's marvellous lecture,<sup>39</sup> was a case brought by Nicholas Toonen, a gay activist in Hobart. He said that there was then, in the Tasmanian criminal code, prohibition on male homosexuality even between consenting adults. His argument was that that violated his right to privacy under Article 17 of the Civil and Political Covenant.

Now, as the questioner has pointed out, you cannot just say, look, I see that my rights on the Civil and Political Covenant have been violated, I am off to Geneva tomorrow. The Committee in Geneva or New York will not even look at your communication, that is the official term, until you have said, I have exhausted every domestic remedy. In other words, the international complaint processes, the Human Rights Committee in that case, does not operate as a so-called fourth level of appeal. You have to completely go through your national legal system. Now in Nicholas Toonen's case it was really easy because what was the Australian domestic remedy? It was a state law criminalising homosexuality. We have no bill of rights, therefore, what avenues did he have? In fact, Nicholas Toonen in his complaint devoted a large section to all the political things he had done. He had lobbied politicians, he had gone to the federal government, he had a whole catalogue of everything he had done. But, in Australia, the requirement of exhausting domestic remedies, in some cases, is not particularly onerous because we have no domestic remedies and that is, I think, yet another reason why we need a bill of rights, because it looks rather ridiculous to say it is terribly easy to fulfil that requirement in a number of cases. Now he did put this part in his communication, but it is fair to say that that was not, strictly speaking, necessary, because the Australian government did not say, oops, you have forgotten the following domestic remedies.

Sometimes what happens in these cases is, the country against which the communication has been made will come back and say, this person stopped at the magistrates court level. They took their case to the magistrates court, they then gave up. We insist that they appeal it all the way through to the highest court in the land. And the Human Rights Committee has said, if there is an available judicial remedy you must pursue it, unless there is a direct contrary precedent against you. They are not expecting you to go all the way up to the High Court with an utterly hopeless case; they will accept if there is a direct precedent against you. But they do not expect you to exhaust political remedies. There has been some debate about whether you should be required to take it to administrative remedies, like an ombudsman, but generally the Human Rights Committee has said it is only available domestic remedies, mainly judicial ones.

You say what was the significance, how persuaded was the Committee by the fact that every other Australian state had changed its laws regarding sexual discrimination. I think the Committee did briefly refer to the fact that Tasmania was the only Australian state that criminalised male homosexuality. It is hard to know how much weight they gave that, but certainly it would suggest that one of Tasmania's defences of the law was, this is part of our culture. Our community finds this behaviour abhorrent, we should be able to criminalise it. And certainly the fact that all the other Australian states did not criminalise male homosexuality undercut the Tasmanian government's arguments, unless they wanted to argue for a specific Tasmanian culture and that was relatively hard to do.

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<sup>39</sup> See page 29, this issue.

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**Question** — I suppose the point I am trying to make is that, could it not also be construed as an equally persuasive argument for allowing the political process to take the natural course it had taken in every other state in Australia? For example, when the law was first changed in South Australia, no one said every other state in Australia does not have these laws therefore South Australia should go back to the way they were. What I am suggesting is, would it not be equally easy to say, every other state in Australia has taken this legislative or political measure, Tasmania will follow.

**Professor Charlesworth** — I think that since what was communicated to the Committee by the Tasmanian Government was, we will never ever change these laws, they are part of the fabric of our society, the Human Rights Committee would have been optimistic to have said that, although, of course, in the event, last year, without a lot of fanfare, Tasmania did, in the end, repeal its laws. So perhaps, it is a chicken and egg; who knows how much the change was a result of international pressure. But the Tasmanian government was fairly intransigent at the time, at least in its written submissions on this issue.

**Question** — Dr Charlesworth, I want to divert to something that is of a different order from the matter that you dealt with in the last question, and refer you to an interesting aspect of globalisation which is occurring, almost without notice, in Australia, but nevertheless does have some fairly powerful human rights connotations. It is the abandonment that has occurred around the world, almost entirely now, of compulsory voting. There is no doubt that some, and probably all, the countries that have jettisoned compulsory voting have done so with an eye to the Covenant on Civil and Political Rights, and especially its Article 25. Now a very good example was given as far back as 1982 in Austria, where the central government legislated to stop three Austrian provinces from putting people in gaol for not voting, even if they had not paid their fines. The Philippines changed its constitution in 1988, I think it was, precisely so that compulsory voting could never be reintroduced. They had experience of the corrupt ways in which Marcos used electoral compulsion. Now Australia has become the only country left which still goes to the barbaric extent of imprisoning people, most of whom turn out to be Aborigines, for the purely political offence of not voting. I wonder, have you got a view on the prospects for change in the law, flowing from change in the attitude of Australian's politicians, on this matter? The politicians, of course, are the only beneficiaries, not the nation, from electoral compulsion.

**Professor Charlesworth** — What I would say is, that would make a really interesting case to take under the optional protocol to the ICCPR. I think that would be quite interesting.

**Question** — Because you have mentioned that first, could I just interpose on that question. I raised that very prospect quite some years ago, with a friend of mine sadly now departed, who was a senior officer in the Attorney-General's Department, and he said you will need to be a multi-millionaire to do it because the politicians will ensure that you spend all your money on very expensive silk, you will never get there, you will never exhaust the domestic remedies.

**Professor Charlesworth** — I think there would be quite a good argument that there are very few domestic remedies in that context, so I do not think exhaustion of domestic remedies would be a massive requirement, and, of course, using the individual complaints procedure does not require a silk. It is a so-called postcard procedure in that it is simply always done on paper and you can send your complaint off to Geneva and it is considered there and there is no time for oral argument. But there is a very interesting general comment of the Human Rights Committee, the treaty body that Elizabeth Evatt is a member of, very recently,

explaining that Committee's views on Article 25, and I think the Committee does not see Article 25 as inconsistent with compulsory voting. It is quite an interesting interpretation, and if this is a particular interest of yours it may be something that you want to read. It is just a two and a half page document, which sets out the Committee's views on that and they do not see any necessary inconsistency there.

**Question** — Professor Charlesworth, when you talk about our attitudes to globalisation, and frankly I prefer the old term—international cooperation—which is not as provocative in that particular relation to law, it is important to bear in mind that when the Covenant first came into being in the late sixties, the world was a very different place. Australia stood out in front and we could scorn attempts to bring about the kind of democracy we already had. We need to bear in mind that that has changed very significantly in recent years. Our level of democracy, in terms of the implementation of basic human rights, has actually declined significantly, particularly in relation to Europe, which of course is bound by the European Covenant on Human Rights, incidentally under which Britain was taken to the European Court of Human Rights on fifty occasions. But I think we need to bear in mind that things have changed a bit and because, I think, of this diffident attitude towards globalisation or international cooperation, or the real implementation of international instruments, Australia has in fact lost ground. I think we are moving towards a crisis point. At last, as you have mentioned, we have ourselves appeared before the UN in the last three years. And if we continue in the same direction that process could become even more serious.

**Professor Charlesworth** — I can only say I agree with you. That was really the thrust of a lot of what I was trying to say, that we cannot hide our heads in the sand and just adopt a superior attitude; we are fine and everybody else has got the problems. I think we have to acknowledge that there is a significant human rights problems here in Australia. While generally we are pretty good, there are quite large areas where we are quite behind. And Elizabeth Evatt made the point in her lecture that Australia is so overdue with its third report under the Civil and Political Covenant that it is has been actually lapped by the fourth report. That is something for which there is really no excuse. So yes, I take the point of your comment very much.

**Question** — Professor Charlesworth, to what extent, if at all, are Australians and their environment protected from the potential adverse affects of the multi-lateral agreement on investment by existing human rights and environmental treaties, conventions and so on; and if they are not, to what extent—and if there is a limit to that extent—would that support the case for the current government's approach to a proper democratic examination of our treaties before they are put into full effect? I am thinking of ones like the current land mines treaty from the Ottawa treaty. Isn't there a case then for supporting that approach so that the Joint Standing Committee on Treaties, the National Interests Analysis and access by NGOs to comment on all those factors come into play?

**Professor Charlesworth** — Just to take the MAI and to what extent, if the Australian government were to become a party to it, we are protected by human rights treaties, one of the problems I guess in this respect is that under international treaty law it is like legislation. Later treaties, if they are inconsistent with prior treaties, are seen to take precedence. That is by and large, there are some exceptions—unless you can argue that the earlier treaty rule forms part of the so called *jus cogens*, the peremptory norms of international law. So I think that there are significant problems with the MAI's inconsistency with human rights standards. I think we

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would all be less worried about the MAI if there was a companion agreement which committed the multinational corporations to observe human rights standards. As I mentioned, the Australian government has announced that it will not accept all of these provisions; it wants to put in some sort of form of reservations. However, the MAI itself says that once you have accepted it you can never add more reservations, and in any event you are committed to slowly roll back those that you have accepted. So it is very little guarantee I think.

To return to the Joint Standing Committee on Treaties and the treaty reforms that came up before in the first question; there is going to be, I understand, an official or internal review of the whole new treaty processes and how they have worked. I think some things have been quite successful and I think some things have been less successful, but I agree with you that in principle the idea that there should be the possibility of public involvement in these processes is very important. To that extent I certainly support the government's initiative and the work of the Joint Standing Committee on Treaties which I think has proved to be not just an empty mouthpiece of government, but an interestingly independent body, and I think we all have to try and support that in its work. So I generally am in favour of those systems, they allow much more input by NGOs, and the work of the Joint Standing Committee shows that that input is taken quite seriously, and that is an extremely valuable development.



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## Tolerating the Intolerable\*

*Chandran Kukathas*

Dissension is the great evil of mankind, and toleration is its only remedy—  
*Voltaire*

Presenting a lecture<sup>1</sup> on the virtue of toleration anywhere, let alone in the chambers of the Australian Senate department, should strike most people as a peculiarly pointless kind of exercise. Would anyone not in favour of toleration bother to turn up? (And what is the point of preaching to the converted? Would anyone against it bother to listen? And could such a person be converted?) In truth, it might not be easy to find anyone who openly professed intolerance. Almost everyone is in favour of tolerance; though of course, each will hasten to add, this does not mean that ‘anything goes’.

It is the signal sent by this last phrase, ‘anything goes’, or not anything goes, however, that tells us that the question of toleration remains a live issue rather than merely a popular platitude. Most of us are prepared, perhaps instinctively, to tolerate others as long as they don’t overstep the mark. But *only* as long as they don’t overstep that mark. As one protestor explained after a violent demonstration against a meeting of the One Nation Party, we don’t have to tolerate the intolerable.

Toleration on these terms is easy. Yet the problem with this attitude is that it simply misses the point. Toleration was never meant to be easy. Toleration is a virtue precisely because it is

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<sup>1</sup> I would like to thank Philippa Kelly and William Maley for their many helpful criticisms and suggestions in the preparation of this paper.

not easy. And it is not easy because it requires us to admit, or accept, or put up with, or endure, or condone, or suffer, or permit, or indulge, or stomach, or swallow things we cannot abide, or bear, or stand, or countenance, or take. To tolerate is to put up with things (or people) we dislike or disapprove of—particularly when we are in a position to suppress them. This is why it is a difficult virtue; and also why it has fewer friends than many think. And this is why there is a case for making a case for toleration.

So my purpose here is to try to put that case. Though before I do, it would be well to say a little about why this topic should be thought in any way apposite in a lecture series in which most of the speakers will be concerned with more practical political questions. It is appropriate because of our political circumstances: because of the times we live in. The fifty years since the 1948 Nationality and Citizenship Act, which recognised Australian citizenship for the first time, have seen Australia undergo a profound social transformation. A country of predominantly British subjects in the immediate postwar years is now a nation of multicultural citizens. The dramatic nature of this change would be difficult to overstate. In one-and-a-half generations Australia has brought about a change in the ethnic and cultural composition of the nation which is equivalent in magnitude to that wrought in Canada over three generations, and in the United States over more than six. Australia was always multicultural in character; but it is now more diverse. And if diversity is the yardstick by which we measure multiculturalism, Australia is more multicultural than ever—and more than was anticipated, or even imagined, by its first citizens. In these circumstances, the obvious—indeed, inescapable—question is: can people who are so diverse co-exist in a single political society? And if so, how?

There is no doubt that this question is being asked—and answered in various ways. It is implicit in public debates over multiculturalism and immigration; in discussions of Aboriginal affairs; and in the all-too-common debates about Australian identity. Many other questions are connected to this fundamental one: should we expect migrants to assimilate rather than hang on to their original cultures or traditions; should we reduce the level of immigration to Australia; should we try to control the cultural composition of our migrant intake? For some the question is, quite simply, how can we be one nation (to borrow one of Paul Keating's many memorable phrases)?

It is because all these questions matter, and are so pressing today, that the idea of toleration is a significant one. Can the notion of toleration provide us with any guidance in our efforts to address these various issues? I want to suggest that it can, and that we should embrace the moral ideal of toleration; though I also want to suggest that this is more difficult to do even than many of the proponents of toleration have been willing to admit—since embracing toleration means accepting a good deal else.

So, what is the case for toleration, and what would embracing it mean? The case for toleration rests on the fact that we are different and we disagree. We not only differ in appearance, in age, in ability, in wealth, and in our origins, but we also differ in outlooks. We live by different religions, abide by (or abhor) different practices, and value different ways of life. None of us thinks he is on the road to hell, though we are all often amazed at how many others are rushing by along it. Indeed, many of us are possessed by a desperate desire to stop these people, to turn them around, and to point them (or lead them) in the right direction. We have different ideas of what constitutes the good life; and we all too often want others to adopt our own. The Scottish philosopher, David Hume, put it very well when he remarked: 'such is the nature of the human mind, that it always lays hold on every mind that approaches

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it; and as it is wonderfully fortified by an unanimity of sentiments, so is it shocked and disturbed by any contrariety. Hence the eagerness, which most people discover in a dispute; and hence their impatience of opposition, even in the most speculative and indifferent opinions.’<sup>2</sup> In fact, he goes on to remark, this feature of our nature, ‘however frivolous it may appear, seems to have been the origin of all religious wars and divisions.’<sup>3</sup> We are, to varying degrees, like the Mr Woodhouse of Jane Austen’s novel *Emma*: ‘His own stomach could bear nothing rich, and he could never believe other people to be different from himself. What was unwholesome to him, he regarded as unfit for anybody; and he had, therefore, earnestly tried to dissuade them from having any wedding cake at all; and when that proved vain, as earnestly tried to prevent anybody’s eating it.’<sup>4</sup> How can we possibly live with one another if such is our nature, and this is our condition?

The answer lies in the idea of toleration. And this is, by and large, the answer we have come to adopt in many societies today. Voltaire answered his own question, ‘what is toleration’, with the reply: ‘It is the prerogative of humanity. We are all steeped in weakness and errors: let us forgive one another’s follies, it is the first law of nature.’<sup>5</sup> Quite simply, when our differences are substantial, and irreconcilable, it makes sense to put them aside—particularly if we concede that we are all prone to make mistakes.

Yet obvious as this may seem, this solution was ignored for centuries in the Europe wracked by religious wars. The persecution of Huguenots in France, (and of Catholics in England) demonstrated vividly that toleration was for a long time entirely neglected as a solution to the problem of dissension. Four hundred years ago the Edict of Nantes (1598) held out the promise of religious toleration for all Protestants in France when it granted the Reformed Churches the privilege of legal existence, and offered various guarantees to make this possible—including the guarantee that the Edict would never be revoked. ‘Never’, it turned out, meant until 1685, when the Edict was revoked in an act which has been described as marking the apogee of religious intolerance.<sup>6</sup> The Revocation consolidated the various decrees of the Royal Council which had, over the previous several years, ‘reinterpreted’ and undermined the basic principles of the Edict. By then, the Huguenots—Protestants in Catholic France—had already begun to endure the ‘dragonades’: the policy of billeting of soldiers on Protestant households until their members converted to Catholicism. Denied the freedom of worship which was once theirs by right, the Huguenots were now also forbidden to leave France. Their fate was to be one of forcible assimilation—though the Crown saw things somewhat differently, since the ground for the revocation of the Edict had been that it had lost its purpose now that there were no longer any Protestants in France!<sup>7</sup>

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<sup>2</sup> David Hume, ‘Of Parties in General’, in David Hume, *Political Writings*, edited, with Introduction and Notes, by Stuart D. Warner and Donald W. Livingston, Indianapolis, Hackett, 1994, pp. 156–64, at pp. 161–62.

<sup>3</sup> *ibid.*, p. 162.

<sup>4</sup> Jane Austen, *Emma*, St. Ives, NSW, Softback Preview, 1996, pp. 13–15.

<sup>5</sup> Voltaire, ‘Toleration’, *Philosophical Dictionary*, edited and translated by Theodore Besterman, Ringwood, Vic., Penguin, 1986, p. 387.

<sup>6</sup> Elisabeth Labrousse, *Bayle*, trans. Denys Potts, Oxford, Oxford University Press, 1983, p. 1.

<sup>7</sup> It was in these circumstances that a large number of French Protestants (more than a quarter of a million), chose reluctantly to leave France and to settle in the various Protestant countries of northern Europe. The term



Nonetheless, out of these centuries of intolerance, and of the devastating religious wars which marked them, emerged the first philosophical defences of toleration, and the social and political institutions which protected religious freedom and recognised the importance of liberty of conscience. A part of the lesson learnt from the wars of religion was that intolerance was costly. The results of suppression were not peace or social cohesion but protracted warfare. Far better results were achieved by the institutionalising of toleration: in the form of greater freedoms of worship, and also in the necessary freedoms of speech and assembly.

What the idea of toleration recognises is that the fundamental feature of our nature—our propensity to differ and to disagree—is ineradicable. This is a condition which can be palliated, but not cured. And toleration is the right palliative, since it is a remedy which does not try to suppress our nature but seeks to work with it. If we must differ, let us at least agree to differ—no matter how different we may be; indeed, let us agree to disagree—no matter how disagreeable we may find one another. How difficult can this be?

In 16th century France, and elsewhere in Europe, it proved very difficult. And it is worth noting some of the reasons why. Inclined though we generally are to think of ourselves as more educated, more enlightened, and generally altogether nicer, than our distant ancestors, I don't think the explanation is that we are simply better people—or even much more tolerant people. Toleration was a solution that proved difficult to reach for more interesting, and instructive, reasons than these.

One reason why it was difficult has to do with the aims and aspirations of the ruling powers. Despite the fact that the great controversies of the sixteenth century were religious controversies, and many of the debates over religious toleration were fought over matters of theology, the concerns which underpinned these disputes, particularly in England and France, were *political* ones. Ruling authorities were interested not so much in the niceties of Christian theology as in the problem of establishing and securing the borders of the emerging state, and settling the issue of the position of the church within it. To put it in another way, they were interested in the problem of national unity. The problem with religious toleration was that it would mean religious diversity. But in the Europe that was still a disparate collection of provinces, each with its own dialect, customs and legal system, the idea that national unity might survive without religious conformity was thought simply implausible. In France the Sun King (Louis XIV) at first tried to bring about religious uniformity by luring people into Catholicism—for example by rewarding those who recently converted from Protestantism by giving them a moratorium on their debts. But eventually the limited success this approach won brought about harsher measures of repression against those who refused to abjure. Yet the ultimate motivation, even if not justification, was political rather than religious: the search for political unity.

Another reason, however, for the difficult birth of toleration was that it was not so evident that a policy of toleration would be costless. On the contrary, it was feared that it might be quite dangerous. As the historian, J.W. Allen, observed, there was at this time:

'The Refuge' came to be used to describe these people, and out of this usage came the word 'refugee', meaning 'one who, owing to religious persecution or political troubles, seeks refuge in a foreign country.'

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a widespread belief that there must needs be some sense in which it is possible for governments to maintain true religion and suppress dangerous error; there was a belief that unity in religion was necessary to national unity and security; there was a sense that toleration of religious differences might lead to a disintegration of moral standards; there was also, of course, a tendency to see dissentients as morally perverse.<sup>8</sup>

While Thomas More might have considered it feasible in Utopia for it to be lawful for every man to pursue his own religion, in the real world he feared that heretics would not simply preach religion but would pursue violence.<sup>9</sup> This was not merely a religious or a moral question: it was a question of public order. And indeed, the toleration of sects could be a dangerous business, since many of the sects were not themselves tolerant. Anabaptists were persecuted, arguably, less because they were religious dissenters than because they were social revolutionaries. The Huguenots were a problem not simply because they were nonconformists in religion but because they were a powerful political party which was only partially a religious party. And one part of that party held strongly to the theory of political Calvinism—according to which the ruler was obliged to establish and maintain the true Calvinist faith, suppressing by force all heretics and idolaters.<sup>10</sup>

The obstacles to religious toleration emerging included, then, the aspirations of an aggrandising state, bent upon national unity; and (possibly) the intolerance of those groups which sought the toleration they were themselves reluctant to give. In short, there were too many persons, or interests, for whom the costs of toleration were simply intolerable.

Now, all of this might seem very remote from Australia in the late 1990s; but in many ways it is not. Although we are in no important sense burdened by the religious controversies of 16th century Europe, we are confronted by an ethnic and cultural diversity which is no less significant—and, for many, troubling. And the options available to be considered in responding to this condition are also not so far away from those grappled with by the Europeans four hundred years ago: to suppress, to assimilate, to tolerate. As Lenin asked, stealing a line from Chernyshevsky, What is to be done?

What has to be done, I suggest, is to reaffirm the importance of the institution, the practice, and the norm of toleration. But what needs to be explained now is why this is so, and what this in fact means in contemporary terms. We need in our public discussions to reaffirm the importance of toleration because there is a danger that, if we do not, we will forget or underappreciate the fact that what is most important about our society is that it is a free society. What toleration protects is freedom. In the sixteenth century its proponents were concerned, above all, with religious freedoms. Today, toleration protects or upholds our freedom to live by our own lights—according to different religious, ethnic or cultural traditions, or indeed according to no particular tradition at all (if this is truly possible). Because we are so inclined to tell others how to live—is there anyone out there who hasn't been told by someone to

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<sup>8</sup> J.W. Allen, *A History of Political Thought in the Sixteenth Century*, London, Methuen, 1961, p. 77.

<sup>9</sup> See in particular More's 'The Dialogue concerning Heresies' in Thomas More, *Utopia and Other Writings*, selected and edited by James J. Greene and John P. Dolan, New York: Meridian Classic, 1967, pp. 196–216.

<sup>10</sup> See Allen, *op. cit.*, p. 303.

avoid smoking or to lose a little weight?—we are all too likely to forget how much our institutions uphold the freedom to be different, whether in concert with others or alone.

But what has to be done to make this less likely? Here I think we may have something to learn from the European experience. If toleration then was obstructed at once by the state's preoccupation with national unity, and by the extravagant ambitions of religious sects, might it not be possible that these are precisely the obstacles that lie in our way now? I think it is—though these obstacles today take different forms. We are not living in times when the creation or establishing of a state is a serious concern; yet the modern variant of this obstacle to toleration is our preoccupation with social unity and national identity. We see this not only in the rhetoric of government but also in the continual raising of the 'problem' of Australian identity, and the incessant demands coming from all sides of politics for 'Australianness' to be protected. Above all, comes the exhortation, we must have unity. In the launching in February 1992 of the government's policy statement, *One Nation*, the then Prime Minister, Paul Keating, argued that 'all our efforts must go towards uniting the country'; that the 'most successful societies are notable for their unity'; that the best policies were those which would 'give us back our sense of purpose'; and that kind of Australia we seek is, above all, 'An Australia which is more truly one nation'.<sup>11</sup>

I want to argue that all these sentiments, which are in no way peculiar to the rhetoric of the Labor Party, need to be regarded with far more scepticism than they have been accorded to date. More than this, for a number of reasons, we should look warily at those who peddle unity. For one thing, we should recognise how dangerous is the pursuit of unity when people disagree. Indeed, nothing is more divisive than the pursuit of unity—as the experience of the politics of the last eighteen months should have made unchallengeably clear. All too often, people calling for unity are interested in conformity—and to an ideal of their own devising.

The most successful societies, to my mind, are free societies; and they are notable not for their unity but for their diversity. They do not put all their efforts into anything in particular but into many things. They do not have *a* sense of purpose because their people have many different purposes. And these people are not worried about being one nation because they recognise such notions for what they are: pieces of shameless rhetoric used by political elites to tell the population that they are at one with the people.

The danger of this rhetoric lies not in its content—for it has none—but in the direction in which it leads. In the first instance it leads to the aspiration to shape and define national identity, for the idea of identity will quickly find its way to the heart of the ideal of social unity. But identity politics is surely something to be avoided—as the history of the Balkans, with its endless quarrels about ethnic origin and territorial inheritances, clearly suggests. What is fairly obviously the case is that identity is neither natural, nor original, nor permanent; or even particularly enduring. The features which describe a Briton, or a Malaysian, or an Indian, or an Australian, cannot sensibly account for the variations across time and region. But too much talk of one nation tempts us to think, or believe others who say, that we can.

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<sup>11</sup> *One Nation*, Speech by the Prime Minister, The Honourable P.J. Keating MP, 26 February 1992, Canberra, Australian Government Publishing Service, 1992, pp. 15–16.

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This is a bad thing not simply because it is silly but also because it in turn tempts us to try to shape and control that identity. In our own context it inclines some people to tell us how to be Australians: what language we should speak, what neighbours we should seek out; and even what international cricket team we should barrack for. And it inclines others to try to make it harder for us to watch New Zealand soaps, or more expensive to buy non-Australian CDs: to protect a particular version of ‘Australianness’. It thoroughly disinclines people to simply mind their own business—which is surely a good part of what toleration is all about.

In short, one major obstacle to toleration is nationalism. One reason why toleration was harder to achieve in the sixteenth century may be that a great deal of energy was being put into the establishing of modern states. In the lead-up to the Peace of Westphalia in 1648 the political interests of the major powers lay in settling boundaries to carve out regions of territorial sovereignty. This made for a politics of exclusion: the issue was, who was in and who was out. Toleration, however, is a virtue of open societies, which are more comfortable with the movement of people—and goods—across boundaries. (A boundary, for those of you who need an explanation, was defined by Ambrose Bierce, as an imaginary line separating the imaginary rights of one people from the imaginary rights of another.<sup>12</sup>) Toleration, in the end, is a quality more readily found in societies which are resistant to planning and control.

Yet if the pursuit of national unity is an obstacle to toleration, it is only one. The other, no less important impediment is the conduct of sects or minorities in a society, and the attitudes they might evince. In the sixteenth century the fear prompted by religious minorities or dissidents was that they would foment public disorder: that their professed wish for toleration disguised less palatable aspirations. What we need to ask now is how much this might also be true of our modern minorities, or at least of the system which gives them succour.

To some extent at least, I think this *is* a problem we face today. Some of the voices raised most loudly in the call for toleration have displayed the most pitiable lack of it themselves, shouting down those who disagree with them, and dealing violently with their supporters or listeners. The problem here is not simply that this is itself intolerant; it is also that it makes it more difficult to entrench the norm of toleration in public life. For toleration to work, people have to accept that what is tolerated is not simply those things they find bearable but those things they find insufferable. If this principle is not accepted, toleration loses any point: we do not need a principle of toleration to tell us to accept things we like; we only need one to tell us to put up with things we don’t. Just as the intolerance of sects in the sixteenth century made it difficult to introduce norms of toleration because they too often made their existence an issue of public order, so do groups today betray the cause of toleration by calling attention to themselves for disorder caused by their intolerant conduct.

Yet the intolerant conduct of some groups is only one way—though a dramatic one—in which the working of groups in contemporary politics operates to hinder the cause of toleration. A more general problem may be simply the fact that groups—and here I mean ethnic groups in particular—operate as highly visible actors in the political process. This has quickly generated a perception in the community that public funds or resources more generally are being distributed on the basis of ethnicity. Apart from the fact that the use of public funding to court the so-called ‘ethnic vote’ runs the risk of spawning what Professor

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<sup>12</sup> See *The Devil’s Dictionary*, New York, Peter Pauper Press, 1958.

Jerzy Zubrzycki has called ‘entrenched low-level corruption in the political system’<sup>13</sup>, the problem is that such a practice does nothing to incline other Australians to regard members of ethnic communities with tolerance, leave aside affection. It is hard to look tolerantly, let alone fondly, on people you think are on the take. This is *not* intended as an indictment of ethnic elites, who have simply responded rationally to the incentives for rent-seeking offered to them. It is rather a criticism of the mainstream politicians who, for their own benefit, have designed these incentives. What makes this all the more frustrating is not only that there is no ethnic vote (since political loyalties in ethnic communities are divided just as they are in the rest of the community), but that the great majority of ethnics have no part in this process. They are pictured as members of political groups—sects—when they are really nothing other than private citizens who hail from different backgrounds and (sometimes) live by different traditions.

If this is so, then one of the obstacles to toleration is that aspect of contemporary multicultural policy which tends to entrench ethnic groups in political life. While some of what happens under that policy, such as helping children learn foreign languages, is commendable, other things, such as the funding of ethnic dance troupes and ethnic poetry are simply nonsensical; and indeed, some aspects of policy, such as the funding of ethnic councils are probably pernicious inasmuch as it operates simultaneously to inflate the status of ethnic leaders and lower the estimation of ethnic people in the wider community.

Finally, we face a serious obstacle to toleration insofar as many of the advocates of toleration are quick to denounce all criticism of multiculturalism as anti-ethnic or racist, or at least motivated by bigotry or prejudice. This is most evident in the way in which assimilation has become a dirty word—something to be advocated at one’s peril. To be sure, in a free society no one should be forced to live according to traditions he finds alien—and there is surely plenty of space for us to go our own ways. Yet it is perhaps also worth noting that public policy which is hostile or indifferent to assimilation is no less problematic morally speaking. Ramesh Thakur made this point very well in arguing against the Canadian ideal of the ‘mosaic’ as compared with the American idea of society as a melting pot. Ultimately, he argued, the former demeans those immigrants who want to become members of society and not live out their days as ‘expatriates’. ‘By being officially hostile to assimilation, Canada forces newcomers to be expatriates rather than immigrants. The mosaic becomes a subtle policy instrument in the hands of ‘true blood’ Canadians for maintaining their distance from the new pretenders.’<sup>14</sup> I do not think assimilation is the best policy. But we should be slower to denounce those who think it is.

Moving toward a more tolerant society, if all this is true, would be accomplished sooner if we could find a way of getting rid of the categories of race and ethnicity from our legal and political practices. They are irrelevant, misleading, and dangerous. To date, none of the political parties have shown any inclination to do this. (One Nation has said that it wants to do this; but in my view it is being entirely disingenuous, because it keeps talking in the

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<sup>13</sup> Quoted in the *Canberra Times*, 30 June 1998, p. 2: ‘Time to end ‘ethnic group grants’.’

<sup>14</sup> ‘From the mosaic to the melting pot: cross-national reflections on multiculturalism’, in C. Kukathas (ed.), *Multicultural Citizens: the Philosophy and Politics of Identity*, Sydney: Centre for Independent Studies, 1993, pp. 105–41, at p. 131.

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language of exclusion, and Australian national identity.) The challenge lies there for the taking.

Yet if toleration is so hard, it might be objected, maybe this should give us pause. Maybe toleration is either not all it's been cracked up to be; or is simply not feasible. Perhaps the conclusion to be drawn from all this should be another lesson altogether: that different people simply cannot coexist and we should not try to make them do so; or that it is impossible unless we commit ourselves to sharing some more substantial common values. Perhaps toleration simply isn't enough because it suggests a lethargic acceptance of bad conditions? Let me conclude with some brief reflections on these objections.

To the suggestion that different people cannot coexist I would say simply that history tells a different story. There are plenty of cases of peaceful coexistence of peoples of different traditions, just as there are distressingly many cases of people persecuting their own kind. Some, like Voltaire and Lord Acton, have argued that the prospects for freedom and peace are better when there is diversity. Voltaire put the matter with his customary bluntness when he observed: 'if you have two religions in your midst they will cut each other's throats; if you have thirty, they will live in peace.'<sup>15</sup>

Another thing that needs to be emphasised is that it is in no way true that tolerance demands no more than a willingness to suffer, and to put up with wickedness, or injustice, or incompetence. It is perfectly consistent with a critical spirit. Tolerance demands that we put up with difference and diversity, not criminality or irresponsibility.

To the suggestion that what is needed is a commitment to some substantial values, however, I would say that this is asking too much. To ask people to share a core of significant beliefs and commitments you need either a small group of people, or very weak and undemanding commitments. The larger the society, the greater the tendency for beliefs to fragment. We simply tend to see the world differently. For this reason no religion has succeeded in expanding without diversifying its tenets. One of the easiest commitments to make, difficult though it is, as I have been insisting, is the commitment to toleration. And this, surely, is as plausible a basis for a workable social unity as any one might imagine or invent?

For those who would still doubt this, I leave with you the words of Confucius. When Zizhang asked Confucius about humanity, the Master said:

Whoever would spread the five practices everywhere in the world would implement humanity. And what are these? Courtesy, good faith, diligence, generosity, and tolerance. Courtesy wards off insults; good faith inspires the trust of others; diligence ensures success; generosity confers authority upon others; tolerance wins all hearts.<sup>16</sup>



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<sup>15</sup> 'Toleration', op. cit., p. 390.

<sup>16</sup> *The Analects of Confucius*, Translation and Notes by Simon Leys, New York, Norton, 1997, ch. 17.6, p. 86 (with apologies for a small amendment).

**Question** — The thing that bothers me is that One Nation has aroused much protest in the community. But then we have the situation where at their meetings, we have this violence and animosity and I think in our ideal tolerant society, it is fine to go along and protest, to stand out the front with a sign or whatever, but when you see these people being extremely violent against One Nation's beliefs or meetings, it makes me wonder whether we will ever achieve a tolerant society.

**Professor Kukathas** — I agree with you entirely and I think in the end it is in itself an obstacle to toleration. I also agree with you that in a free society, people should be free to protest about these things. They should be able to stand there with placards and voice their disapproval, in fact I think it is necessary because toleration should not mean that you simply let things you disagree with or think wrong, simply pass by. On the other hand I do not think it means you are entitled to prevent people from themselves doing precisely that. They might find you equally insufferable.

**Question** — For instance, I might go to a One Nation meeting and come out entirely disagreeing with everything that I have heard, but it seems to be the popular assumption that if you are walking through that door, you are going to agree entirely with what you are going to hear inside.

**Professor Kukathas** — Yes, I think that is the case. I think there have been some unfortunate incidents in which people who went along to listen out of curiosity, and in fact out of disagreement, were themselves beaten up. So I agree with you. I think that is a bad thing and I think it should be criticised.

**Question** — May I make one point and ask one question. I was interested in what you said about assimilation. Because these words are so flexible and can be used in so many different ways, you have got to look at it in the context of our history. Assimilation to me means the forcible taking of Aboriginal people, to force them into a society which we thought was best for them. In fact, I was reading a speech by Kim Beazley Senior in 1961 when he said that to him, even though he abhorred apartheid, apartheid was a more moral philosophy than assimilation, because at least apartheid gave people the right to their own culture, whereas assimilation did not. And I think I react against the word assimilation because of the history we are coming from and that is what we have to overcome.

I wanted to ask you about another topic. How do we move towards a more tolerant society? You have mentioned the intolerance of religion, or religion being a force for dividing people and forcing people into other aspects. I read a book recently called *Religion, the Missing Aspect of States Craft*, in which a number of historians argued about the different religious groups which have helped to overcome hostility, for instance between France and Germany after the Second World War, and in the Philippines and so on. Do you see religion as a force for helping us towards a more tolerant society, or against it?

**Professor Kukathas** — Can I first comment on your comment and then try to answer the question? I agree, assimilation is a word that really carries a lot of baggage with it because it is not only a word that describes a particular practice and an idea, but also describes a policy which has a very long history. But I think there is another aspect of the history that we also

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need to bear in mind in the Aboriginal case, and that is not just the story of the forcible assimilation of the stolen generations, but also the history, to some extent, of say, Aborigines in the 1930s, many of whom argued that what they were prevented from doing was assimilating. What they thought was unjust about much of government policy, was the fact that it denied them the right to become a part of the Australian mainstream. So, I think in a way, what we need to do is to strike that balance which allows those who want to assimilate, to do so, so that there are no obstacles in their way. But also recognise that there are others who simply want to live in different ways, who want to hang on to valued traditions. I think the history of policy in this regard shows how difficult this is to do because what has tended to happen is that policy fluctuates from one extreme to the other. It is difficult to strike that balance, and this is one of the points I tried to make in the lecture, about assimilation.

But on the question of whether religion can help, I think the answer here is going to be more ambivalent and the reason for it is this. On the one hand there is much in religion which in fact is conducive to toleration because much of religion preaches a type of toleration. Certainly Christianity does. This is not to say that the church always has, but Christianity certainly does, and Islam certainly does; it has very strong traditions of toleration which are described in great detail. But the problem with religion is that because religion has the capacity to gather such large numbers of people together as a group, as a community, as a force, the temptation is always for political people, the political elite, to try to latch on to this and use it for their own purposes. That is the first problem with it.

The second problem is that when religious leaders find themselves in charge of a large mass of people, the temptation is for them to use that power to move into politics. This is where I think the problem comes, that toleration and powerful states and powerful nations do not always mix. So, the role of religion is always going to be a mixed one and those within particular religious traditions should work towards toleration, but on the other hand, I think we should not get our hopes up.

**Question** — This is probably the most objective lecture I have ever heard on the subject, but there was one aspect about which I would like to ask a question, and that concerns the nation state. It is perfectly true that there is a certain amount of coercion in the history of the creation of the nation state, and what, in fact, you were talking in favour of, and it is a beautiful ideal, is perfect individualism. However, as far as I can see from history, the only groupings of human beings where you have evolution of toleration, though not perfect toleration, is in a nation state, otherwise what you seem to get is groups, tribes, fighting one another. Now, if you want to define this nation state, you have common laws and perhaps certain over-arching values, and of course it is very hard to say which of these values should be accepted by everybody. Perhaps you would like to try to define them. Would you agree to a common legal system, or do you think that certain groups, for instance Aborigines, should have their own? Do you think that, for certain groups, un-elected individuals can stand up and speak for them, because they have never had experience of elections? I just think that the nation state is the only unit, however bad its history may be, that has even allowed us to talk about the concept of toleration.

**Professor Kukathas** — As I understand it, your point is that I have been too critical of a nation state because without the nation state, in effect, we will not be able to have toleration because there are certain pre-requisites to toleration that we need, such as a common legal system, and a system in which people can be represented, and without these things we cannot



really look for something like toleration. I am going to disagree with you on quite a few things here. First, it seems to me that the nation state is not only a relatively recent invention, but it is also the case that before the existence of the nation state, people were, in fact, able to and capable of co-existing in peaceful ways, in all kinds of social formations. The nation state is something that we would trace back to something like the sixteenth century, but prior to that there were certainly organisations of people, various kinds of political units in a whole range of different societies; whether we look at medieval Spain with its system of co-existing Jews and Muslims and Christians, or ancient Greece, there are certainly all kinds of political units in which co-existence is possible.

Your point that the nation state is needed for things like a common legal system is also not quite true. In fact, the legal system that we operate under now is one which transcends the nation state, which predates any existing nation state. It is a legal system which crosses state boundaries in as much as we are talking about the common law. But even if we are talking about legislation, what we find, in fact, is that in every nation state we can think of, what we have is many different jurisdictions. We have states, we have local governments, we have provinces. There are all kinds of jurisdictions, so it is not as if you need a single, common system that is peculiar to a nation state in order for a legal system to exist.

All of that said, I do not want to suggest that we should get rid of the nation state or that it serves no useful function, or that it is at all possible for us not to have a nation state. My purpose in this lecture is not to suggest that we get rid of the nation state, but rather that we need to be wary of the kinds of powers it can naturally acquire. Because it is, as a modern institution, one which has amassed so much power over the years, what our traditions have consistently tried to do over the last several hundred years in what we call liberal political societies, is to find ways of constraining the nation state, find ways of putting obstacles to the operation of government, and I am very pleased to make this point, particularly because I am here as the guest of the Senate, which is one of the most important institutions, I think, for making sure that the nation state is properly checked, because power is not going to reside in any one place. It is going to be deflected, divided, not only institutionally within parliamentary systems, but by the fact that it is divided amongst different states, different regions, different entities of all sorts. So I take some of your points but I also am going to disagree with a number of them.

**Question** — Listening to your remarks today, I was reminded of another piece of political rhetoric, namely that which, not that long ago, suggested that we should move towards a republican form of political system on the basis that the head of state should be one of us. I was wondering whether you would like to offer some comments on that, in the light of the broad themes you have addressed today?

**Professor Kukathas** — This is something of a Dorothy Dixier because Bill knows very well that I am a monarchist. Essentially, being a very open and tolerant kind of guy, I think of so many people as one of us, so I am more that happy for Queen Elizabeth to be counted as one of us. More seriously, I think the point is that one should be wary of those people who want to say we should look up to people or we should admire people or we should call on people because they are in some way, one of us. Why is the fact that someone is one of us something that is going to count for a great deal? I can see how it might count for something in personal relations. I give my son pocket money—very seldom, but I do—because he is a part of me, a part of my family, but why should we consider this a significant qualification if we are

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looking for someone to fill a public office? It has never seemed to me to be anything very compelling.

**Question** — In your talk you have said that tolerance, basically, is a word that needs to be defined, to have some meaning, and you have defined it as acceptance of diversity; and in the same way words like identity and unity must be defined before they can have a meaning. So I think it is wrong to simply assume they are dirty words. I think where unity is defined in terms of homogeneity it is possibly a dirty word. But where our national identity is defined in terms of our tolerance of diversity, it is not a bad thing to have a national identity; in fact, I think the problem is that we do not have an identity at the national level defining ourselves in this way, in terms of our existence at the two levels of national unity and sub group diversity. At the moment, definitions of our national identity are in terms of homogeneity. But where we have a definition of ourselves in terms of diversity, that might provide some solution. I think that it is a mistake to think that we exist at one level or the other, we exist at both, at a shared level and at a level of diversity, the issue is they need to be compatible.

**Professor Kukathas** — I agree very much with what you are saying, and I did not mean to suggest that unity is a dirty word, or at least not a very dirty word, because in the end, what I wanted to suggest, and I think this is what I was coming to at the end of the lecture, is that if we do have to have a kind of unity then toleration is really a pretty good basis for describing our unity. The kind that we should be more troubled by is that kind that wants to describe our unity by suggesting how we are in fact homogeneous in some ways. I do not want to overstate this because I think to be fair to those who talk about unity, most of those people would in fact recognise the very obvious points that we are different in various ways. So again, my concern was, in a sense, to bend the stick back a bit to make it straighter. To try to say, well, we should not get carried away with this because it is so easy then, when you talk about unity, to fall into the language of exclusion, because once you start talking about us, and what we are, the natural corollary of this is to identify others who are not, and this is where the danger comes. So, to talk about unity in terms of toleration, toleration as being the tradition that we share and unites us, is entirely acceptable.

**Question** — I feel that today we have heard a lecture that has made an important contribution to this debate that troubles Australians. But it has been inward looking. It has looked at the polity of the people of Australia, and suggested that tolerance is one of the values, the virtues that we should be adopting. But, I would like to hear your views on how we should react, when others, to wit, One Nation, are reflecting something to peoples outside Australia which we find repugnant, repulsive all those sorts of words. To me, that is one of the most important aspects of what is going on, in that as a nation we thought that we had put all this, or much of what One Nation is saying, behind us, instead of which we find it is alive and well and in fact is being projected outward in a way that is actually dangerous to Australia as an entity, seen in the eyes of others, particularly Asia and so on.

**Professor Kukathas** — I suppose in general I am much less bothered by that, I think for a couple of reasons. One is that I think we should not be preoccupied with how others see us but we should spend our attention trying to work out how we should be ourselves, that is to say, concentrate on doing the right thing, not on whether others think you are doing the right thing. Now, that is not to say that the rest can take care of itself, but I think in the end, you do the wrong thing by trying to manipulate others' perceptions rather than to concentrate on doing the right thing.

The other thing is that I think, to some extent, other societies have to accept that this is not what we are, and if they think that just because one group expresses a particular opinion, if they happen to think that this means that that group speaks for everyone, they are simply mistaken. I think we should tell them, but I do not think we should change anything because one of things that is important about our society is that it allows those people to say what they think. If they do end up giving the wrong impression, that this is what everyone thinks, well we should tell other people overseas that this is not what everyone thinks. This is what some people think, and our tradition allows people to do precisely that, and we are not ashamed of this tradition, and people overseas have to accept it. Now, if you say this is going to have an effect on things like the number of students coming to Australia, and on trade, I think that is probably all true. I think that is probably one of the costs you accept when you are a free society. It may mean that there are these consequences. But the response, I think, should still be simply to state straightforwardly what it is that you believe, why you accept the freedom of these other people to say things you do not like, and why you think others should accept this tradition for what it is, and not rush to judgement. I do not think there is anything else we really can do sensibly.

**Question** — Pity that was not done somewhat earlier by our leadership.

**Professor Kukathas** — Well, I will not be a bad guest and comment on that.

**Question** — Could I first congratulate you on what I think was an excellent talk, raising some very important issues. But I just want to press a point, that actually my wife raised, and it really concerns the limit of the nation state. Now it struck me that the points you were making referred essentially to a peaceful society. A society that was not subjected to stress, either in the economic or military sense. The problem arises though, that that sort of society, which I think we all want, is likely to fissure, or at least come under stress when it is liable to attack from outside. In other words in a state of war. Given that these unfortunate occasions have happened in the past and may well happen again, where does one put the coercive limits of the nation state, the coercive limits of the legal system for instance, as opposed to toleration?

**Professor Kukathas** — I can see the point that you are making, and that is, that in a way, an excess of tolerance may leave us more vulnerable. I have often debated this question with friends and colleagues and my answer to this problem has always been much the same, which is to say, I think that is one of the risks you take in being a free society. One of the costs of being a free society, if you can call it a cost, is that it makes it easier for those who want to undermine it. The alternative, or one possible solution to this, is to have much tougher laws, regulation, police powers, state powers, to try to suppress this, to make sure that we are never endangered by dissidents, by terrorists and so on. But of course, this runs the risk of turning the society into precisely the kind of thing that you want to protect it from, from these underminers. So what do you do? Do you let it be undermined by those who take this course, or do you, in effect, undermine it yourself? My attitude is always that free societies have to take the risk. That is why free societies are always much more at risk when it comes to acts of terrorism, for example, because they are open societies. People can move about freely. People can come in and out. Should we accept this? I think in the end, yes. Is this a danger? I think the answer is also yes. Living freely, to some extent, means living dangerously.

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**Question** — In Germany, fifty years ago, a political party emerged which identified a group within that community and blamed them for the economic and other ills that were perceived, and we know how that finished. In Australia, fifty years later, we have a political party which has emerged and has identified at least two groups which they feel are responsible for the social ills here. Do you believe that tolerance can prevent that sickness from spreading?

**Professor Kukathas** — I think very much so. And I think if you look at Nazi Germany, one of the things that is striking, is how much Hitler's stocks rose when he was imprisoned. First it gave him the opportunity to write *Mein Kampf*, and then he emerged out of it as a martyr. This is not to say nothing should have been done to stop him, and I think clearly, along the way, things ought to have been done both nationally and internationally. But, this is not to say that suppressing him would necessarily have done very much good either. In effect, what you need to do is combine norms of toleration with institutions which are able to stop genuine criminality, and that is what we should focus on and not take more lightly our institutions of toleration.



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## Republicanism, Politicians, and People's Conventions— Goulburn 1854 to Canberra 1998\*

*David Headon*

Perusing the pages of Australian social and political history, these last one hundred and fifty years, it is difficult to avoid the conclusion that Australians have always looked with either bemusement, apathy or the keen eye of disapproval at their political representatives—and politics in general. In the later 1840s Robert Lowe (eventually to be William Gladstone's Chancellor of the Exchequer, and after that Viscount Sherbrooke) noted in the pages of his Sydney weekly journal, the *Atlas*, that New South Wales:

... is the colony that's under the Governor, that's under the Clerk, that's under the Lord, that's under the Commons, who are under the people, who know and care nothing about it.<sup>1</sup>

Political disinterest, Lowe claimed, plagued the citizenry in Britain and in the colonies.

The decades that followed self-government in the lead-up to federation, it seems, did little to alter popular prejudices. William Goodge, a prominent *Bulletin* poet at the turn of the century spoke for many in his poem entitled 'Australia's Wisdom'. He retained a healthy scepticism about the elected few:

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\* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 28 August 1998.

<sup>1</sup> From the *Atlas* (Sydney), quoted in *Australian Dictionary of Biography*, vol. 2, p. 135.

In other lands the wise men and the great,  
The greatest minds, are given to rule the State;  
Each seeks to make his own the ascendant star  
And genius leads them to the verge of war.  
But mild Australia, wiser in her ken,  
To trade and commerce gives her wisest men,  
While shiftless dolts and wealthy fools are sent  
To play at making laws in Parliament!<sup>2</sup>

And the politicians have fared little better, even by their own partisan assessment, in the second half of this century. The conservative *Sydney Morning Herald* in 1958 ran an article by Malcolm Muggeridge which provided a stringent, mid-term report card for the Menzies era when it noted that 'When they become politicians Australians are pretty odious—small-eyed men with quick glances and often a bottle of Scotch in the desk cupboard. They have practically no political ideas as they are extremely old-fashioned, an antique Whiggism which finds expression in Mr Menzies' relentless platitudes washing like breakers against the harsh, rocky shores of the mid-twentieth century ...'<sup>3</sup>

In the decades that followed, politicians themselves, regardless of party orientation, continually added to this severe critique of the fraying relationship between the people and their elected representatives. Jim Cameron noted rather acidly in 1971 that 'Australians appear to a man to regard their politicians as time-serving crooks or simple-minded hirelings; as a direct consequence of this many of them doubtless are.'<sup>4</sup> Robert James Lee Hawke, before he became Prime Minister, registered his opinion on the subject with uncharacteristic clarity. 'People', he suggested in the 1979 book *The Resolution of Conflict*, 'have become cynical about politics and this is unhealthy and dangerous for our body politic.'<sup>5</sup> It would be fair to say that, if anything, such cynicism has actually increased in the last twenty years. In part at least, the rise in support for the One Nation Party reflects this development.

With the sands of his prime-ministerial hour-glass almost through, Gough Whitlam during November 1975 repeated his faith in 'the Australian people themselves—in their commonsense, their intelligence, their decency, their instinctive sense of fair play'.<sup>6</sup> History records that Whitlam's sense of 'intelligence' and 'fair play' was not commensurate with that of the electorate. Not for the first time, before or since, had a politician completely misread the people. The perception of the politician radically differed from that of his constituent. How, then, to

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<sup>2</sup> William Goodge, 'Australia's Wisdom', quoted in Stephen Murray-Smith, ed., *The Dictionary of Australian Quotations*, Richmond, Vic., Heinemann, 1984, p. 95.

<sup>3</sup> *Sydney Morning Herald*, 24 May 1958.

<sup>4</sup> *Sunday Australian*, 27 February 1971.

<sup>5</sup> Robert J. Hawke, *The Resolution of Conflict*, Sydney, Australian Broadcasting Commission, 1979, p. 31.

<sup>6</sup> E.G. Whitlam, Australian Labor Party policy speech (November 1975), quoted in Murray-Smith, *Dictionary of Australian Quotations*, op. cit., p. 282.

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discuss meaningfully this gap, some would say a chasm? Michael Boddy and Bob Ellis wrote a musical play in 1974 called *The Legend of King O'Malley*. In his Introduction to the play, Donald Horne gets us some way towards answering my question. With characteristic bluntness he stated that:

Politicians cannot help being clowns. Political activity is essentially absurd. The hopes held for it can be high, the results tragic but the political act itself must lack dignity: it can never match our ideals of how such things should be done.<sup>7</sup>

Here, I believe, is the clue to my enquiry: Horne's suggestion that many 'ordinary' Australians, far be it from deferring to politicians, from creating heroes and heroines of their politicians, in fact believe that they could do a better job themselves. Not that they want the job; just that they could do it more successfully if they had it. How excruciating it is for us to watch our politicians on the campaign trail being mischievously followed by television cameras if they dare to enter a suburban or country pub. They know—we know—that they might just get ignored completely. I have vivid memory of a coiffured Andrew Peacock, on the campaign trail in 1983, walking into a Sydney wharfies' pub, desperately trying to establish conversations—one group to the next—with palpable and increasing panic. What do we make of this not atypical response of a lunchtime hotel crowd? And how is it relevant to my broad subject here?

The main issue, I am certain, is this gaping space between what the politicians do and what the people believe might ideally be achieved. Some politicians might be clowns, crooks or hirelings—but that is incidental. Predictable. No different here to anywhere else. But we believe that, given the right circumstances, we non-politicians could do it better than they can. If we needed any proof of the contemporary currency of this assumption, then we got it at the Australian Constitutional Convention held at Old Parliament House on 2–13 February 1998, when Victorian delegate and politician-turned-self-appointed-people's representative Phil Cleary, a high-profile participant over the two weeks, caught the mood of the Convention in his shrewdly populist way:

It's really not hard to understand why the pitched ideological battle fought in the chamber, in King's Hall, in every nook and cranny in the Old Parliament ... captured the imagination of the nation. In the cavernous Big House on the Hill where the party line rules, dissent just isn't tolerated. The truth is the real Parliament doesn't represent Australia—not our diversity, not our much vaunted larrikinism, nor our innate creativity. In the Old Chamber above the Aboriginal Embassy it was different. With the party line struggling to assert its dominance over the disparate collection of free-travellers who gathered there to discuss the republic, the dissenters had a chance to speak for another Australia, and speak they did. Pedantic scholars, dreamers, the young, old men and women who'd once been something, historians and thinkers traded ideas with such passion [that] a rollicking yarn was born.<sup>8</sup>

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<sup>7</sup> Donald Horne, Introduction to Michael Boddy and Robert Ellis, *The Legend of King O'Malley*, Sydney, Angus & Robertson, 1974, p. ix.

<sup>8</sup> *Australian*, 16 February 1998.



The truth is that this is one 'rollicking yarn' (of pollies, people and the coming republic) which was with us long before Phil Cleary—indeed, even before Robert Lowe, as an energetic thirty-something-year-old cast a yearning, pinkish eye on the ocean of Empire politics in London from his colonial billabong in the 1840s.

In this paper today, I will not have time to run the gamut of this whole historical yarn. Mark McKenna has done that superbly in his award-winning *The Captive Republic* (1996), a history of republicanism in Australia from 1788 to the present.<sup>9</sup> What I will do is to focus on four compelling moments in our social and political history when this divide between politicians and the people, replete with republican and/or federation overtones, was discussed and debated in earnest. I will start close to home—in Sydney and Goulburn in the 1850s—as a young Daniel Henry Deniehy articulated his vision of the coming republic and the role he might play in giving substance to that vision. With the utmost reluctance Deniehy entered politics in 1857, specifically because he felt those already in the New South Wales Legislative Assembly were performing so abysmally. He felt personally underdone, not yet up to assuming what he believed to be the awesome responsibility of an elected representative of the people. Deniehy heading to Sydney as the Member for Argyle in 1857? This was Mr Smith heading to Washington, a young man of the people determined to challenge the old hard-heads of the political establishment.

With Deniehy established as my prototypical dissenter and impractical dreamer, a reluctant people's representative and one of the first Australian-born to articulate publicly and powerfully the rolicking yarn of 'them' versus 'us', politicians versus the people, I will then discuss three so-called 'people's' conventions in Australian political life. At these gatherings, stretching over one hundred years, those issues raised with such cunning and humour by Deniehy in the mid-1850s re-emerged with heightened meaning: first, the Federal Conference in Corowa, held over two days, 31 July and 1 August 1893; second, the 'People's Federal Convention', as it was named, held in Bathurst over five days in November 1896; and, finally, the February 1998 Constitutional Convention, 'Con Con 1', claimed by some to have been, in fact if not in name, a 'people's convention'. This gathering was accurately described as a strikingly successful example of democracy in action. Certainly, it raised issues about participatory politics that had been canvassed in Goulburn, Corowa and Bathurst a century and more earlier. But did Con Con 1 enhance the prospects of a meaningful republic in 2001? Can those Australian voters, the 'people' if you like, who want to be actively involved in the process of 'republic creation', be meaningfully accommodated? In attempting to provide a few answers to these questions, I trust I will be able to bring to the discussion a better grasp of Australian social and political precedent than was immediately obvious from any of the self-proclaimed delegates of the people in Canberra last February. Goulburn, Corowa and Bathurst will be our compass points.

Dan Deniehy was born in Sydney in 1828, the son of Irish convict parents. He was thus categorised as a 'currency lad' or, as Deniehy would later put it, a true 'son of the soil'.<sup>10</sup> His

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<sup>9</sup> Mark McKenna, *The Captive Republic—A History of Republicanism in Australia 1788–1996*, Melbourne, Cambridge University Press, 1996.

<sup>10</sup> D.H. Deniehy, 'The Legend of Newtown', *Sentinel* (Sydney), 5 November 1845.

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father, transported from County Cork for seven years on a vagrancy charge, was routinely emancipated and made good in commerce. This gave his brilliant son the opportunity to receive a decent colonial education—and gave him a chance to travel, the family touring extensively through Europe in 1842–4. The Deniehy's decided to include a return to Ireland, doing so at a politically volatile time. Young Dan probably heard 'the Liberator', Daniel O'Connell, speak on at least one occasion. Deniehy's later writings indicate that this trip confirmed his sympathies for Ireland, the downtrodden Irish, and their affinity with native-born Australians. Deniehy would never waiver from this position as an outspoken opponent of privilege and of establishment politicians. He would forever oppose the culturally cringing 'geebungs', the colonial status quo.<sup>11</sup>

Deniehy was at his most politically active at precisely the time when the colony of New South Wales was undergoing a significant social and political transformation, during the years from the anti-transportation activism of 1849 up to the confirmation of self-government in November 1855. It was during this period that Deniehy, in his restless twenties, emerged so strikingly in the life of the colony that for decades after his death he would be fondly recalled as the brightest star in the Australian firmament. The pride of the native-born sons of the soil.

While he had written in 1845 a number of published poems and stories as a precociously confident sixteen-year-old ready to take on the world, and some trenchant reviews for Henry Parkes' *Empire* newspaper in 1851, it was two speeches given in the space of just three weeks in August/September 1853 that projected Deniehy into public prominence.<sup>12</sup> The speeches came at a time when William Charles Wentworth, arguably the most influential senior politician in New South Wales, was lobbying hard for the establishment of colonial hereditary titles for the Upper House, in effect an Australian House of Lords. The specifics of the New South Wales Constitution were being publicly debated and the native-born, fearing the prospect of being shut out from power, were furious. None took this issue more seriously than Deniehy, whose speeches (historian Ken Inglis has suggested) take their place amongst Australia's finest. In both addresses Deniehy gives passionate and, it must be said, manipulative voice to the people/politicians dichotomy, that curious divide which continues to affect the shape of our polity to this day.

The speeches are stunning examples of rhetorical, public-meeting strategy, but my concern here is strictly with what he said, not how he said it. In the first of the speeches, delivered at Sydney's Victoria Theatre to a capacity crowd, Deniehy begins by identifying himself as one of the crowd, a 'native of the colony', but one privileged to have the opportunity to speak out because nothing less than 'the political institutions of the country' were being undermined.<sup>13</sup> Such a process was already threatening 'the very dearest interests of the citizen'. To thunderous applause Deniehy

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<sup>11</sup> See, for example, David Headon, 'God's aristocracy: Daniel Henry Deniehy's vision of a Great Australian Republic', *Australian Journal of Political Science*, vol. 28, pp. 136–45 (Special Issue: *Australia's Republican Question*); David Headon, 'Sons of Morning: Daniel Henry Deniehy's trustees of the coming republic', in Headon, et al, eds, *Crown or Country—the Traditions of Australian Republicanism*, Sydney, Allen & Unwin, 1994.

<sup>12</sup> See *Sydney Morning Herald*, 16 August 1853 (reproduced in David Headon and Elizabeth Perkins, eds., *Our First Republicans*, Leichhardt, NSW, The Federation Press, 1998, pp. 127–30; *Sydney Morning Herald*, 6 September 1853.

<sup>13</sup> Citations from the 'Bunyip Aristocracy' speech in *Our First Republicans*, *ibid.*, pp. 127–30.

compared the group for whom he was determined to speak, the anonymous citizenry, with that group he categorised as the 'patrician element'—the Wentworths, Macarthurs, Murrays and Nichols—'political oligarches', fumed Deniehy, men who treat 'the people at large as if they were cattle to be bought and sold in the market ... .' Deniehy proceeded to configure imaginatively each one of these men for the crowd, concluding with his memorable phrase that theirs constituted not a genteel nobility at all, but 'a bunyip aristocracy'. What Deniehy sought, by contrast, was:

... a land, where man is rewarded for his labour ... there is an aristocracy worthy of our ambition. Wherever man's skill is eminent, wherever glorious manhood asserts its elevation, there is an aristocracy that confers honour on the land that possesses it. That is God's aristocracy.

Here, then, was the choice for mid-century colonial Australian society, put for the first time with clarity as two mutually exclusive options: the future colony posited either as a society of patricians, with Wentworth's 'clique' dominating, or as a real democracy, with office-bearers drawn from the people, chosen on merit. Politicians, or true representatives of the people? Either the aristocracy of 'William the Bastard', or, Deniehy asserted, that of 'Jack the Strapper'. The chaotic scenes at the end of the speech (according to the *Sydney Morning Herald*, the 'Vehement and prolonged applause') confirmed for Deniehy where the sympathies of his audience lay.

Deniehy was no less successful in his next foray into public life when, shortly after his Victoria Theatre appearance, he addressed a crowd at Circular Quay variously estimated at between ten and twelve thousand people. The young son of Erin and Australia had become an instant cult figure. He merely re-worked the same material, this time categorising his audience and himself with a sort of Les Murray or perhaps Tim Flannery flourish, as 'the movement out of doors', the out-door, honest citizenry—men whose labours starkly contrasted the 'fallacies, sophistries, and speculative disquisitions' of Wentworth and co.<sup>14</sup> Those politicians he dismissed as 'Macquarie Street legislators', the 'Dukes in blossom and the Marquises in bud'. Emboldened to really chance his arm, Deniehy ultimately depicted Wentworth out at Vaucluse House as an ageing, debauched figure, a man 'wallowing in soup and pig, and claret'. Wentworth the politician, and his sycophantic political allies, were not the representatives of honest men at all, but rather of 'bullocks, buniyps, sheep and gum trees'.

These two speeches of Deniehy's were so dramatic, so carefully focused to appeal to a popular audience already deeply distressed that decisions were being made into which they had no input, that when the Rev. John Dunmore Lang sought to broaden his base of republican sympathisers in early 1854 by establishing the Australian League, Deniehy was chosen as the main speaker. Addressing the League in mid-March 1854 on the subject of 'Political Independence for the Australian Colonies', he raised the spectre of the American revolutionary example, he aimed the now obligatory criticism at the bunyip aristocracy of the colony, and then he began to outline for his audience his vision of a government, a 'really responsible' government, which would provide for its people. It would be one:

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<sup>14</sup> *Sydney Morning Herald*, 6 September 1853.

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... entirely identified with the place and the people—the growth of a national character—the full development of the country’s physical resources—the necessity that would ensure of making the best of everything around us and so converting the country really into a home, and also allowing our laws and institutions to expand freely into forms fitted for the character and social conditions of the people.<sup>15</sup>

Deniehy envisaged nothing less than government of, by and for the people. In the years that followed, easily the most productive of his professional life, he methodically constructed in writing his blueprint for a model democracy. The town of Goulburn thus appears on our canvass.

Within two months of giving the Sydney speeches, Deniehy had moved lock, stock and barrel to the thriving southern town of Goulburn, intent on establishing a law practice which would make money. He was ultimately unsuccessful in this over the next few years (1854–7), mainly because he was writing so prolifically. While some of his speeches and occasional writings were published in the *Sydney Morning Herald*, the *Empire* and the radical *People’s Advocate*, the vast majority of his output appeared only once, in the pages of the *Goulburn Herald*. It was a period in which, by his own admission in a letter to a friend, Deniehy enjoyed a ‘regular Reign of Terror’ over the editorial pages of the newspaper.<sup>16</sup>

Some fifty-plus articles were published in a little over two years, most of them addressing his model republic, commencing with a long editorial entitled ‘Our Country’s Opportunity’, which was published on 10 June 1854.<sup>17</sup> Wentworth’s ‘dishonest statesmen’, his squattocratic allies, are again mentioned and summarily dismissed, as well as the system of patronage and nomineeism which maintains them, but Deniehy spends the bulk of his time outlining the rights and responsibilities of those men whom he believed were poised to supplant them: the ‘honest and zealous patriots’ that he calls ‘trustees’ of the coming republic. It is a grand dream, yet in truth one where the more utopian the dream became, the more it departed from political practicalities. Realisation was impossible. Elected in February 1857, Deniehy was a member of the Legislative Assembly for about three years. The longer he stayed on, the more disenchanted he became with the pragmatism and opportunism of his colleagues. These men were no trustees, they were Parkes and Wentworth men with ‘too much’, as Deniehy once said of Parkes, ‘not of the English man *in* [them], [so much] as Englishmanism *about* them.’<sup>18</sup>

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<sup>15</sup> ‘Mr Deniehy’s lecture before the Australian League’, *People’s Advocate* (Sydney), 18 March 1854, republished in *Our First Republicans*, op. cit., p. 132.

<sup>16</sup> See letter to John Armstrong, 6 January 1856, MSS 869, Mitchell Library, Sydney.

<sup>17</sup> ‘Our Country’s Opportunity’, *Goulburn Herald*, 10 June 1854, republished in *Our First Republicans*, op. cit., pp. 140–4.

<sup>18</sup> See letter to J.D. Lang, Lang Papers, vol. 7, MS ML A 227, pp. 60–3, Mitchell Library, Sydney, and republished in *Our First Republicans*, *ibid.*, p. 138.

The rapid and desperately sad decline of Deniehy in public life I have detailed in other publications.<sup>19</sup> Until recently you could access virtually none of his original writings, except on microfilm at the National Library or in one of our state libraries. However, there is at last an edition of Deniehy's finest writings, along with the selected prose of his fellow republicans, John Dunmore Lang and the poet Charles Harpur, in a volume launched in late 1998 by the Leader of the Opposition, the Hon. Kim Beazley, and published by the Federation Press. It is called *Our First Republicans*, edited by Elizabeth Perkins and myself, and in it the idealistic, impractical visionary Deniehy speaks for himself in what deserves to be a key source book in Australian republican discussion. The people and their natural rights, are central.

That Deniehy's social and political stance continued to have relevance for the next generation, the Federation generation, appeared to be confirmed in 1888. In that centenary year, when the *Bulletin* revitalised and reclaimed Australia's convict past, Deniehy's bones were exhumed from their pauper's grave in Bathurst and, with belated fanfare, re-buried under a handsome obelisk in a prime location at Sydney's Waverly Cemetery. Henry Parkes, still energetic though aged, one year later delivered his Tenterfield oration, followed shortly after by the 1890 Australasian Federation Conference in Melbourne and the 1891 National Australasian Convention in Sydney. The latter produced the draft bill to constitute the Commonwealth of Australia. If these were positive signs of federation momentum, then what went wrong in the next few years? The complex set of reasons do not have to concern us here, only the result. A short time after the lawyer-dominated, politician-dominated 1891 Convention, Sir John Robertson declared federation 'as dead as Julius Caesar'.<sup>20</sup> While federation historians dismiss Robertson's extreme opinion, they do agree that little or nothing happened in the years following the Sydney Convention to progress the cause. A rescue operation began, and to this the towns of Corowa and Bathurst were pivotal.

Let me include my second plug. The Senate's journal, *Papers on Parliament*, published a special issue which gathers scholarly articles on both of these conferences: Corowa in 1893 and Bathurst in 1896.<sup>21</sup> I am not going to restate the basic facts about these gatherings, for that has been well covered in the *Papers on Parliament* issue. What I will do is discuss the opinions espoused and the strategies used by the delegates which added substance to the narrative of this country's people/politician divide.

For when politician and non-politician alike rubbed shoulders in Corowa and Bathurst, they were agreed on one thing: that when solely entrusted with progressing what many regarded as the high cause, even the sacred cause, of federation, the politicians had failed miserably. Reading the *Official Report of the Federation Conference Held in the Courthouse, Corowa, on Monday, 31st July and Tuesday, 1st August 1893*, one cannot help but be struck by the unanimous agreement

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<sup>19</sup> See footnote 11.

<sup>20</sup> See *Sydney Mail*, 25 April 1891.

<sup>21</sup> *Papers on Parliament*, No. 32, December 1998 (Special Issue: *The People's Conventions: Corowa (1893) and Bathurst (1896)*, David Headon and Jeff Brownrigg, eds.)

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on this point.<sup>22</sup> Here again, the perception that the ideals of those not in politics, the ‘people’ if you like, were simply not matched by those in power. Corowans, of course, and those in the Murray border towns, definitely had tariffs on their mind at the conference. Professor Stuart Macintyre has shown this to be the case.<sup>23</sup> He has also shown that politician Edmund Barton’s support for the Corowa Conference was not necessarily based on lofty motives, for Barton’s attempt to establish a central Sydney branch of the Federation League at the Town Hall a month earlier had disintegrated into scenes of pandemonium as John Norton and his rowdy republican mates disrupted proceedings and managed to pass a republican motion by a 2-1 majority.

But it is equally clear that the Corowan delegates were not only motivated by hip-pocket considerations; they genuinely sought to enhance the debate and to take the country along with them. The aim of the organisers, largely achieved, is plainly expressed by Edward Wilson, the Honorary Secretary to the Conference and a member of the Corowan Australasian Federation League, when he states in his Preface to the report:

Several statesmen from the ranks of those known to be favourable to the movement in both colonies were invited in order to make the demonstration as imposing as possible; but it was never intended that the gathering should be of a political character; and, in consequence, invitations were not issued indiscriminately.<sup>24</sup>

True to their aim, of the seventy-four delegates attending, only six were members of parliament. But just to provide a bit of on-site insurance, and to demonstrate the determination of organisers on this point, an agreement was confirmed at the outset that ‘the Conference should be conducted free of party or political influences ...’<sup>25</sup> The Conference President was given power to rule out of order ‘anything of a party nature ...’

Notwithstanding, two ‘political’ issues did emerge: Corowans clashed with their Albury neighbours over which town had the superior credentials as a likely capital for the coming Commonwealth; and two politicians, Edward O’Sullivan, a New South Wales MLA, and Victorian Socialist MLA Dr Maloney, sought to pass a motion advocating a republic based on one man one vote. Under pressure, motions on both topics were withdrawn since they were certain to divide the delegates.

There was no division, however, on the issue of the necessity of the ‘people’ being involved, or feeling involved, or being seen to be involved, if Federation was to succeed. On this point, politician and non-politician were unanimous. Corowan delegate C.T. Brewer put it bluntly: ‘... it was rather hopeless’, he said, ‘to expect much from the politicians of the present day in carrying

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<sup>22</sup> James C. Leslie, *Official Report of the Federation Conference, Proceedings and Debates*, Corowa, NSW, Free Press Office, 1893.

<sup>23</sup> See Stuart Macintyre, ‘Corowa and the voice of the people’, *Papers on Parliament*, no. 32, December 1998, pp. 1–12.

<sup>24</sup> Edward Wilson, Preface, in *Official Report (Corowa)*, op. cit., p. 4.

<sup>25</sup> *ibid.*, p. 9.

out what was required ... .'<sup>26</sup> These sentiments were reinforced by Sydney Australian Natives' Association (ANA) representative Edward Dowling and Melbourne ANA representative Herbert Barrett. As Barrett put it: 'Parliament ... was proverbially slow-going ... .'<sup>27</sup> Unless the people stepped forward, he said, federation was destined to 'be little more than a dream'. All the politicians present wholeheartedly agreed.

While history records that John Quick's intervention was the crucial moment for the Corowa Conference, as he proposed his 'Corowa Plan' based on the simple proposition that federation was 'essentially a question for the people to deal with', I find the most compelling contribution to be that from a Mulwala farmer named Robert McGeogh. He made two very brief contributions to the conference. The first of them begins unmistakably though unintentionally echoing Dan Deniehy, with the declaration that he, McGeogh, was 'no politician, but a simple son of the soil'.<sup>28</sup> While he admitted openly to his dislike of 'those cursed Border duties', he had principally come to Corowa because he was determined 'to do anything he could in order to advance the prospects of the country in which he lived ... ' Such testimony (along with McGeogh's diaries<sup>29</sup>) belies Stuart Macintyre's claim that Corowa was just concocted by organised lobby groups for political ends.<sup>30</sup> Indeed, when secretary Edward Wilson concluded the conference with the

observation that 'he saw before him so large a gathering of friends to Federation ...',<sup>31</sup> based on the official proceedings, I find it difficult to disagree with him. Despite the more complex political overtones, the group shared a common purpose: that of motivating their fellow colonists—the 'people', the 'citizens' as they were constantly invoked—to embrace the cause of federation. On their own, the politicians, as Mr Brewer said, had shown themselves to be rather hopeless.

Conscious of the success of the Corowan strategy, stage-managed or not, when William Astley (perhaps best-known for his convict short-story writing pseudonym 'Price Warung'), the organising secretary of the Bathurst Federal Convention in 1896, sought a compelling nomenclature for his event he strategically opted for the Bathurst '*People's Convention*'. Astley sought to broaden the appeal of federation by angling if possible even further away from the politicians, whom he distrusted, towards a grass-roots constituency. It was a tactic, Australian history was telling him, likely to succeed. And it was a tactic that, once again, the delegates—politician and non-politician alike—totally endorsed. In her book *To Constitute a Nation—A Cultural History of Australia's Constitution* (1997), Helen Irving observes that by the mid to

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<sup>26</sup> *ibid.*, p. 22.

<sup>27</sup> *ibid.*, p. 26.

<sup>28</sup> *ibid.*, p. 25.

<sup>29</sup> Tessa Milne, 'Farmer McGeogh's Diaries'. This paper is included in *Makers of Miracles—the Cast of the Federation Story*, to be published by Melbourne University Press in Spring 1999.

<sup>30</sup> See Macintyre, 'Corowa and the voice of the people', *Papers on Parliament*, *op. cit.*, pp. 11–12.

<sup>31</sup> *Official Report* (Corowa), *op. cit.*, p. 31.

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later 1890s ‘the people had become the legitimating force behind Federation.’<sup>32</sup> She is absolutely right. The official *Proceedings of the People’s Federal Convention, Bathurst* substantiate the claim. As William Lyne, leader of the New South Wales Opposition expressed it in his Bathurst speech, Bathurst was doing ‘similar work’ to Corowa, ‘only in a larger degree’<sup>33</sup>: the motto was simultaneously inclusive and directed at the triumphal (‘By our Union we are made equal to our destiny’<sup>34</sup>); the politicians all supported Barton, who declared that the most ‘noticeable feature of the Convention’s debates’ was that ‘no spirit of political partisanship was shown’<sup>35</sup>; and the Bathurst Convention president, the indefatigable Thomas Machattie, taking his cue from Corowa, proclaimed that he and his co-workers ‘distinctly let the delegates understand that they came here as people and people only.’<sup>36</sup> Machattie certainly did, tirelessly stressing this point in both his inaugural and closing addresses. The Bathurst organisers, he trumpeted proudly, wanted:

... a People’s Convention divested of all political or party significance; in fact, the spontaneous effort of a people crying aloud for more light, knowing no party, favouring no sect, having for its goal the attainment of an organisation of unity and coherence ...<sup>37</sup>

Daniel Deniehy’s address to the Australian League, forty years earlier, consciously invoked the people, their immediate and future aspirations, in precisely the same way. Indeed, the artfully modulated rhetoric of Machattie not only recalls Deniehy, it pre-figures one Phil Cleary and his rollicking yarn. Let us shift to Canberra.

In studying the two-week catalogue of activity at the first federal Constitutional Convention this century, held in Canberra early last year, the echoes of the past are manifest. Many of the questions asked at the Convention replicated the Bathurst experience. Would it capture the popular imagination? Were the delegates representative of the community? Could the professional politicians resist the grandstanding and the politicking? Would the results justify the money and effort by furthering the debate for which they were brought together in the first place?

Let me make a few observations which might help to address these questions.<sup>38</sup> First, despite the reservations of the Democrats and Labor Party, along with many political pundits around the

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<sup>32</sup> Helen Irving, *To Constitute a Nation—a Cultural History of Australia’s Constitution*, Melbourne, Cambridge University Press, 1997, p. 152.

<sup>33</sup> See *Proceedings, People’s Federal Convention, Bathurst, November, 1896*, Sydney, Gordon & Gotch, 1897, p. 94.

<sup>34</sup> *ibid.*, p. 20.

<sup>35</sup> *ibid.*, p. 97.

<sup>36</sup> *ibid.*, p. 41.

<sup>37</sup> *ibid.*, p. 78.



country, once the Constitutional Convention legislation passed, the enthusiasm generated was palpable almost immediately. The media began seriously to analyse the terms of the legislation and, when announced, the Prime Minister's seventy-six appointees. As *The Canberra Times* (7 September 1997) put it: '... if they represent a cross-section of the community, it is a community sadly unrecognisable to many Australians.' Non-parliamentary appointees included the usual suspects such as Geoffrey Blainey, Digger James, Leonie Kramer, Donald McGauchie, Roma Mitchell, Arvi Parbo, David Smith and Lloyd Waddy—mostly unelectables deemed by the Prime Minister to be suitably brahmin, or anti-republic, or both. *The Canberra Times'* Robert Macklin, a former press secretary to Sir John McEwan, was not impressed. He entitled his article on the subject 'PM stacks the convention deck' (*The Canberra Times*, 2 September 1997). Many keen observers agreed.

By contrast, the election for the other seventy-six, the people's representatives, the community seventy-six, was rich with theatre. The New South Wales slate of candidates provided an abundance, including Godfrey Bigot's 'Traditional Family Values Party'; candidates proclaiming themselves the 'Voice of the Ordinary People'; 'Republicans for a Helluvalot More Democracy'; the 'Bush Telegraph Republican'; the 'Dinkum-Boss Cobbers'; the 'Bob Fung for People Movement' (touting but one candidate, not surprisingly Mr Fung himself); and Marlene Byrne, 'Australia's Holiday Coast Northern NSW Republican'. None was successful but they all stood, with pride, expectation and presumably the odd tongue-in-cheek.

In the ACT, electors were faced with far less choice, though the contest was vigorous indeed. Ultimately, two Australian Republican Movement (ARM) candidates were elected: a young woman, Anne Witheford, and an older man, Frank Cassidy. Alan Fitzgerald and Malcolm Mackerras both stood as constitutional monarchists, unsuccessfully. Malcolm did not take it like a man. Partly attributing his failure to his gender, age and 'Britishness' (certainly not any lack of discernible talent), he could not contain his disappointment. Rather than blame the electors, whose voting patterns have always been something of a mystery to him, he critiqued Ms Witheford's credentials with undisguised acerbity, noting that she was a 'young woman' and of 'Asian look' (*Australian*, 19 December 1997). I suspect we have seen the last of Malcolm's fleeting career as a political candidate.

With the jostling of the preliminaries over, the main event began, and what a show it was! The ABC covered 'Con Con' with dedication and discernment, quickly realising that it had a ratings winner on its hands; Australians tuned in, many riveted by the mix of personalities and backgrounds and the live theatre; commercial television stations and newspapers right around the country picked up the scent and ran with it within a day or two of commencement; crowds flocked to Canberra to see for themselves, the unprecedented numbers catching the Old Parliament House security people, used to the torpor and neglect of recent years, completely off-guard. Many people queued in King's Hall again and again, on the same day, day after day, seemingly intoxicated by the atmosphere, the living history, despite the fact that each viewing

<sup>38</sup> Sections of what follows can be found in my paper specifically on the February 1998 Constitution Convention in Canberra. See David Headon, 'The 1998 Constitutional Convention; people, politicians and poor old Malcolm', *Current Affairs Bulletin*, vol. 75, No. 1, June/July 1998, pp. 24–30.

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was a bare fifteen minutes in the gallery. If this was not a convention of the people, it was giving a darned good impression. Each day had something new to offer the citizenry.

Monday 2 February was in effect a 'getting to know you' routine for the delegates, accompanied by the opening addresses of the Prime Minister, the Leader of the Opposition and other key individuals including ARM Director and merchant banker Malcolm Turnbull. Initial expectations of Con Con ranged from editorial writers counselling caution to Kim Beazley, with his stated aim of an Australian republic in time for the Sydney Olympics in 2000. The heavyweight speeches—of Howard, Beazley and Turnbull—unanimously favoured a Parliament-elected president. Far more important on day one, however, was what was happening off the ball.

Glenn Milne noted ominously in *The Australian* (2 February 1997) that John Howard's 'accelerating shift towards recognising the inevitability of an Australian republic had coincided with a critical series of private conversations' with Malcolm Turnbull. The suggestion of deals being done by the perceived key players, the professional politicians or their clones, backroom deals brokered entirely independent of rank-and-file delegates, was shaping as Con Con's most controversial issue. The historic divide was widening once again. The politicians saying 'trust us'. The others saying 'no way', we can do it better, our aspirations are set higher. Our ideals have not been compromised by public life.

On the first Tuesday and Wednesday, the monarchists' contribution to proceedings was confirmed as a slight one. *The Australian's* editorial heading on Tuesday—'Monarchists on the road to irrelevance'—seemed to be confirmed the next day when perceived 'loyalists', Peter Costello and Tony Abbott, declared for a republic. Clearly, the main game developing was that between competing republicans: those delegates (the ARM and a few independents) wanting the minimalist, parliament-elected, president option, and those delegates whom Gareth Evans prematurely dismissed as nothing more than a 'rag-tag' bunch. Journalists christened them variously 'the fringe-dwellers', 'the bomb-throwers', or simply the 'radical republicans'. Assuming to speak for the people, this alliance, ultimately terming itself the 'Direct Presidential Election Group', included Clem Jones, Ipswich councillor Paul Tully, Pat O'Shane, and academics Moira Rayner and Paddy O'Brien. State Labor leaders and Northern Territory Chief Minister Shane Stone joined their ranks to comprise a formidable team. It launched a stinging and persistent attack on brahmin Turnbull.

By mid-first week, one journalist suggested the republican mood was one of 'sinking despair'. Paul Kelly, in his Wednesday morning *Australian* column, summed up the dilemma in his header: 'Will people power lose as realists and dreamers collide?' The direct-election republicans were growing in confidence and resolve as they characterised themselves, with increasing frequency, as the 'people's' republicans, for the 'people's' republic. The ARM's plan, built up over years of national campaigning, was beginning to unravel. Some blamed Malcolm Turnbull's ego, others the minimal nature of its minimalist model. Enter the consummate politician, deal-maker, number-cruncher and ego-soother, 'nifty' Neville Wran. In a stirring address on Wednesday of the first week, he implored all the Con Con republicans to 'seize the day'. When questioned by 'rag-tag' University of Western Australia political scientist Paddy O'Brien about his 'battler' credentials, Wran was ready to pounce: 'I come from the shit heap. Just because I wear a nice suit now and have a good-looking missus and live in Woollahra, doesn't mean I'm an

elitist.’<sup>39</sup> At the end of week one, with Clem Jones calling Malcolm Turnbull not the ‘father of the republic’ but the ‘mother of destruction’, and the ARM scrambling to replace Malcolm’s visage on television with that of Mary Delahunty and Janet Holmes à Court, the Convention’s contending republican camps had reached a potentially damaging impasse.

By mid-second week, though, when it seemed possible that the Convention might *not* endorse one model for referendum purposes, the deal-makers sought to take over. The group that was soon labelled the ‘Politburo’—Malcolm Turnbull, Gareth Evans, Barry Jones and Attorney-General Daryl Williams—brokered a compromise termed the ‘bipartisan’ or ‘midi’ model. It was tested against the Richard McGarvie ultra-minimalist model of president elected through a council of elders, and against the direct-election model. With national poll after national poll consistently saying that Australian voters wanted to elect their president (in fact, with many declared republican voters saying they would not vote for anything else), the Convention finally, amidst tense and teary scenes on the last day, voted 73 to 57 (with 22 abstentions) for the adoption of the midi compromise, the parliamentary two-third majority model. The ballot to proceed to referendum, the Convention’s final ballot, was won 133 to 17.

While not a pyrrhic victory for the ARM, this was no victory about which to feel complacent. Fourteen declared republicans at the Convention abstained in the final vote. While it was clear that theirs was not a vote for the monarchy (as one journalist stupidly asserted), it was equally certain that the abstainers did not necessarily represent ‘the people’ either, as Ipswich councillor Paul Tully maintained. If Con Con was an event which stimulated far more community interest than pundits predicted, then its conclusion was disconcerting. Stuart Macintyre suggests that Corowa and Bathurst were triumphs, not of the citizenry but of politicians in people’s clothing. Or words to that effect. In the wash-up of Con Con 1, Canberra 1998, some commentators suggested the same.

Professor Geoffrey Blainey was quoted in a newspaper article on 21 January 1998 as saying that ‘The debate about republicanism is still in its infancy.’<sup>40</sup> Blainey’s more recent social and political assessments lack the perspicacity of his earlier, less doggedly ideological years, but he could be right on this. If enough Australians do not regard the republican process as a genuine, fair dinkum exercise in participatory democracy then, quite simply, the referendum will not get up. If Turnbull, Evans, Williams et al. are not William Astley’s feared political spin doctors, then for many Australians they certainly resemble them. No Australian republican today could view Malcolm Turnbull’s Con Con performance as anything but a liability for the cause, at the crucial level of public perceptions. For years Turnbull has given stoutly of his time and his money for the republican cause, yet his high public profile, his very success, now represents a problem. As the *Weekend Australian*’s editorial put it one week after the Convention’s conclusion: the ARM ‘remains a company with Mr Turnbull and others as its directors.’ Between now and the referendum in late 1999, if the republican option is to be adopted by the Australian people, then they need to see much less of rich old Malcolm and more of Lowitja O’Donohue and Hazel

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<sup>39</sup> See Miranda Devine, *Daily Telegraph* (Sydney), 5 February 1998.

<sup>40</sup> See James Devine, *Australian*, 21 February 1998.

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Hawke, more of young republicans come to prominence at Con Con like Jason Yat-Sen Li, Mischa Schubert and Anne Witheford.

When Dan Deniehy worked energetically through the first blueprint of his model republic, in his first-floor room at Mandelson's Hotel looking across Goulburn's Sloane Street, north-east past the railway line and into the beautiful countryside, he was full of hope for his country. Establishing a republic, he felt, would constitute the mature change that an independent nation must undergo. One hundred and fifty years on, Goulburn to Canberra, the nation is still grappling with the change. The forthcoming years are crucial. With slow, deliberate and, above all, inclusive steps Australia can establish a republic worth having. This will happen providing the politicians work with the people, not on their behalf. Nothing less than a partnership will ensure a republican outcome.



**Question** — Thank you David. My question really is related to these great divisions which are coming about; I do not mean the divisions between the Republic majority and Monarchist minority, but the difference which you mentioned between the people and politicians. Well, I just want to plead guilty to being both, and I wondered whether you thought that looking at conventions, looking at what you might do for the future, you would feel that once a politician had ceased to hold office he regains his senses. The other question is related to the lecture that was given last month by your colleague, Chandran Kukathas, who divided the country into ethnics and others and I was wondering whether you had met many of the 'others', bearing in mind that the world 'ethnic' means 'people' or 'folk'. I was wondering who were the 'others' and whether they would be eligible to vote in any referendum, particularly if they were not people or folk.

**David Headon** — Let me deal with the second part and say that I disown the comments made by my ADFA colleague, so I will just put those to the side and not even comment on them. Let me deal with the other part, this notion of the division. It is fascinating when you look at the historical precedents in the 1890s, the very delicate road that the politicians had between being members of the community and, of course, politicians. Some politicians, it might be said, were far more successful in establishing themselves as one of the folk than others. A case in point is Edward O'Sullivan. O'Sullivan was the member for Monaro from 1885 until 1904, for about eighteen or nineteen years. One of the things that he did constantly, though he lived out of the area, was to always return, shortly before election time, and to head to the pub at Hall, the 'Cricketers' Arms' to buy a few beers, recite a few poems, sing songs. Every time there was an election, somehow he was perceived as being one of the people. Now, this is not necessarily easy. One of the things that really surprised me at Con Con 1 was the way in which the politicians, the professional politicians, revelled in being able to leave that part of their baggage—the politician's baggage—behind for two weeks. They were able to divest themselves of what they do up here, and really kind of get into the swing of things, with the result there was a better and better, looser, more informal atmosphere. Not that the politicking did not arise late in the Convention, but on the whole it was an interesting 'people's' exercise—so successful that we

should take it on as a nation. In the years to come we should have successive constitutional conventions to discuss republican legislation and an altered constitution. These would act as a good sort of reality check. A social conditions check. Con Con 1 really seemed to work. One would hope that it is something that we actually lock in, in the 21st century, as a genuine participatory exercise for the Australian public.

**Question** — That's a terrific job you have done there. You could have dealt more thoroughly, I think, with the relevance nowadays of the policies that Deniehy had, especially his material on the independence of the public service, of the judiciary, his satire on the Attorney-General, and so on. But the critical thing about which I would like your views is on the way he collaborated with other people in the political scene last century. In Deniehy's era, there was not a party line, and the thing that broke him finally was what he called 'bunching', what we would call factionalism and the party system, which we inherited from Westminster. Do you have any comments on his views about factionalism, bunching, and whether or not it is possible to have an independent type of person in Parliament?

**David Headon** — I regard that question as a revelation. I thought there was only perhaps a handful of us around the country that knew anything about Deniehy at all. I have been trying to change that. Deniehy was a fascinating figure. When he emerged in writing in the pages of the *Goulburn Herald*, beyond his famous speeches of 1853, he was determined to give some sense of his social and cultural blueprint for the future. He was, if you read his letters, genuinely reluctant to accept nomination in February 1857. He felt he was, as I said, underdone. But he was outraged at the way politicians in Sydney were acting. So off he went, as the Member for Argyle, for about three years. The critical moment for Deniehy came when his great mate from the past and with whom he went to school, William Bede Dalley (the man who sent the troops to the Sudan in 1885 and the man who gave his name to the first great rugby league player, Dally Messenger), was much more inclined to play the numbers game and get involved in things in Sydney. Deniehy and Dalley were elected to the NSW Legislative Assembly about the same time. Deniehy only lasted a few years, however; his cynicism resulted in the published satire: *How I Became Attorney-General of New Barataria* (1860). When an Englishman named Littleton Holyoake Bayley was actually appointed to the position of Solicitor-General by the NSW Government, and after only six weeks in the colony, in 1859, Deniehy was furious and wrote the satire. The appointment depressed him and he became progressively more maudlin, and alcoholic. When you read his speeches from middle-1859 onwards most are reported as 'inaudible'. He was, of course, drunk in the House.

Deniehy hated the machinations of the Assembly itself and, when Bayley was appointed by Dalley, he was a shattered individual. The last vestiges of idealism disappeared. He still managed to publish his newspaper, *Southern Cross*, for a year (1859–60), but he was past it. By 1861 he was a bankrupt and a drunk.

**Question** — You mention that the Constitution badly needs change. Can you identify these areas of need?

**David Headon** — The area of greatest need, immediately, is the preamble. If you read the pragmatic, highly political Preamble in the Constitution at the moment, it is quite clear that in

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1998 it is embarrassing. I am embarrassed by it. We must have a preamble that basically reflects Australia in 1998, not in 1898. At the very least we need to recognise Australia's first inhabitants, and custodians. Many other areas of the Constitution need attention—need to reflect Australia now. Of course, the original draftsmen of the Australian Constitution regarded such updating in the middle-term future as crucial. The Constitution, they felt, must not be seen as a set of unchangeable assumptions and edicts. Andrew Inglis Clark thought that the Constitution would have to be updated within a few decades. Sir Samuel Griffith also mentions in his letters that this was a document that had to be flexible enough to reflect a changing society. Thomas Jefferson was adamant that the American Constitution must also be a fluid document.

**Question** —I just want to follow on about the Constitution. You have stressed here the divide between politicians and the people. Do you see that as a key reason, perhaps, for the lack of referendum successes in Australia through the decades?

**David Headon** — That is a toughie. It is fair to say that, as people like *The Canberra Times'* Crispin Hull have said, referenda fail when they are perceived to be a grab for more power by the federal politicians. Whether rightly or wrongly does not have to concern us here. Perceptions, as we know, and I have said it many times in my talk, are very, very important. In the wash up of the Queensland election, a Griffith University poll suggested that something like eighty five percent of the people who voted for 'One Nation' were concerned to expressed what they saw as a protest vote against the politicians, capital 'P', in Canberra. It is crucial that in the 1999 republican referendum mechanisms are in place that maximise 'people' involvement, 'people participation'. As it stands, the president must be an Australian citizen, appointed by two thirds majority of Parliament after recommendation by the prime minister. A short list of candidates is presented to the prime minister by a committee comprising representatives from parliament 'and the community'. The politicians must show the voters that they have some level of involvement in the process. Any mechanisms that can enhance that involvement, such as several Constitutional Conventions, at intervals of say three years, would be very helpful.

## **Curbing Judicial Activism: the High Court, the People and a Bill of Rights\***

*Scott Reid*

On 7 December, 1941, the Imperial Japanese Navy launched simultaneous attacks on American and British Empire forces in the Pacific. As a result, both Canada and the United States found themselves at war with Japan. Both countries contained large populations of naturalized and second-generation citizens of Japanese origin, living mostly along the Pacific coast and working largely as fishermen. Given the fear of coastal attacks, the White majority in both countries reacted with what one author has described as ‘near-identical racism to the perceived security threat posed by the Japanese minorities’.<sup>1</sup>

As a result, in February 1942 these mostly patriotic Canadians and Americans were rounded up and shipped to internment camps in the interior. In their absence, their property, including fishing vessels, was in many cases seized without their consent.

Naturally, some of the internees sought legal remedies to the outrageous manner in which their rights had been violated. In Canada, which had no Bill of Rights at that time, their appeals were rejected by the courts, and the policy banning these citizens from returning to the West Coast remained in effect until 1949. In the United States, the cases eventually made their way to the Supreme Court, which ruled in 1944<sup>2</sup> that the wartime internment of American citizens without

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<sup>1</sup> John Thompson and Stephen Randall, *Canada and the United States: Ambivalent Allies*. Montreal/Kingston, McGill/Queen’s University Press, 1994, p. 173.

<sup>2</sup> *Korematsu v United States* (1944) 323 U.S. p. 214.

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proof of anti-government activity or treasonable sentiment was a justifiable use of state power. This ruling has made some commentators conclude that in times of crisis, Bills of Rights cannot be relied upon to protect against the tyranny of the majority.

What is forgotten, in this criticism, is that the same court had also ruled, at a time when war was still raging and the Japanese Empire seemed to be years from defeat, that it was not permissible for the American government to place travel restrictions on Japanese-Americans of demonstrable loyalty, forbidding them to return to their homes on the Pacific coast. Similarly, perhaps in anticipation of unfavourable court rulings, the American authorities did not engage in compulsory sales of property. In Canada, seized property was sold for a fraction of its value without regard to the protests of the former owners, and to add insult to injury, deductions were made for sale costs and taxes. In a comparison of the treatment of the Japanese on either side of the border, historian Roger Daniels concludes that it was 'the American constitution, with its tradition of judicial review which was largely responsible' for the less uncivilized behaviour of the American authorities.<sup>3</sup>

I have related this story because I am a little concerned that the title of this talk will leave the impression that I am opposed to Bills of Rights in general, or at least to constitutionally entrenched Bills of Rights that include the power of full judicial review. In truth, the exact opposite is the case. It seems to me that even in as civilized a country as Australia, Canada, or the United States, there are a number of vital services that can be performed by a well-written, well-interpreted Bill of Rights. These are functions that cannot be performed by any other institution of which I am aware. Although there have been other, less spectacular occasions on which American citizens have been protected by their Bill of Rights against what have been called the 'momentary passions of the majority',<sup>4</sup> the example of the Japanese internments alone is enough to convince me that all democratic states can benefit from having a Bill of Rights.

This being said, however, I freely confess that I am a great deal less optimistic about either the willingness or the ability of courts to always serve as absolutely neutral defenders of the law and of the public interest. If Australia adopts a Bill of Rights, whether constitutionally as in Canada and the U.S. or by means of legislation as in New Zealand, it will be placing enormous potential power in the hands of the judiciary. The manner in which the judges choose to exercise this power will be entirely their own decision; Parliament will have lost the power to rein in the High Court, should the justices choose to begin the process of striking down legislation. As Gil Remillard, a Canadian cabinet minister, warned shortly after the 1982 adoption of the *Canadian Charter of Rights and Freedoms*, 'The Charter will be whatever the Supreme Court chooses to make it, because only a constitutional amendment ... may alter a Supreme Court decision.'<sup>5</sup>

<sup>3</sup> Roger Daniels, 'Japanese relocation and redress in North America: a comparative view', *Pacific Historian*, vol. XXVI, no. 1, 1982, pp. 2-13.

<sup>4</sup> I have borrowed this phrase from Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, Toronto, Wall and Thompson, 1989, p. 48.

<sup>5</sup> Gil Remillard, 'Supreme Court of Canada', *The Canadian Encyclopedia*, Edmonton, Hurtig, 1988, p. 2098. Remillard later served as Quebec's minister of justice and of intergovernmental affairs.



This would not be problematic, if:

- (a) judges could be counted upon to always enact decisions that are entirely impartial and entirely free of arbitrary content; and
- (b) impartial judgments always promoted justice, equity and other socially important goals.

Sadly, neither of these two propositions is valid.

For this reason it would be appropriate for Australians to consider writing certain safeguards directly into the text of any Bill of Rights that the country may choose to adopt. In the course of this talk, I hope to outline some of the dangers that can result from unchecked judicial supremacy, and also to suggest some potential solutions to these dangers.

Intelligent observers have long recognized the concerns that I will be raising today. Ninety-one years ago, U.S. Chief Justice Charles Evans Hughes warned, ‘We are under a Constitution, but the Constitution is what the judges say it is.’<sup>6</sup> Hughes’ contemporary, the humorist Ambrose Bierce, defined the term ‘Lawful’ in the following words in his *Devil’s Dictionary*: ‘Lawful (adj.): Compatible with the will of the judge having jurisdiction’.

What Hughes and Bierce were really doing was to state, in the form of aphorisms, the law of constitutional design that the great British jurist Albert Venn Dicey had earlier noted in his book, *The Law of the Constitution*: it is not possible to administer a constitution unless you are standing outside the control of that constitution, and whenever an administrator, enforcer or adjudicator is given power over a constitution, the individual or body so empowered ceases to be under the control of that constitution. There is no way to avoid this problem; it is *the* fundamental paradox of constitutional design.

But while you cannot avoid placing some actor or another outside the bounds of the Constitution, it is important to realize that there is a choice as to which actor should be made into the final, extra-constitutional authority. In Britain it is Parliament that holds this position. In the United States, it is the Supreme Court. In Switzerland, it is the people themselves, acting by means of nationwide referendums.

Adopting an Australian Bill of Rights slavishly constructed on the American precedent would cause a simple transfer of extra-constitutional authority from Parliament to the High Court, full stop. So it is important to recognize that this is not the only available alternative to the status quo. When Canada adopted its Charter of Rights sixteen years ago, our leaders attempted to make only a partial shift from parliamentary supremacy to judicial supremacy. I see no reason why Australians could not do the same thing—and do it a good deal more successfully than we have done in Canada. As well, I see no reason why an element of Swiss-style popular sovereignty could not also be applied.

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<sup>6</sup> Speech at Elmira, New York. May 3, 1907.

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Before turning to such matters, however, I'd like to review some of the dysfunctions that can result from adopting a Bill of Rights on the American or Canadian model. This will give a good idea of what Australians may wish to protect against when and if they decide to adopt a Bill of Rights.

The first problem arises when the courts are presented with requests to render decisions on the basis of sections of a Bill of Rights that are poorly drafted or unclear. In the *Canadian Charter of Rights and Freedoms*, for example, there are some very precisely defined rights, such as the right not to be punished for any act that was not illegal at the time at which that act was performed, regardless of its illegality at some later date. These very precise sections of the Charter tend to correspond to subjects on which there was broad consensus among the elites that drafted and ratified the Charter in 1981. But there are other provisions which are extremely vague. A large enough proportion of the rights protected under the Charter are loosely worded to prompt one observer to make the observation that 'The Charter is mostly a collection of vague incantations of lofty but entirely abstract ideals, incapable of either restraining or guiding the judges in their application to everyday life.'<sup>7</sup> But vague or not, all parts of the Charter are equally authoritative, and any part of it can be invoked with equal force to strike down laws that cannot thereafter be re-enacted without a formal constitutional amendment.

Worse yet, the truth of the matter is that the areas where the Canadian Charter and the American Bill of Rights are most likely to be vague are the areas in which there was no consensus among the authors of these texts. This is perhaps less relevant in the case of the American Bill of Rights, as two hundred years have gone by since it was drafted, and broadly held social mores on everything from slavery to homosexuality have shifted since that date. But most of the authors of the *Canadian Charter of Rights and Freedoms* are still alive, and the issues on which they could not agree, and therefore either glossed over or included in the Charter in unclear language, are still issues on which Canadian society is deeply divided. To ask a court to make an authoritative and absolutely final decision on the basis of supreme but unclear laws on precisely the matters where society is most deeply divided, is simply unfair to the judges. It's unfair to the rest of us too.

The classic Canadian example of this kind of deeply divisive constitutional provision is an amendment to the Constitution that was presented to Parliament in 1987 and then in modified form to the voters in a referendum in 1992, that would have contained (*inter alia*) the following words: 'The Constitution of Canada shall be interpreted in a manner consistent with ... the recognition that Quebec constitutes within Canada a distinct society.' Five years of heated public debate did not produce a consensus as to the meaning of this provision, which means that, as one observer put it, in entrenching this new amendment, we would simply have decided as a people to 'pass the buck to the Supreme Court'.<sup>8</sup>

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<sup>7</sup> Mandel, *op. cit.*, p. 39.

<sup>8</sup> David Thomas, 'Turning a blind eye: constitutional abeyances and the Canadian experience', *International Journal of Canadian Studies*, no. 78, Spring-Fall 1993, p. 76.

Sometimes the rules contained in the Bill of Rights are reasonably clear, and judges are able to interpret them without acting in a manner that seems unreasonably arbitrary. But this does not mean that any decision that they make will necessarily be in the public interest. When a legislature enacts a law, it does so on the basis of utilitarian considerations. Will this measure benefit society as a whole, even if a few citizens may be rendered worse-off? If so, the measure goes ahead. For parliaments, the ends justify the means.

It is precisely because parliaments act in this manner—sometimes creating injustices for groups like the Japanese-Canadians as they act to protect the broader public interest—that we have a court system with an anti-utilitarian mandate. For a court armed with a Bill of Rights, it is the means that are always under scrutiny. Not only do the ends not justify the means, but if the means are found to violate the rules laid down in the Bill of Rights, then they must be rendered invalid, regardless of the consequences. As Justice Sopinka wrote in a 1990 decision of the Canadian Supreme Court that had the effect of setting free a known murderer: ‘Any price to society occasioned by the loss of such a conviction is fully justified in a free and democratic society which is governed by the rule of law.’<sup>9</sup> So for the courts, it is no exaggeration to say that the means justify the ends.

There are other ways of repeating this point. If you like, you could say that legislatures are Benthamite, while courts must be Kantian. Or you could say, as Ronald Dworkin does in his book, *Law’s Empire*, that legislatures may take into account considerations of policy, but courts must look exclusively at considerations of principle.

Whichever way the matter is put, it does not take much imagination to see how things can start to go wrong in society when the institution that is vested with supreme power starts to make decisions based solely on the consideration of means, and is prohibited from looking at the end results of its actions. Sometimes the judges themselves are startled by the negative outcome of their decisions. In 1990, the Supreme Court of Canada ruled that the right to a trial without

unreasonable delay had been violated in the case of a man held for 23 months on assault charges without trial. The justices added that they thought a wait of six to eight months seemed a great deal more reasonable. Within a year, as a result of this decision, 43,640 charges were stayed in the Province of Ontario alone, including 817 charges of assault with a weapon or assault causing bodily harm, and 290 charges of sexual assault.<sup>10</sup>

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<sup>9</sup> *Feeney v the Queen* (1990) 2 S.C.R. 1199. My italics. The case involved a certain Mr. Feeney, who returned to his home after having killed another man. Guided by a neighbour, police entered Mr. Feeney’s premises without a warrant. As an editorial note, I should observe that I do not agree with Justice Sopinka’s conclusion that the actions of the police in entering Mr. Feeney’s premises without a warrant represented the obtaining of evidence in a manner that ‘infringed or denied any rights or freedoms’ in such a manner as to ‘bring the administration of justice into disrepute’. Therefore, I am of the view that Mr. Feeney’s bloodstained clothes, which were obtained during the search, should have been permissible as evidence. However, Justice Sopinka’s reasoning that courts should consider only means, not ends, is absolutely correct.

<sup>10</sup> Rainer Knopff and F.L. Morton, *Charter Politics*, Scarborough, Ontario, Nelson Canada, 1992, p. 218.

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Afterwards, the Justice who had authored the decision on behalf of the Court indicated that he was ‘shocked’ by the practical results of the court’s decision.<sup>11</sup> But it is difficult to see what the Court could have done, aside from disregarding the express word of the Charter of Rights, that would have avoided this outcome. It certainly was not the Court’s fault that in drafting Section 11(b) of the Charter, Canada’s leaders had chosen to say, ‘Any person charged with an offence has the right to be tried within a reasonable time’, instead of ‘Any person charged with an offence has the right to be tried within one year’—or two years, or whatever other length of time seemed to them to be more reasonable than six to eight months.

The difficulty is compounded by the fact that Supreme Courts are regularly faced with situations in which judgments in cases that are highly atypical will be applied to an entire range of situations to which they bear a merely formal similarity. Christopher Manfredi of Montreal’s McGill University warns that this may lead to constitutionally-entrenched decisions ‘that prevent the worst case, but make things worse in most situations’.<sup>12</sup>

This problem is summed up in the well-known saying that ‘hard cases make bad law’. A case that exemplifies this problem made its way to the Supreme Court of Canada in 1993, when a woman named Sue Rodriguez, who was dying of Lou Gehrig’s disease, petitioned for the right to an assisted suicide, which is forbidden under the Criminal Code of Canada. She maintained that this provision was a violation of her rights under section 7 of the Charter of Rights. Ms Rodriguez was absolutely unlike a typical candidate for euthanasia, in that she had entirely lost control of her body but nonetheless was alert, in complete control of all her mental faculties, supported by a strong and loving family, and in possession of an iron sense of determination. In the event, the Court refused her plea, meaning that any law permitting assisted suicide will have to originate in Parliament. But a decision to overturn the relevant part of the Criminal Code based upon her case might have permitted the euthanizing of other persons whose personal situations were utterly different from that of Ms Rodriguez.

Sometimes judges who have been empowered by a Bill of Rights are aware that their decisions may have socially harmful consequences, and they are forced (or seduced, if you like) into taking ends as well as means into account—in other words, taking notice of policy considerations—when they make their decisions. There are several ways in which this can be done. The first way

is to exercise self-restraint. A court may refuse to use the Bill of Rights to strike down a certain type of law, thereby serving notice to the legislative branch that it will have to make the relevant decisions for itself. This is what both the Canadian and the U.S. Supreme Courts did when presented with the question of euthanasia. Judicial restraint of this sort is easiest to exercise in good conscience when the judges are reasonably certain that the authors of the Bill of Rights had simply not anticipated that the question would ever arise. It is a great deal more difficult to justify in a case where the drafters were simply negligent, as Canada’s legislators were when they decided to give citizens the right to a speedy trial.

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<sup>11</sup> Rory Leishman, ‘Robed Dictators’, in *The Next City*, Fall 1998, p. 40.

<sup>12</sup> Christopher Manfredi, *Judicial Power and the Charter*, Toronto, McClelland and Stewart, 1993, p. 176.

A second solution is for courts to weigh each law that appears to be in violation of the Bill of Rights and to decide if the social purpose being served by that law is sufficiently important to justify the violation that is taking place. If the answer is yes, then the law is permitted to stand. Laws that are challenged before the courts can also be reviewed to determine whether they achieve their socially useful goals in the least intrusive manner possible. If the answer is yes, then they are allowed to stand. If not, then they are struck down.

This method of applying utilitarian considerations in court decisions is explicitly recognized as valid under Section 1 of the *Canadian Charter of Rights and Freedoms*, which contains a derogation clause stating that all rights under the Charter are subject to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. It is interesting to note, however, that the very same solution has been invented, without a shred of constitutional authority, by the supreme courts of a number of other countries where the constitution contains a Bill of Rights, including the United States, India, Japan and Germany.<sup>13</sup>

In fact, the practice of using these Benthamite tests in the nominally Kantian courts is so widespread that one Canadian commentator, David Beatty of the University of Toronto, has gone so far as to argue that all courts under all Bills of Rights in all countries will in the end largely disregard the specific provisions of their country’s Bill of Rights and instead simply apply a personal test as to whether in this case or that case societal considerations justify a violation of constitutionally-entrenched rights, or are proportionate in importance to the right that is being violated. What is more, the judges can be expected to engage in this exercise of weighing ends against means with their ‘thumb on the scales’.<sup>14</sup>

Beatty does not think that this is an enormous tragedy, since judicial notions as to the definition of the terms ‘justice’ and ‘proportionality’ are probably not so very far removed from the definitions that the average citizen would hold. And Beatty is right. It is not the end of the world. Countries with courts that act in this manner remain civilized, democratic states. But this can hardly be described as the best of all possible worlds, since the basic non-utilitarian function of a Bill of Rights is largely eviscerated. Whenever courts act this way, in practice they are not sitting as judges at all, but rather as a kind of appointed third house of Parliament, a chamber of ‘sober second thought (or third thought), to which laws are submitted on a more or less *ad hoc* basis for potential approval or veto.

This criticism leads us, at last, to the matter of judicial activism. Once judges have been assigned a rule, as in Canada’s Charter, that instructs them to take utilitarian considerations into account, or have invented a doctrine that allows them to do so, as in the United States, the courts can choose ‘to be as deferential to lawmakers and their agents as they think appropriate in each case’.<sup>15</sup> The problem is simply that each of us must, in making utilitarian considerations, apply our own beliefs and standards—our own ideologies—to each case that we consider. It becomes,

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<sup>13</sup> David Beatty, *Constitutional Law in Theory and Practice*, Toronto, University of Toronto Press, 1995, Chapter 4.

<sup>14</sup> *ibid.*, p. 124.

<sup>15</sup> *ibid.*, p. 146.

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quite literally, impossible for a judge not to make decisions based on his or her own status as a libertarian or a social democrat, a social conservative or a feminist, a Christian or an agnostic. And once you have crossed the Rubicon (even if you were pushed across), there is no turning back.

But some judges seem to make the crossing with a great deal more enthusiasm than others, and actively set about trying to achieve policy goals. This is what is known as ‘judicial activism’.

One step that must be taken by a judge who seeks to actively promote an ideological agenda is to adopt some version of what American scholars refer to as the doctrine of ‘non-interpretivism’<sup>16</sup> An ‘interpretivist’ or ‘originalist’ reading of a Bill of Rights attempts to seek out the original intentions of its authors and ratifiers. A non-interpretivist approach holds that judges must apply considerations such as contemporary social or economic conditions, or the general spirit of the entire Bill of Rights, to their reading of the individual rights contained therein. Sometimes it is argued by non-interpretivists that it is impossible to determine what the authors of the Bill of Rights meant, and that in view of the fact that it would be wrong to assume that the authors meant nothing at all, it is therefore the obligation of the judges to ‘breathe life’ into the rights by applying their own interpretations.<sup>17</sup>

Only three years after the *Canadian Charter of Rights and Freedoms* had gone into effect, the future Chief Justice, Antonio Lamer, was justifying his own non-interpretivism by stating that he could not determine what the authors of the Charter had intended:

[T]he simple fact remains that the *Charter* is not the product of a few individual public servants ... but of a multiplicity of individuals who played major roles in the negotiating, drafting, and adoption of the *Charter*. How can one say with confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants [whose words are on the official record] can be determinative.<sup>18</sup>

In Canadian and American debates, the tendency is for persons on the political right to be interpretivists and opponents of judicial activism, and for persons on the political left to be non-interpretivists and supporters of judicial activism. These positions seem to have been adopted

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<sup>16</sup> There is an exception to this rule, applicable only in the United States. As will be noted below, in the United States the large body of existing case law, based on non-interpretivist doctrines, mean that a strict originalism would actually represent a form of activism.

<sup>17</sup> The reference is to Justice Dickson’s comment, in *Mahe v. Alberta* (1990) 1 S.C.R. 342, that the courts must ‘breathe life’ into section 23 of the *Canadian Charter of Rights and Freedoms*, possibly by applying ‘novel solutions’ to the problem of minority-language education, which is guaranteed under this section.

<sup>18</sup> *Reference re British Columbia Motor Vehicle Act.* (1985) 2 S.C.R. 501.

based primarily on the fact that the activist Warren court of the 1950s–1970s had a generally leftist orientation.<sup>19</sup>

But it is a serious mistake to conclude that judicial activism will always push the political agenda to the left. During its previous period of activism, which lasted from the 1870s to the 1930s, the U.S. Supreme Court used the Bill of Rights to repeatedly strike down redistributionist legislation. One prominent Supreme Court justice of this period was so loose in his *laissez-faire* interpretations of the Constitution that a commentator has since written, ‘The fact that Stephen Field had been born too late to participate in the Constitutional Convention was an accident of history that he was happy to correct.’<sup>20</sup> And more recently, the court in the 1990s has become fairly consistently libertarian. Once public opinion latches onto the ideological shift in the court, I anticipate a complete rotation of personnel among supporters and critics of judicial activism.

A more useful point to be made in respect of judicial activism is pointed out by Gabriel Moens, a professor of law at the University of Queensland, who warns that ‘this judicial philosophy largely destroys the very reason as to why an entrenched Bill of Rights is adopted by its proponents, namely to protect people against arbitrariness and uncertainty.’<sup>21</sup> Once the courts have made the decision to engage in activism, protection from arbitrary legislative measures will occur only in circumstances where the courts and the lawmakers have a philosophical disagreement, and for that reason, to some extent the rule of law will be compromised.

I turn now to solutions to the problems described above. I hope that it is clear from what I have said that problems start to arise only when courts are either unable, or unwilling, to exclude utilitarian considerations from their judgments, or when a provision of the Bill of Rights is vaguely drafted that the exclusion of utilitarian considerations becomes an unnecessarily great burden upon society. Therefore it is *your* job, should you ever find yourselves in the position of drafting a Bill of Rights, to ensure that included within its text are provisions that will allow judges to do their job without (perverse as this sounds when stated baldly) being forced to take the public interest into account. And as well, to include measures that will remind any willfully activist members of the court that they are paid to be judges, not legislators.

As samples of this kind of limiting clause, I have included an appendix which contains possible wordings for a set of derogations which could be attached to either a legislated or a constitutionally-entrenched Bill of Rights. In engaging in this little self-indulgence I am painfully aware that I might be accused of engaging in a little judicial activism of my own, but in my own defence I would like to observe that my contribution seems modest compared to Frank Brennan’s new book, *Legislating Liberty*, which contains the complete text of an entire Australian Bill of

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<sup>19</sup> Earl Warren was Chief Justice from 1953 to 1969, so strictly speaking the ‘Warren court’ does not extend into the 1970s. However the era of activism continued for a few more years, most notably in the case of *Roe v. Wade* (1973) 410 U.S. p. 113.

<sup>20</sup> David Friedman, review of *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (by Paul Kens), *Liberty*, vol. XII, no. 1, September 1998, p. 54.

<sup>21</sup> Gabriel Moens, ‘The Wrongs of a Constitutionally-Entrenched Bill of Rights’, in M.A. Stephenson and Clive Turner, *Australia: Republic or Monarchy?* St. Lucia, Queensland: University of Queensland Press, 1994, p. 234.

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Rights, and Malcolm Turnbull's *The Reluctant Republic*, which contains the full text of an entirely rewritten Commonwealth constitution.

The first measure that I would suggest is an interpretive clause stating that this Bill of Rights is to be interpreted in a manner consistent with the original intentions of its framers and ratifiers. Interpretive clauses are certainly not a new innovation. Sections 26 and 27 of the *Canadian Charter of Rights and Freedoms* give specific instructions on how the Charter is to be interpreted. Similarly, the Ninth Amendment of the American Bill of Rights advises future courts that 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

In making the suggestion that an Australian Bill of Rights should contain a clause mandating an originalist interpretation, I am not siding with those who argue that the same rule should be applied by American judges in interpreting the U.S. Bill of Rights. The fundamental difference between taking this position in Australia and taking it in the U.S. is this: in America, two centuries of interpretation have led to a large body of case law that causes the Bill of Rights to function in a very different manner than James Madison probably had in mind when he wrote it in 1789. So it is impossible to return to an original interpretation without engaging in a judicial revolution in which decades of prior decisions are cast aside.<sup>22</sup> But under a newly-minted Australian Bill of Rights, the courts would not yet have had the opportunity to wander away from

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<sup>22</sup> A recent article gives a good sense of the revolutionary implications of an originalist interpretation of the U.S. Constitution by contrasting the conservative originalism of Justice Thomas with the precedent-based conservatism of Justice Scalia. See Dylan Carp, 'Out of Scalia's shadow', *Liberty*, vol. XII, no. 1, September 1998, pp. 27-29, 50.



the original intentions of the framers and ratifiers. So a clause mandating an originalist interpretation would *prevent* the possibility of a judicial revolution.<sup>23</sup>

This is not to say that this proposal would not have consequences which might endear it to one ideological strand within Australian society and alienate another. In enacting such an interpretive clause, the Bill of Rights would effectively prevent the achievement of the agenda described as follows by Sir Harry Gibbs:

Many of the advocates of a Bill of Rights do not merely wish to protect rights already recognized by the law; they often seek, quite openly, to create rights which the law has hitherto denied and hope to achieve that result by securing a favourable interpretation of vague, general phrases which are not specifically directed to the matter which concerns them. In other words, they hope to achieve social change by judicial rather than legislative action.<sup>24</sup>

A Bill of Rights containing a clause like the one I have described above would inevitably be interpreted as protecting only such rights as are currently the subject of society-wide consensus, such as freedom of religion, the right to a jury trial, and protection from *post facto* laws. Other more controversial rights would have to be added by formal amendment at a later date, just as citizenship rights for Black Americans had to wait until the 14th Amendment was added to the Constitution in 1868.

This may seem discouraging to some, but I encourage you to remember that when drafting a Bill of Rights, we are all sheltered by a version of what John Rawls once called ‘the veil of ignorance’ from knowing how the words we craft today will be interpreted by future High Courts populated by Justices who are today in their mothers’ wombs dealing with legal issues that have not yet been imagined on the basis of ideologies that have not yet been put to paper. The one thing we do know, from reviewing U.S. Supreme Court judgments like *Dred Scott v. Sandford*, which used the Bill of Rights to rule that slavery could not be banned from federal territories, or *Plessy v. Ferguson*, which ruled that segregated education was permissible, is that courts cannot be relied upon to be systematically more enlightened than legislators.

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<sup>23</sup> Canada represents a midway case in terms of the impact that an interpretivist reading would have. In practice, interpretivism has not had much of a following in Canada, based largely on the traditional English rule that legislative history is not admissible as an aid to the interpretation of statutes. See Peter Hogg, *Constitutional Law of Canada*, third edition (supplemented), Toronto, Carswell, 1992 and dates of supplements, sections 57.1(c)–57.1(e). However, the logic of the rule as applied to statute law is that it improves the fixity of the law, even if at the price of a certain narrowness of judicial interpretation. (See Dicey, *The Law of the Constitution*, Indianapolis, Liberty Fund, 1982 (1914), p. 269.) When applied to Bills of Rights, the rule seems to have the opposite effect. This is due to the fact that in interpreting statute law, the practice of ignoring the legislative history prevents the law from being interpreted in an expansive manner reflecting the desire of some legislators to create a broader law than was finally implemented. In the case of Bills of Rights, the legislative history will tend to produce evidence that the framers of the Bill were divided as to its meaning or assigned only limited power to a clause that is assigned great importance after the fact of the Bill’s entrenchment.

<sup>24</sup> Harry Gibbs, ‘A Constitutional Bill of Rights?’ in K. Baker (ed.), *An Australian Bill of Rights: Pro and Contra*, Melbourne, Institute of Public Affairs, 1986, p. 40.

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If we fail to take this lesson into account, then it seems to me that we run the risk warned of by Canadian commentator David Frum in the early 1990s, when he said that courts were starting to ‘read the Charter of Rights as if it contained one fun-filled clause: ‘Be creative!’<sup>25</sup>

A second precautionary measure that I would suggest incorporating into a Bill of Rights would be a requirement that any court decision that has the consequence of disallowing a statute or a pre-existing common-law rule be concurred in by at least two-thirds of the justices hearing the case. Remember Gil Remillard’s observation from the beginning of this talk: any decision that strikes down a law cannot be overturned except by a constitutional amendment. Such amendments can only be enacted by extraordinary means, including a referendum victory in two-thirds of the states. These rules are designed to ensure that a consensus exists across Australian society before Parliament and the people are permitted to change Australia’s most fundamental law. It is difficult to see why a bare majority High Court justices should be granted the same power.

William Brennan, who served on the nine-member U.S. Supreme Court for thirty-four years, once observed that ‘with five votes, you can do anything around here’. Australia’s High Court has seven members, so under the rule that I am proposing here, it would take five votes to overturn a law, assuming that the full bench was sitting. This may seem like a small matter, but it is important to remember that the issues that divide society are also the issues that divide the courts, and these are precisely the issues where it is least advisable to run amok amending the constitution.

This can be illustrated by reference to an interesting calculation performed by Canadian political scientist F.L. Morton, who noted in 1993 that the Supreme Court of Canada was bringing down unanimous decisions in over 80% of cases not related to the Charter of Rights, but only in about 64% of cases relating to the Charter.<sup>26</sup> And all too often, the most controversial cases are decided by single-vote majorities. Just to cite two examples, the 1978 case in which the U.S. Supreme Court determined that affirmative action was not a violation of the Constitution was decided by a one-vote majority. The Supreme Court of Canada decision rejecting Sue Rodriguez’ plea to overturn the anti-euthanasia parts of the Criminal Code was also decided by a single vote. These issues seem too momentous to be decided by such narrow margins.

The third recommendation that I would make relates to the remedies that the courts may select, once they have determined that the rights of an Australian have been violated. In the United States, the remedies were never spelled out in the Constitution, with the result that the courts have had to innovate. That is why Americans assign such importance to the 1803 decision of the Supreme Court in *Marbury v. Madison*. In this decision, the Court simply asserted a right to nullify the offending law in its entirety.

The authors of the *Canadian Charter of Rights and Freedoms* were aware of this shortcoming in the U.S. Constitution, so they included a provision that stated, ‘Anyone whose rights or

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<sup>25</sup> *Financial Post* (Toronto), 31 October 1992, p. 53.

<sup>26</sup> F.L. Morton, ‘The politics of rights’, *Literary Review of Canada*, May 1993, p. 14.

freedoms, as guaranteed by this Charter of Rights, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers justified in the circumstances.’

The intention of this clause was noble, but its effect has been to greatly—and in my view dangerously—enhance the powers of the courts at the expense of all other sectors of society. Over the past decade and a half, the Supreme Court has developed an array of six remedies which may be applied, depending upon the situation.<sup>27</sup> Four of these remedies seem to me to be practical. Briefly, these remedies are:

- nullifying a statute in its entirety;
- nullifying only the offending portion of the statute;
- nullifying a statute after a period of delay specified by the court to permit Parliament to enact a replacement law that does not offend the Charter;<sup>28</sup> and
- reading a statute narrowly, where a narrow reading makes it compatible with the Charter but a broad reading would render it repugnant to the Charter.

The Court has also developed two additional remedies that seem clearly to move it out of the judging business and into the legislating business. The first of these is the creation of what the Court calls ‘constitutional exemptions’. This rule was applied in a series of cases regarding laws that require shops to close on Sundays.<sup>29</sup> These laws were judged to be an unconstitutional restriction on freedom of religion, because they forced members of other religious groups to honour the Christian Sabbath. But the Court indicated that if the law were to be revised to permit an exemption to non-Christians (that is, to make the law applicable to Christians but not to Jews, Muslims and so on), it would be valid. This is a novel doctrine that seems to me to lead dangerously in the direction of different rights for different classes of citizens, on the model of the Ottoman Empire’s ‘millet’ system.

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<sup>27</sup> These remedies are discussed in detail in Hogg, *op. cit.*, section 37.1.

<sup>28</sup> This remedy strikes me as being particularly useful, in that it allows the courts to impose solutions that *would* impose considerable hardships upon society, if good laws were to be struck down immediately due to a breach of a right that is protected in the Constitution. By imposing a temporary period of validity, the court is able to impose an uncompromisingly Kantian solution, while turning the business of the general well-being over to the legislative branch, where it belongs. The only utilitarian consideration that is made by the court therefore is one that is of temporary duration. The classic Canadian example of the use of this remedy is in reference to a right that is protected in the general text of the Constitution of Canada rather than in the *Canadian Charter of Rights and Freedoms*. In *Re Manitoba Language Rights* (1985) 1 S.C.R. 721, the Supreme Court ruled that the provincial government of Manitoba had for nearly a century been in violation of its constitutional obligation to enact all laws in both English and French. The only remedy available to the court would have been to invalidate the entire provincial statute book, which would have produced anarchy. Moreover, it would not have been possible to produce well-drafted French-language versions of all Manitoba laws rapidly, so the legal vacuum would have been a period of long duration. The court’s solution was to give the laws a temporary validity, after which they would cease to be of force and effect if not yet translated.

<sup>29</sup> The remedy is discussed, although not always applied, in *R. v. Big M Drug Mart* (1985) 1 S.C.R. 295, 315; *R. v. Edwards Books* (1986) 2 S.C.R. 713, 783; and in *R. v. Westfair Foods* (1989) 65 D.L.R. (4th) 56 (Saskatchewan C.A.).

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The second remedy is known as ‘reading in’. When a law is found by a court to be inconsistent with the Charter, the court may now exercise the option of adding such words to the statute as would make it consistent with the Charter, and hence valid once more. For example, in a 1995 case,<sup>30</sup> the Supreme Court ruled that a provision of one province’s auto insurance laws were invalid because they made accident benefits payable to the ‘spouse’ of the victim, and this excluded common-law spouses, thus discriminating unconstitutionally on the basis of marital status. Rather than strike down the law or declaring it temporarily valid pending the passage of remedial legislation, the Court simply ‘read in’ words that made the law include common-law spouses as beneficiaries.

This particular remedy is utterly unnecessary, since there is no wrong that it cures that is not equally curable under one or more of the other remedies established by the Court. But it does deprive Parliament and the provincial legislatures of the chance to review and reconsider the relevant legislation.

The proposal that I make here is simply to include in a Bill of Rights a clause giving an exhaustive list of the remedies that the courts may apply in dealing with violations of individual rights. This exhaustive list would simply exclude those remedies that seem inappropriate to the authors of the Bill of Rights.

The fourth and final recommendation that I will make today is the one that I regard as most important of all. I suggest that, as a part of the process of judicial review, any Bill of Rights ought to include a provision mandating popular review of those decisions of the High Court that nullify statutes. A draft constitutional amendment that is approved in Parliament must be submitted for the approval of the voters, so it is difficult to see why a *de facto* amendment drafted by the High Court should be exempt from a similar review.

I can think of two concerns that would naturally occur to someone hearing of this suggestion for the first time. The first of these is that an enormous number of overturned laws would find their way before the voters, and there would be an unending series of referenda. In practice, this seems highly unlikely. In 1996 I calculated that the Supreme Court of Canada was striking down laws at the rate of 7.9 federal and provincial statutes combined, per year (this is in a country with ten provinces).<sup>31</sup> The Canadian Supreme Court is generally regarded as being pretty activist. In the United States, the Supreme Court nullified federal statutes in only two decisions between the Revolution and the Civil War.<sup>32</sup>

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<sup>30</sup> *Miron v. Trudel* (1995) 2 S.C.R. 418.

<sup>31</sup> Scott Reid, ‘Penumbra for the people: placing judicial supremacy under popular control’, in Anthony Peacock (ed.), *Rethinking the Constitution*, Toronto, Oxford University Press, 1996, p. 204.

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<sup>32</sup> *Marbury v. Madison* (1803), and *Dred Scott v. Sandford* (1857).

The second reason for concern might be that this seems to be a radical new idea which has never been tested anywhere else, and that it's never a good idea to volunteer to be the test case for any new-fangled idea, particularly when tyranny of the majority seems to be a conceivable outcome.

This is a reasonable concern, so for this reason I draw your attention to the fact that Switzerland's constitution permits citizens to overrule any decision at all of any of the other branches of government. For over one hundred years, Swiss citizens have enjoyed not only the right to strike down laws that they find unsatisfactory, but to initiate any new law that seems to them to be needed. Although this right does not apply expressly to overriding judicial decisions, it is clear that the unrestricted right to initiate new laws necessarily involves the right to initiate laws that override any decision of the courts. The constitutions of all but one of the Swiss cantons<sup>33</sup> contain similar provisions, and two cantonal constitutions have for decades contained provisions that specifically allow for referenda to deal with the clearly judicial function of interpreting statute law in cases of ambiguity.<sup>34</sup>

What I am proposing here is a great deal less dramatic than this. It would be a version of a provision entrenched in section 33 of the *Canadian Charter of Rights and Freedoms*. This provision states, 'Parliament or the legislature of a province may expressly declare in an Act ... that the Act or a provision thereof shall operate notwithstanding a provision included in ... this Charter.'

The legislatures of Quebec and Saskatchewan have enacted laws that make pre-emptive use of this provision in order to avoid the possibility of judicial review, which is to my mind a practice that should not be permitted. But the exercise of such an override after the fact of a court decision, re-enacting a law that the court has nullified, indicates that the court has misjudged its interpretation of its constitutional obligation to allow such 'reasonable limits' on Charter-protected rights as are 'demonstrably justified in a free and democratic society'.

In practice, the section 33 override provision in Canada seems to be falling into disuse, because of the fact that Canadians appear to have a greater confidence in their courts than in their parliaments. There is a justifiable fear that in the hands of a legislature, and used in its pre-emptive form, the override might one day be used to prevent judicial review of a rights abuse on the scale of the wrongs perpetrated on the Japanese Canadians in 1942. This is one reason why the policy manual of Canada's largest opposition party calls for the override provision to be exercisable only when authorized by a referendum.

But if the override were to be usable only retroactively, and only by means of referendum, and if any such referenda were to be placed at some distance from the date of the actual court decision (for example, to be held concurrently with the next general election), then I think that the passions of the moment would be eliminated from any popular review of the judges, and a very

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<sup>33</sup> The exception is Fribourg.

<sup>34</sup> The cantons are St. Gallen and Solothurn. See William Rappard, 'The initiative and the referendum in Switzerland', *American Political Science Review*, vol. VI, no. 3, August 1912, p. 351.

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useful line of communication would be opened to the High Court, relieving it of the obligation to take policy considerations into account in interpreting the Bill of Rights.

The legislators and the people could concern themselves with the greatest good of the greatest number, and the courts could return to doing what they do best: judging individual cases on the basis of statute and of the ancient principles of our common law, and judging laws on the basis of the letter and spirit of the Constitution.



**Question** — I guess my question is more a request than anything. In the case that you talked about in Canada where the judge made a ruling on reasonable time in gaol before your case was heard, I was wondering if you could expand on what happened once that ruling was made in regard to whether Parliament then called a referendum and people voted against. I wondered if you could discuss how it worked.

**Scott Reid** — The case often gets cited as an example. I can't recall the full citation, but it is generally known as the 'Askov Decision' from 1990. There was a one-time event where a large number of individuals awaiting trial were freed and the charges against them dropped. Since that date the six-month rule has applied. A rule which, incidentally, I think is quite fair. I don't see why, if I were accused of something—maybe wrongly accused—I should have to wait, sometimes in custody, for a period that could exceed a year. That being said, there was a fair bit of public outrage in the immediate aftermath of the Askov decision. It wasn't open to Parliament to enact a law establishing an alternative procedure to the six-month rule, unless they were willing to use the section 33 override that I mentioned. The use of the section 33 override—the 'notwithstanding clause', as we call it in Canada—is politically difficult because of the fact that the best-known case in which it has been used was in reinstating a Quebec law that took away rights that a lot of people regard as pretty fundamental, regarding freedom of speech. So as a result, the section 33 override had fallen largely into disrepute in this period and the government simply did not want to risk taking on the courts following this particular precedent.

**Question** — Does the Canadian Charter have a particular problem, given that it's bilingual and both versions are equally valid? Of course, the U.S. Bill of Rights is in a sense bilingual; words like 'probable cause' or 'privileges' have quite a different meaning today than they did 200 years ago. Firstly, is that a distinct problem that Australia wouldn't have? Secondly, it occurred to me that you have hit the nail on the head in saying the U.S. Supreme Court is libertarian. It seems to me, regardless of the left/right distinction, it has always been libertarian; whether striking down affirmative action laws or abortion laws, it has always been a case of stopping the government from intervening. I'm curious whether this perhaps illustrates Abraham Maslow's saying that when the only tool you have is a hammer, every problem looks like a nail. When the only tool you have is to declare a law invalid—you can't appropriate funds, you can't order the government to set up a program—the biggest threat seems to be government action rather than inaction.

**Scott Reid** — You are certainly right that, in a sense, courts are only equipped with a hammer. They are given a very narrow range of remedies to apply. The range of available remedies is much broader in Canada, in recognition of this problem in the United States. I don't want to seem unfair to the Canadian courts, I think most of the remedies they have invented are good. They have tried to equip themselves with tools other than hammers. My reservations about some of the tools they have invented were noted in the talk.

With regard to the first question, obviously this wouldn't be an issue in Australia. A Bill of Rights would be drafted in English and that would be that. In Canada, there is one particular example, exclusion of evidence, where the two texts are a little bit different—the relevant provision is more generous in French than in English. All that happens is that the court is forced to choose between the two. It happens that exclusion of evidence is a hot issue in Canada, but not because of the inconsistent French and English texts of the Charter. The problem is more fundamental: we've basically thrown out the common law rule regarding the exclusion of evidence discovered in the course of a warrantless search. If the police enter premises without a warrant and they find evidence that can then lead to the conviction of a person on a certain offence, the very fact that the police found it there serves as an indication that they entered in a justified manner. There are caveats on that, but that general rule applies in the common law. The American rule has been very much the other way around. The police must provide extraordinary reasons, before evidence found in the course of such a search will be permitted in court.

In the case that I cited in the talk, a man named Mr Feeney killed an elderly man and went back to the trailer where he lived. I gather he was drunk at the time. He went inside, making a great deal of noise, and went to sleep. The police were advised by a neighbour to enter Mr Feeney's trailer. They did so. Finding Mr Feeney still dressed in blood stained clothing, they arrested him. Well, of course, the blood on his clothing was then entered in the case against him, and the court ruled that this evidence would have to be thrown out, that the exclusionary rule was put into effect. Part of the reason here is that the exclusionary rule was actually written into the Charter of Rights. It hadn't been there before, so the courts weren't enabled to consider other potential remedies.

This is a shame, because it elevates a single remedy to constitutional, unamendable status, while ignoring the function that this rule is intended to serve. The whole point of the exclusionary rule—and the literature is very clear on this—is to dissuade the police from entering private property as a means of intimidation, or on 'fishing expeditions'. So, perhaps some kind of tort against the police would be appropriate when they enter premises wrongly, rather than excluding evidence when they have entered premises rightly, but without having first carried out the proper formalities.

**Question** — The greatest example of judicial activism I remember concerns Garfield Barwick's deliberate destruction of the punitive provision of the Income Tax Act. They are to be remedied by the new government here. Back in 1971 I recommended that we have a Koori Bill of Rights for the ACT and Australian territories. That was in dealing with Murphy, and when he went into power he did discuss it with me. I based that upon some material I'd read when we did law back in the 1940s, when there was talk about the legal systems of the Indian tribes. In Canada you have the French areas with a different traditional law. What's the situation regarding a Bill of

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Rights and the indigenous tribal laws, and could this be rectified by such a thing as a special Bill of Rights for them?

**Scott Reid** — In Canada, as in Australia, you are not dealing with one reasonably homogenous community of aboriginal people. They are in fact as diverse internally as, say, the people of different parts of Europe. So I suppose there would be a problem trying to draft up a special ‘one size fits all’ provision that reflects indigenous values in the sense that there is no single set of indigenous values. I’m not sure I’m actually getting at the question you asked, but I’ll just keep on going a little bit further.

In 1992, as part of a proposed set of quite extensive amendments to the Canadian Constitution, which were voted down in referendum, there was included a provision that would have excluded aboriginal governments from the workings of the Charter of Rights, the argument being that it had been drafted for societies that were very different from the ones in which aboriginal Canadians participate. It was quite a controversial proposal. A lot of people felt that what this would actually do was to allow aboriginal governments—which are in some cases corrupt and not always democratically elected—to ride roughshod over the rights of their citizens. I am not sure that would universally have been the case, probably it wouldn’t, but nonetheless that was the fear.

The other thing you mentioned very briefly, was a different set of laws for the French. What’s happened is that, in the Province of Quebec (and also in the state of Louisiana in the US), for questions that deal purely with private relations, a civil law code is used, similar to the Napoleonic Code of France. But only in those areas, and not in relation—in Canada anyway—to, for example, criminal law. I don’t know how criminal law works in Louisiana, because in the United States the criminal law is under state jurisdiction. I suspect, therefore, that the civil law code may actually be used more extensively in Louisiana than it is in Quebec.

**Question** — In Australia, as I think is the same in Canada, the High Court has been much more respectful of indigenous peoples’ rights than certainly the democratically elected governments of Australia. I’m curious how your proposal of having citizens’ referenda reviewing a High Court decision of any future bill of rights would go in protecting minority groups against the tyranny of the majority. Particularly indigenous rights. If, in the future, you had a bill of rights with a non-racial discrimination principle in it, if that principle was interpreted by the High Court with a particular development of native title or land rights in a way that has happened in Wik and in a way that the Delgamuukw case happened in Canada; and if say the Wik decision then went to a citizens’ referendum as to its fairness or unfairness, then I would bet that in Australia it would go down. Surely that’s an issue of population percentage and an issue of media power and all sorts of things?

**Scott Reid** — What you’re describing is an ideological difference between where the majority of the people stand and where the justices of the High Court stand. Right now, both in Canada and in Australia, the High Courts are generally more favourable towards indigenous rights than is the population at large. I give the cautionary note that I’ve given before regarding the longer term. Remember how justices are appointed to High Courts: they are appointed by the politicians. So, if indigenous rights became one of the primary issues under consideration for a future High



Court, you could expect that future Prime Ministers (not all of whom may be terribly favourable towards these rights) might start appointing justices who are on the opposite track to that favoured by the current High Court. It is very hard to believe that any specific ideology will dominate the High Court over an extended period of time, so I caution against placing all of one's policy hopes in the actions of the judges.

To deal directly with the specific consideration which you have raised, there is an option open that is used under the Canadian Charter of Rights and Freedoms. Certain provisions of the Charter—these are the ones dealing with freedom of speech, religion, assembly and so on—are open to the legislative override that I described. Certain other rights that were perceived as being particularly open to legislative abuse, given the highly politicised nature of the language issue in Canada—for example, the right to expect the laws to be written in two languages and to be of equal validity in either language—were not subject to legislative override; they were sheltered from section 33. So, if it was felt that some kind of additional protection of that sort was necessary and that it would be inappropriate to have a popular override, you could include a similar provision in an Australian Bill of Rights.

There is one last point that I want to make. Imagine that the people of Australia were sufficiently unsympathetic to Aboriginal rights that they would support a government that overruled the High Court on the issue. Given such a population, it is very difficult to see how you could entrench any Aboriginal rights in a Bill of Rights in the first place. Remember: you have to have the support of more than a simple majority of voters in order to entrench a Bill of Rights at all.

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## Appendix

### *Suggested provisions for a Bill of Rights<sup>#</sup>*

1. This Bill of Rights shall be interpreted in a manner consistent with the original intentions of its authors and ratifiers, and shall be applied only in circumstances in which these intentions can be reasonably ascertained, and only to cases to which these intentions can reasonably be applied.
2. No remedy proposed by a court in respect of this Bill of Rights shall be of any force or effect unless it is concurred in by two-thirds of the justices participating in the decision.
3. Anyone whose rights or freedoms, as guaranteed by this Bill of Rights, have been infringed or denied may apply to a court of competent jurisdiction to obtain such of the following remedies as the court considers just in the circumstances:
  - (a) A ruling that the law, rule or regulation, or a part thereof, by which the right or freedom has been infringed or denied is of no force or effect.
  - (b) A ruling that the law, rule or regulation, or a part thereof, shall remain temporarily of force and effect for a period, prescribed by the court that is in the court's view of sufficient length to allow Parliament to enact replacement measures that do not infringe or deny the rights and freedoms guaranteed by this Bill of Rights.
  - (c) A ruling that a law, rule or regulation, or a part thereof, that could be interpreted in a manner that would infringe or deny a right or freedom shall be interpreted more narrowly, so as not to infringe or deny that right or freedom.
4.
  - (a) The eligible voters of Australia or of a state, as the case may be, may expressly declare, by means of a majority vote in a referendum, that an Act or a provision thereof shall operate notwithstanding a provision of this Bill of Rights.
  - (b) A referendum determining whether it is the will of the eligible voters to make such a declaration shall be held at the general election next following a decision of the High Court that an Act or a provision thereof is repugnant to this Bill of Rights.

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<sup>#</sup> In the case of three of the four proposals, I have tried to use language based as closely as possible on the words of the *Canadian Charter of Rights and Freedoms*—although obviously with significantly different practical results. The parallels are as follows:

Proposal 1: Section 27.

Proposal 2: No parallel clause.

Proposal 3: Section 24(1).

Proposal 4: Section 33(1) and 33(2).

- (c) An Act or a provision of an Act in respect of which a declaration is made under this section shall have such operation as it would have but for the provision of this Bill of Rights referred to in the declaration.
- (d) When handing down a decision that an Act or a provision thereof is repugnant to this Bill of Rights, the High Court shall indicate which of the remedies, permissible under this Bill of Rights, shall take effect pending a decision of the voters in a referendum, and which of the remedies, permissible under this Bill of Rights, shall take effect if the voters do not authorize the Act or provision thereof to continue to operate.
- (e) Parliament shall enact legislation for the execution of this section.



## **Fear, Hope, Politics and Law\***

*Martin Krygier*

My title<sup>1</sup> is sufficiently cumbersome to need an explanation, if not an apology. So I begin with some words that hover between the two. In 1997 I delivered the Boyer lectures, under the title *Between Fear and Hope: Hybrid Thoughts on Public Values*.<sup>2</sup> While writing those lectures, I was uneasily conscious that an employee of a law school might reasonably be expected to devote one lecture, at least, to law. And not only to placate my Dean. For law, after all, intersects with many of our deepest fears and hopes, whether we are doing something as mundane as preparing a will or buying a house, or something spectacular like, say, planning a murder or a robbery.

But it didn't turn out that way. There were other things I wanted to say, and by the time I had said them there was no room for a lecture specifically on law. It was plain I thought law was important. Among other things, and crucially, it can help us close doors against certain fears and open them to some hopes. But how one might think in any detail about the connections between fears, hopes and laws was left unexplored. In the context of that set of lectures, and the book that

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\* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 20 November 1998.

<sup>1</sup> I am grateful to David Anderson, Arthur Glass, Owen Harries, Philip Pettit and Philip Selznick for their comments on an earlier draft and to the students in my class on 'Law between Fear and Hope' for helping me to work through some of the issues raised here.

<sup>2</sup> *Between Fear and Hope: Hybrid Thoughts on Public Values*, Sydney, ABC Books, 1997.

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expanded upon them, I don't regret the choices I made, but they left some unfinished business. In this lecture, I want to turn to some of that business.

Only some of it though. The subtitle of the lectures stressed that they dealt with *public* values, and I will adopt that as a restriction on what I deal with today as well. For law connects with so many of our fears and hopes—public, private, intimate, secret—that I would need to range far more widely than I have time or inclination for, to deal with them all. And anyway, I have a particular interest in politics, as, I imagine, most of the people who come to work in this building do too. So I will stick to fears and hopes within the public domain, and thus: fear, hope, politics and law.

This title is, I know, rather unwieldy but it could have been worse. For if I'd been braver last year, I'd have used a title that spoke to an even deeper theme of the book than its concerns with fear and hope. That title, drawn from the—perhaps apocryphal and perhaps inaccurate—observation of a great American senator and President that his opponent couldn't do both at once, would be *Pissing and Chewing Gum*. Whatever the truth of the attribution or the allegation, it is apt of our public debate on almost any topic: we're constantly being pressed to choose from a restricted range of oversimplified and allegedly incompatible alternatives, where a choice is often neither necessary nor appropriate. I gave some examples at the beginning of the fifth lecture: realism and idealism, survival and flourishing, individual and community, ethnics and Australians, symbols and practice, pride and shame, civil society and the state. The subtitle of a book with this title would have been: *Try Both*.

And that applies in spades to fear and hope. It is perhaps a characterological divide, maybe even congenital, that some people are drawn to optimism and others to pessimism, but in principle it should be possible to learn from both. The pessimist is concerned—at times obsessed—with the bad that might happen. While that is a sad obsession, it is a healthy concern. For as has been well said by someone—Henry James has been suggested—those who lack the imagination of disaster are doomed to be surprised by the world.<sup>3</sup> But then, sometimes, so are those without the capacity to imagine success. The former might fail to protect themselves against the loss of things precious to them; the latter might deny themselves the experience of anything precious to lose. Love, after all, is a very risky venture which no consistent pessimist should contemplate, since it renders one almost infinitely vulnerable. One should of course reckon with that vulnerability. And yet it would be a pity to avoid it altogether.

And so I have advocated what I call 'Hobbesian idealism', an approach that takes fears very seriously and considers it a matter of priority to seek to allay them, but which also tries to make room for the realisation of hopes. More specifically I recommend thinking 'simultaneously about avoiding evil and about pursuing good, about threat, about promise, and about their interplay.'<sup>4</sup> Where does such Janus-faced thinking lead? And what does it have to do with politics and law?

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<sup>3</sup> See Owen Harries, 'America and the Euro Gamble', *The National Interest*, Fall 1998, p. 128.

<sup>4</sup> *Between Fear and Hope*, op. cit., p. 23.

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## **Fear and institutions**

Many things have been asked of public institutions and actors, among them, fulfilment, liberation, justice, mercy, prosperity, social equality. The list is long and it can be inspiring. There is, however, a strain of thought which appears to ask for little, and that quite austere, but does so insistently. It asks for security from the worst evils that we can do each other and, in particular, that the powerful can do to others. People of this disposition might ask for more than such security, but they insist that it is central. Judith Shklar, one of the most recent, uncompromising and eloquent exponents of this way of thinking about politics, has aptly named it the ‘liberalism of fear’.<sup>5</sup> It is only one strand within the larger liberal tradition,<sup>6</sup> often combined with other strands, but it is a profoundly important one.

I want to explore some of the implications of taking fear seriously, to explore its logic, some of its tendencies and some of its limitations. Though the liberalism of fear has distinguished exemplars and I will refer to writers often enough, what follows is not their version or fault but mine. This caveat is entered not merely to protect me from the erudite, but also because I think that many people betray signs of the disposition I want to flesh out, who have never heard of the liberalism of fear or any of its great exponents and would not admit to be—indeed may not actually be—influenced by it or them. I suspect there will be people hearing or reading this lecture who recognise some elements of this disposition in themselves or someone they know, and it is this disposition that concerns me, more than any particular theorist or theory.

Fear underlies and informs many of our central institutional arrangements and our thoughts about them, though it weighs more heavily on some than others. In thought about public affairs, fear is more associated with a sceptical temper, than with optimistic, sunny expectations or ideals. Those who fear fear are likely to be impressed more by history and memory than by hope<sup>7</sup>, are aware of the ‘crooked timber’ of which we are all made<sup>8</sup>, take the first duty of public arrangements to be ‘damage control’<sup>9</sup> rather than the pursuit of perfection, dream less about

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<sup>5</sup> Judith Shklar, ‘The Liberalism of Fear’, in Nancy L. Rosenblum, ed., *Liberalism and the Moral Life*, Cambridge, Mass., Harvard University Press, 1984, p. 5.

<sup>6</sup> And arguably beyond liberalism, properly so-called. It figures centrally in a tradition that liberalism largely supplanted from the seventeenth century—republicanism. See Philip Pettit, *Republicanism: a Theory of Freedom and Government*, Oxford, Oxford University Press, 1997, and Quentin Skinner, *Liberty Before Liberalism*, Cambridge, Cambridge University Press, 1998. With one exception (below note 18) in what follows I have not discussed the crucial distinction that Pettit and Skinner see between the republican (or, for Skinner, neo-roman) and liberal understandings of freedom and its relation to law. I don’t believe that that distinction affects the arguments presented here, though a historically more scrupulous discussion might have to abandon Shklar’s capacious notion of the ‘liberalism of fear’ and distinguish between republican and liberal approaches to fear and when, how and why it needs institutional containment.

<sup>7</sup> See Judith Shklar, ‘The Liberalism of Fear’, op. cit., p. 8, citing Emerson’s distinction between the ‘party of memory’ and the ‘party of hope’.

<sup>8</sup> Isaiah Berlin renders Kant’s aphorism in these terms: ‘out of the crooked timber of humanity no straight thing was ever made’. See his *The Crooked Timber of Humanity*, New York, Alfred A. Knopf, 1991.

<sup>9</sup> Judith Shklar, ‘The Liberalism of Fear’, op. cit., p. 5.

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attaining the best than avoiding the worst, indeed prefer talk of the least worst to that of the very best.

Acknowledged and unacknowledged, this concern to tame major sources of fear has had deep resonance among thinkers about public affairs over several hundred years. It is expressed among other places in the writings of Montesquieu which greatly influenced the American Founding Fathers. They, in turn, influenced us all, even if today restraint of fear commonly finds more eloquent partisans among those who have suffered its absence than those who live off the fruits of its presence.

This disposition has a distinctive concern with the character of public *institutions*, rather than, say, of public persons. If I were trying to think about personal morality—say, seeking to influence my children’s moral development or my own—I might start by examining traits of individual character apt to steel us against folly and temptations and open us to worthy pursuits. I might begin with notions such as prudence, wisdom, or judgment and follow that up with more morally ambitious ideals such as virtue. And if I did I would be in very good company, for much that is wise and good has been written about these aspects of character and personality. Particularly about virtue.

Political thinkers of a fearful disposition, however, are reluctant to leave too much in public affairs to individuals’ propensity for virtue. They believe that in such matters, while we might (or might not) want to *encourage* individual virtue, we would be unwise to *rely* upon it, and certainly to rely solely upon it. And that for two reasons. One is that we might not find enough of it, and we need safeguards against its absence. The other is that we might find too much of it and we need safeguards against its presence. For we have good reasons to fear not only fiends but saints as well. Particularly if they are powerful fiends or saints. We need security against excess of zeal from either source. Indeed excess or abuse of power from *any* source.

For such security to be enduring and reliable, institutions are necessary. And in particular, institutions that restrain the exercise of power, channel it through established pathways, divide it, check it, tame it, and thus help us keep fear, at least of the power so exercised, at bay. Many of our most valuable legal and political institutions are intended to serve as barriers against or antidotes to some of the most dangerous public sources of fear. It is important to keep that in mind, particularly when the institutions work effectively and the fear is hard to recall.

A classical first move in the argument, is the claim that life will be literally and necessarily frightful, at the very least disorderly, without institutions which can keep the peace, adjudicate disputes and restrain and disarm potentially combative citizens. In different ways, thinkers such as Hobbes and Locke made this move. As they, and particularly Hobbes, knew, not only does the existence of public institutions make it possible to disarm people who can make each others’ lives ‘solitary, poore, nasty, brutish, and short’, but, where they are effective, such institutions can reduce fears that might otherwise impel people to behave in abominable ways. At least on some readings, the ghastliness that has overtaken so much of the former Yugoslavia confirms this insight. In response to clichés about primordial ethnic hatreds, for example, Michael Ignatieff has recently observed that the slide into savagery in that tragic country followed a particular trajectory, which he thinks is generalisable and which he explicates in the following terms:



Note here the causative order: first the collapse of the overarching state, then Hobbesian fear, and only then nationalist paranoia, followed by warfare. Disintegration of the state comes first, nationalist paranoia comes next. Nationalist sentiment on the ground, among common people, is a secondary consequence of political disintegration, a response to the collapse of state order and the interethnic accommodation that made it possible. Nationalism creates communities of fear, groups held together by the conviction that their security depends on sticking together. People become ‘nationalistic’ when they are afraid; when the only answer to the question ‘Who will protect me now?’ becomes ‘my own people’.<sup>10</sup>

To avert such tragedies and lesser ones too, this reasoning goes, we have need of lawmakers who can issue binding laws of general application and who have sufficient power and resources to be able to enforce the laws they make. Which spawns the next problem, and the one that Locke identified, in opposition to Hobbes. If we have so much reason to fear our neighbours who are just individual humans, how should we avoid terror of that ‘mortal God’, the State, which Hobbes called Leviathan?<sup>11</sup> This is a question Kosovo Albanians might put to Ignatieff.

One very old answer—central to liberalism though not its invention—is that rulers must be constrained to operate in accordance with an overarching legal ideal, a framework ideal for law, commonly known as the rule of law. At least since Aristotle, western legal and political traditions have known ideals of ‘the rule of law and not of men’, even though no one imagined that law could rule without men. Why should people be so attracted to this ideal, and why should they think it so important? One reason—one very good reason—has to do with fear of arbitrary exercise of power. Quite apart from the particular *aims* of any exercise of power, law is looked to as a means of restraining the *ways* in which power can be exercised. Locke put the point thus:

Absolute Arbitrary Power, or Governing without *settled standing Laws*, can neither of them consist with the ends of Society and Government, which Men would not quit the freedom of the state of Nature for, and tie themselves up under, were it not to preserve their Lives, Liberties and Fortunes; and by *stated Rules* of Right and Property to secure their Peace and Quiet. ... And therefore whatever Form the Common-wealth is under, the Ruling Power ought to govern by *declared and received Laws*, and not by extemporary Dictates and undetermined Resolutions ... For all the power the Government has, being only for the good of the Society, as it ought not to be *Arbitrary* and at Pleasure, so it ought to be exercised by *established and*

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<sup>10</sup> Michael Ignatieff, *The Warrior's Honor. Ethnic War and the Modern Conscience*, New York, Metropolitan Books, 1998, p. 45.

<sup>11</sup> Cf., John Locke, *Two Treatises of Government*, revised edition, with introduction and notes by Peter Laslett, Cambridge, Cambridge University Press, 1965, p. 405. In a more recent formulation, Brennan and Hamlin characterise ‘a central problem of politics—indeed, the central problem of politics ... as a form of principal-agent problem. Society must delegate powers to agents, but the agents cannot be trusted fully to act in the interests of the principals.’ Geoffrey Brennan and Alan Hamlin, ‘Constitutional political economy: the political economy of *homo economicus*’, *The Journal of Political Economy* vol. 3, no. 3, 1996, p. 296.

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*promulgated Laws: that both the People may know their Duty, and be safe and secure within the limits of the Law, and the Rulers too kept within their due bounds ...*<sup>12</sup>

Judith Shklar, similarly, considers escape from arbitrary power the fundamental virtue to be sought from legal and political arrangements, and insists that it cannot be achieved without the rule of law. The choice, according to Shklar, is simple and stark. As she explicates Montesquieu's institutional recommendations, designed to ensure what he described and valued as 'moderation' in government, '[t]his whole scheme is ultimately based on a very basic dichotomy. The ultimate spiritual and political struggle is always between war and law. ... The Rule of Law is the one way ruling classes have of imposing controls upon each other.'<sup>13</sup>

In a similar vein, in the conclusion of his book, *Whigs and Hunters*, the eminent Marxist historian, E.P. Thompson scandalised many other Marxists, who traditionally had little time for law, by insisting that 'the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error.'<sup>14</sup> What Shklar, a lifelong liberal, and Thompson, a somewhat rueful Marxist or ex-Marxist, share is the insistence that the value of the rule of law lies primarily in what it shields us against. When they warn complacent beneficiaries of the rule of law to value what they have—what *we* have—it is by comparison with the perils that they know flow from its lack.

But—as Locke, Shklar and Thompson knew all too well—despots have laws too, so not just any sort of law will do. And important as ideals are, no sceptic will want to trust to them alone. They need support, and if the support is to be robust and lasting, it must be built into enduring structures, among which legal structures are crucial. The trick is to arrange an institutional order in such a way that it manages to restrain precisely those with the most power: lawmakers, as well as other significant powerholders. That's quite a trick.

One way of elaborating Locke's theme is to try to spell out the institutional implications of rule of law values, values that—above all—seek to ensure that power cannot catch us unawares. Note that in the passage quoted, Locke is not insisting merely that government be by something that can be called 'law'. Nor does he say anything in this passage about the *content* of the law. He insists, rather, on the need for laws of a particular—clear, stable and knowable—*character*, on '*settled standing Laws ... stated Rules of Right and Property ... declared and received Laws*, and not ... extemporary Dictates and undetermined Resolutions ...'. And the reason for this emphasis on the medium rather than the message is plain. The vice he is most concerned to condemn is not the exercise of power itself but 'Absolute Arbitrary Power', 'Government ... Arbitrary and at Pleasure'. And, as anyone who has suffered such power will confirm, he is right to condemn it.

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<sup>12</sup> John Locke, op.cit., pp. 405-06.

<sup>13</sup> Judith N. Shklar, 'Political Theory and the Rule of Law', in Shklar, *Political Thought and Political Thinkers*, edited by Stanley Hoffmann, Chicago, University of Chicago Press, 1998, p. 25.

<sup>14</sup> E.P. Thompson, *Whigs and Hunters. The Origins of the Black Act*, Harmondsworth, Penguin, Eng., p. 266.

Laws that conform to the rule of law are not retrospective, secret, incomprehensible, contradictory. They do not require things that are impossible to perform. On the basis of them, one can make plans. To the extent that a legal order approximates the rule of law ideal, citizens have or can obtain clear understanding, in advance, of their legal obligations and they can reasonably have faith that the law will constrain other citizens and officials of state in ways that, under the rule of law, they can predict.

This is not just a question of the formal character of the written laws, for citizens must also be able to have reasonable faith that the interpreters and enforcers of the law will construe it with fidelity to its publicly known terms and independently of extra-legal pressures to bend or ignore it. That, in turn, will require institutional safeguards for the independence of those who interpret the laws. It will also benefit from a host of—apparently ‘soft’ but actually crucial—cultural supports, among them socialisation into the values of the rule of law, at least of the professionals who have to administer it and, commonly less self-consciously and explicitly, among large numbers of citizens. For a crucial aspect of the rule of law which only partly depends on the law itself is that, in the society at large, laws can, do and should significantly *count* as part of the normative fabric of everyday life. The extent to which any of these features exists is highly variable among and within societies and so, therefore, is the salience of the rule of law.<sup>15</sup>

To the extent that the ideals and conditions of the rule of law are honoured in practice, citizens have some means of knowing where they stand and where others stand. This contributes to lessening their reasons for fearing what others might do, or at least clarifies what they have to fear. And it puts others in the same position when they seek to anticipate what we will do.

The various strands of thought that Shklar characterises as the ‘liberalism of fear’ can be understood as moments in an extended meditation on ways to institutionalise restraint on power, consistent with the rule of law ideal. The products of such meditations are various. Different rule of law regimes have often embodied different judgments about how to implement rule of law ideals, and have different legal and other histories and traditions which have influenced the particular shape of the institutions they have. These differences are not automatically fatal, since the rule of law is not a recipe for detailed institutional design. It represents rather a cluster of values which might inform such design, and which might be—and have been—pursued in a variety of ways.<sup>16</sup>

Still, among liberal arrangements which have often been adopted are forms of separation and division of powers, and more generally attempts to check power by institutionalising countervailing powers. Since the American revolution, a written and binding constitution has stood as a symbol and instrument of many endeavours in this direction, and, since shortly

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<sup>15</sup> I have sought to explore the nature, complexity and consequences of some of these conditions in ‘Institutional Optimism, Cultural Pessimism and the Rule of Law’ in Martin Krygier and Adam Czarnota, eds., *The Rule of Law after Communism*, Aldershot, Eng., Ashgate, 1999, pp. 77-105.

<sup>16</sup> See Philip Selznick, ‘Legal Cultures and the Rule of Law’ in Martin Krygier and Adam Czarnota, eds., *The Rule of Law after Communism*, op. cit., pp. 23-40.

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thereafter, judicial review of the legality of the exercise of power has become its common accessory. Many motives feed these arrangements, but one important among them is trenchantly—if perhaps uncharacteristically—expressed by Thomas Jefferson: ‘free government is founded in jealousy, and not in confidence; it is jealousy, not confidence, which prescribes limited constitutions, to bind down those whom we are obliged to trust with power; ... in questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.’<sup>17</sup>

None of this can completely *eliminate* fear, of course. Nothing could do that, and particularly not law, since its association with force renders it—for many people in many circumstances—inevitably a source of fear itself. But it helps tame some of the worst things we have reason to fear from public power, and it helps us to know what, and in what circumstances, we have to fear. All it needs to make one take this kind of thinking seriously is the concession that the world can be a dangerous place. And all it needs to make that concession seem sensible is a cursory knowledge of history, or even a glance at a newspaper. The less cursory that knowledge, the longer the glance, the more sensible the concession will appear.

The legal recommendations so far discussed are devoted to providing frameworks for the containment, and channels for the safe transmission, of political energies. But what of the animating sources of these energies, where politics and law meet. Politics is, after all, not a frictionless motion of actors bounded and insulated by faithfully applied and unchanging laws. And laws are not neutral or eternal frameworks. They are *made* by people with purposes and ambitions. How to domesticate those purposes and tame those ambitions? Moreover, laws have effects, so one is not merely concerned with what goes *into* the political machinery, but with what comes out. How to make those who make and enforce laws accountable to those whom they will affect?

At the centre of most modern answers to these questions is democracy. In modern times, the rule of law has been intertwined with political democracy. And so we speak routinely of liberal democracy. These two elements were not always linked historically and on one view<sup>18</sup> they have

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<sup>17</sup> Quoted in Philip Selznick, *The Moral Commonwealth*, Berkeley, University of California Press, 1992, pp. 279-80.

<sup>18</sup> This is the classical position of such writers as Benjamin Constant and Isaiah Berlin, for whom ‘[t]he answer to the question ‘Who governs me?’ is logically distinct from the question ‘How far does government interfere with me?’” [‘Two Concepts of Liberty’ reprinted in *Four Essays on Liberty*, Oxford, Oxford University Press, 1969, p. 130.]

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The first question, according to Berlin has to do with ‘positive’, the second with ‘negative’ liberty. And, Berlin believes, the liberal is first of all committed to negative liberty. According to Pettit and Skinner, on the other hand, republican or ‘neo-roman’ thought saw liberty not merely as absence of interference, but *secure* absence; the opposite not merely of coercion by another but of domination by another, whether coercive or not and whether benign or not. That, so the argument goes on, is why slavery is always inconsistent with freedom, even if a slave-owner treats his slaves well. For he *could* do otherwise. Republican freedom requires that no one else have dominion over me, and for this to be possible I must have the right to control over decisions that affect me, however indirect practical constraints make that right. As Skinner expresses the neo-roman argument: ‘From the perspective of the individual citizen, the alternatives are stark: unless you live under a system of self-government you will live as a slave.’ [*Liberty Before Liberalism*, op. cit., p. 76. See also Pettit, *Republicanism*, op. cit., *passim*.]

no special conceptual connection either, since one can imagine a benign and liberal prince who respects legal constraints<sup>19</sup> or an elected demagogue who does not. However, quite apart from the many independent reasons to value democracy, their connection makes a great deal of sense.

One major reason for democracy, certainly not the only reason but one which allies it with the liberalism of fear, is that it puts ultimate control, over those with their hands immediately on the levers of power, in the hands of those who will be affected by the exercise of that power. But what stops the people themselves from being unruly? After all, politics is a domain of passions, contests, ambitions, interests, values. How to contain the results of these often tempestuous forces? Here the liberal democrat folds politics back into the restraining web of institutions and the rule of law. Political power should be exercised by way of laws within a system that conforms to the rule of law, and social power should also be contained within the framework of such laws.

To simplify complex theory and different and unevenly successful practice, the political process has the task of liberating, but then containing, what emerges from the agitation of politics and then *funneling* it through legislative institutions, which distil it into laws. Some laws come out of this process to affect us directly, others through the activities of officials. If there are disputes about the meaning and bearing of laws, other officials interpret those laws and adjudicate those disputes.

On this view, it is important to distinguish between the mouth of the funnel, where new matter appropriately enters to become law, and these ancillary points of official intervention, which are to be limited to enforcing and applying the law and not be additional sources of that law. For the ambition is to fix the location of political decision to where the people are or can be, so that from the time it leaves them to be distilled into laws it can emerge to affect them as untainted and unaltered by alien material as can be contrived. On this view the application of the law by unelected officials should not be another inlet, not itself the occasion for fresh political agitation or lawmaking. For that one must return to the funnel mouth, where politics rightly happens and the people can control what is decided.

Now from the point of view of the liberalism of fear, the complex institutional arrangements that I have merely sketched are at once indispensable and fragile. Indispensable because they limit the sway of unaccountable power. Fragile, both because they are subject to external threats and also because the complex interdependencies and balances upon which they rely are so liable to being upset. Each of the elements might become stronger or weaker than it needs to be to cooperate with and to limit the others. Popular passions might overflow or erode the channels intended to restrain them, or they might be led astray. Power might seep or flood from the elected government to its bureaucracy, as unelected officials contrive to render oversight by the people or their representatives nugatory. And what of also unelected and virtually irremovable judges, particularly senior judges? These are strategically located in the whole design of control over other institutions and the law, but they themselves escape the circles of control because of their institutionally protected independence, which itself has impeccable liberal foundations. Here the

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<sup>19</sup> This was implicit in the non-democratic ideal of the *Rechtsstaat* in nineteenth century Prussia.

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liberal component in liberal democracy tends to strain against its partner; the former often biased in favour of institutions that limit lawmakers, such as courts, the latter favouring those that are accountable to the people, such as legislatures. And I have not even mentioned the arguments of radical critics of liberalism, who suggest that the whole enterprise of constraining social power by legal means is doomed to fail, or at least systematically to serve some elements of society at the expense of others, while masking this systematic bias under the universalist rhetoric of the rule of law.<sup>20</sup>

At each of these and other points of suspected vulnerability, the logic, the *grain*, of the liberalism of fear will tend in the direction of strengthening accountability, finding ways of controlling controllers, guarding guardians, cabining, confining and balancing every position and every moment where power can be exercised: legislatures by citizens; governments by legislatures, courts and tribunals; courts by the law. This, of course, makes adjudication a very sensitive and delicate business *in principle*, since though the judges are the exemplary officers of the rule of law, responsible for maintaining it against all comers, they are—at least in constitutional matters—formally controllable by no one. If fear is what motivates you, that is a worry, and I will return to it. But it is only one of many.

### **Fear, strength and competence**

The logic of the liberalism of fear leads naturally, then, to concern for systematic restraint on state power. But it is important to recognise that that is one *consequence* among others of that logic, not its originating source. To forget the distinction between source and consequence, as many fearful liberals have, often leads to exaggeration of the importance of that consequence. It also tends to obscure the fact that *restraint* on the state comes into play only after the first—sometimes only dimly-remembered—move of the liberals' own argument. That, after all, was to stress the importance of *having* a state with, in Madison's terms, 'regular powers commensurate to its objects',<sup>21</sup> one that is strong and effective enough to do what states need to do. And that, as I have tried to show elsewhere, is quite a lot.<sup>22</sup> It also requires states, and public institutions more generally, to do well what they do. That too is no small matter.

Even 'simply' keeping the peace—which mattered so to Hobbes—is no small matter, as is evidenced by the difficulty of restoring peace in societies whose states have ceased to be able to keep it. Moreover, if we explore what else of value in well-functioning modern societies depends on a state that is effective and strong, the list becomes long and complex. It certainly includes markets, private property, and civil societies, which are so often wrongly seen as alternatives to

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<sup>20</sup> I have discussed one version of this criticism, that of the critical legal studies movement, in 'Critical legal studies and social theory. A response to Alan Hunt', *Oxford Journal of Legal Studies* vol. 7, no. 1, 1987, pp. 26-39, and others from within the Marxist tradition, in 'Marxism, Communism, and the Rule of Law,' in Martin Krygier, ed., *Marxism and Communism. Posthumous Reflections on Politics, Society, and Law*, Poznan Studies in the Philosophy of Sciences and the Humanities, Amsterdam-Atlanta, GA., Rodopi, 1994, pp. 135-68.

<sup>21</sup> *The Federalist Papers*, [no.38], New York, Mentor, 1961, p. 240.

<sup>22</sup> *Between Fear and Hope*, op. cit., chapter 5.

strong and effective states, though in fact they depend upon them. Moreover, as the World Bank has recently reminded us, and perhaps itself, and as is clear from the evidence in the Bank's Development Report of last year,<sup>23</sup> if economic and other social development is to be successful, there is a lot that governments need to do, not merely to make and enforce laws, but also to invest in basic social services and infrastructure, to protect the vulnerable and to protect the environment. They shouldn't do everything themselves, indeed there are excellent reasons why they shouldn't even dream of it, but they have a responsibility to make it possible that such things be done and, often, to see that they are done.

Indeed, even the most classical, and allegedly 'negative' of the liberal rights depend on very substantial state provision. They are, as I stressed in the Boyer lectures:

... products of systematic state interference in society. They exist owing to laws which enforce certain rules and not others, embody certain images of social interaction and not others, penalise certain behaviours and reward others. None of this is small game, and none of it involves simply tracking and backing autonomous social activity. What form this activity takes, what consequences it will have, what is to be tracked and what to be backed, and how, and with what implications, are all state decisions. How effectively any of this happens depends on state solvency, integrity, institutional design, trained personnel, and an ethos of office which can withstand the variety of corruptions that high stakes will, without counteraction, attract.<sup>24</sup>

So one should avoid the mistake, often made, of seeing the state as the inevitable enemy of liberalism, or at best a necessary evil. It is a necessary good, and if it is in good shape that is very good. At least it is if it is the right sort of state, since states differ. My point is not to praise them all, since many are evil and even adequate states commonly do much that they shouldn't or worse than they should. It is merely to insist that states need to be effective and strong to provide the goods that it is indispensable that they do provide. One consequence of that insistence, worth repeating in the present political climate, is that the liberalism of fear should not be thought to require the emasculation of the state. Rather it should seek to ensure that the state can do and does what it should, and doesn't and can't do what it shouldn't.

The significant questions, to which we only have tentative and controversial answers, have to do with the conditions, character and consequences of good states. We would do better if our public debates were less determined to identify such *qualitative* questions with quantitative ones, with questions of size and cost. Those matters might well be important, but only as they bear on the qualitative issues I have mentioned and only if their bearing is demonstrated. It is not enough to assume their significance without more. For between the extremes of statism and anarchy, the difficult problems concern what states are good for, what that presupposes and requires, and whether our state is capable of doing and apt to do the right things in the right ways. These questions will be no less controversial than quantitative ones, which today assume that more

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<sup>23</sup> World Development Report, 1997. *The State in a Changing World*, Oxford, Oxford University Press, 1997.

<sup>24</sup> *Between Fear and Hope*, op. cit., pp. 128-29.

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means worse and yesterday assumed that more meant better, but they are likely to be more fruitful.

Fortunately, the liberalism of fear is capable of addressing these qualitative issues in a fruitful way, even though it is today most often interpreted otherwise. For its concern with restraint on state power, properly construed, is quite compatible with—indeed an ingredient in—an equally significant concern for the effectiveness of state power. That is a point too often missed. It has been forcefully made by Stephen Holmes, who advocates an interpretation of the values which he describes as ‘positive constitutionalism’ in preference to the negative form that is so often the only one of which we hear. The tradition of what Holmes calls ‘negative constitutionalism’ is the most common way in which we articulate the point of liberal institutional considerations, but not the most illuminating way. It speaks, of course, a fundamental truth of the liberalism of fear: unrestrained power, despotism, tyranny, are terrible. They are to be avoided at all costs and constitutional restraints are key ways in which we seek to avoid them.

Positive constitutionalism does not underrate these virtues of restraint. Rather, it understands them in a different light, for it is concerned to stress at the same time the enabling and facilitating role of constitutional and legal institutions. The insight of this tradition, as Holmes describes it, is that:

Limited government is, or can be, more powerful than unlimited government. The paradoxical insight that constraints can be enabling, which is far from being a contradiction, lies at the heart of liberal constitutionalism .... By restricting the arbitrary powers of government officials, a liberal constitution can, under the right conditions, *increase* the state’s capacity to focus on specific problems and mobilise collective resources for common purposes.<sup>25</sup>

Just as many people distrust states in general, however, so people involved in institutional design often seek to implement that distrust through legal and constitutional means. The danger of this approach is that it will thwart whatever good the state can do, and that without an effective state cannot be done. For to the extent that state power can be harnessed to valuable ends, we will want not only to limit the ability of the state to do harm but maximise its ability to do good. Even to reduce our fears, states need to be effective. Even more so, to the extent we think they might contribute to advancing our hopes.

What must be avoided, then, is not state power *per se*, but arbitrary, capricious, despotic exercise of that power. What must be nurtured is not state weakness, but sufficient strength, and strength of the right sort, to enable the state to tax fairly and adequately, spend effectively and deploy its power to good ends. For states must be *competent* to do what they are peculiarly suited to do, even as they must be restrained from doing what they are ill suited to do well, or well suited to do ill. And not just states at large but a variety of particular public institutions. To ensure such institutional competence requires that we understand what it involves. This will be complex and

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<sup>25</sup> Stephen Holmes, *Passions and Constraint*, Chicago, University of Chicago Press, 1995, p. xi.



will vary from institution to institution. Then the small matter remains of achieving it. Fearful liberals are not incapable of addressing these issues, but that is not always their central interest, nor always their special strength.

### **A law of rules?**

There is, of course, nothing startling about recommending that public institutions should be competent. Who wants anything else? Nevertheless the recommendation is not as banal as it might seem. For not only are some people so impressed by the pathologies of state power, that it is unclear what good the state might be able to do if the more strident calls for ‘rolling back the state’ were to be heeded. There are also several contexts in which the natural and laudable implications of the liberalism of fear, untempered by other concerns, tend to pinch and strain against certain kinds and sources of institutional competence.

One context of crucial importance is that of law. Here there are strong liberal and perhaps even stronger democratic reasons to insist that law be solely or as much as possible a ‘law of rules’,<sup>26</sup> where rules are understood to act as ‘exclusionary reasons’.<sup>27</sup> Where such reasons for decision are in play, they exclude recourse to extra-rule considerations which might otherwise be considered relevant, whether these be considerations of politics, morals, consequences or whatever. On a strict interpretation of this view, that might even exclude direct consideration of, say, the purposes which might have or be thought to have led to the rules in the first place, and it would certainly exclude any considerations which lay further afield. That, so this view insists, is what is meant by *applying* the law that you have, rather than speculating about why you have it or making a new law, different from the one in front of you. For a rule to have the signal attribute of ‘ruleness’, then, it must act at the point of application as an unambiguous, mandatory and exclusionary rule, to be preferred to non-rule considerations, not a mere rule of thumb, simply to be taken into account along with them.

There are authoritarian ‘top-down’ versions of such a model of rules, which emphasize the subordination of officials and citizens to rules, but leave prerogatives untrammelled at the centre. Here the law is seen as above all an *instrument* of authoritative command, and ‘ruleness’ is assessed in terms of its efficacy in transmitting central commands. It will go along with weak political and legal accountability of power-wielders and a merely instrumental and contingent commitment on the part of the centre to abide by the rules. And there may well be circumstances where open-ended discretions or extra-rule exercise of power will be preferred by the rulers, instead of or as well as insistence on rules. Citizens will not be empowered to insist that rules bind rulers as well.

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<sup>26</sup> cf. Antonin Scalia, ‘The rule of law as a law of rules’ *University of Chicago Law Review*, 56, 1989, p. 1175. For a forceful argument along these lines, see Tom Campbell, *The Legal Theory of Ethical Positivism*, Aldershot, Eng., Dartmouth, 1996.

<sup>27</sup> Joseph Raz, *Practical Reasons and Norms*, London, Hutchinson, 1975, pp. 15-84. Though this is Raz’s conception of mandatory rules, what follows is not his conception of the role of the judge.

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When combined with liberal democracy, however, the significance of rules in the model is different. Their point is to segregate the legislative level at which politics, interests and clashes of value have legitimate play, from the executive and adjudicative levels where they do not, on the grounds that the former are controlled democratically, while the latter are not. Only this, and the associated *autonomy* of law-application from the world of politics, interests and clashes of value, gives democratic legitimacy to the former, since the *demos* is there and to the latter, since it isn't. Moreover, unless the law observes such segregation, the rule of law itself might be imperilled, since any alterations at the stage of application would mean that the law could not have been known beforehand. Its effect will be retrospective. So too with any softening of the 'ruleness' of law. If law is comprised of open-ended 'standards' which are only made concrete at the point of 'application', if it can be outweighed by the decision makers' views of morals, politics or consequences, then again the rule of law threatens to degenerate into the rule of men.

It is easy to see the attractiveness of this understanding to the liberalism of fear, and to liberal democrats inspired by it. It would seem to keep the consideration of politics and values where, in their scheme of restraint, they should lie—at the properly *political* stage of the process, where laws are made by representatives answerable to the people. If the laws so made can be ignored, revised, remade, by unelected officials, whether bureaucrats or judges, or if their terms are so vague that their particular scope and meaning must await an interpreter's decision, the whole ambition to *funnel* values into a set of institutions constrained by law starts to come apart. This seems calculated to puncture holes in the legal funnel, through which legitimate (because under democratic control) purposes and values might seep out, and illegitimate ones (because uncontrolled either by legality or democracy) might be injected. Moreover, the whole notion of clarity, non-retrospectivity, and stability of law would seem up for grabs, at the mercy of the next decision. If so, doesn't that rob citizens of precisely what the rule of law was intended to ensure them?

It is parallel considerations that lead many people to decry the consequences of the welfare state for the rule of law. The modern active state relies greatly on open-ended laws, expanding official discretions, ballooning and hard to ascertain regulations. How to know them in advance? How to interpret them? How to rely on them? How to keep them from favouring some at the expense of others? Many thinkers have warned against the consequences of these developments for the maintenance of the rule of law<sup>28</sup>, and their fears are not empty.

One response to such developments, by fearful liberals among others<sup>29</sup>, is to advocate tight legislative definition of administrative action and limitations on administrative discretion, clear

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<sup>28</sup> See F.A. Hayek, *Law, Legislation and Liberty*, Chicago, University of Chicago Press, vol. 1, 1973, vol. 2, 1974, vol. 3, 1979; Eugene Kamenka and Alice Erh-Soon Tay, 'Beyond Bourgeois Individualism—The Contemporary Crisis in Law and Legal Ideology' in Eugene Kamenka and R.S. Neale, eds, *Feudalism, Capitalism and Beyond*, Canberra, ANU Press, 1975, pp. 127-44; Theodore J. Lowi, 'The Welfare State, The New Regulation, and The Rule of Law', in Allan C. Hutchinson and Patrick Monahan, eds, *The Rule of Law. Ideal or Ideology*, Toronto, Carswell, 1987, pp. 17-58; Geoffrey de Q. Walker, *The Rule of Law*, Melbourne, Melbourne University Press, 1988.

<sup>29</sup> Tom Campbell advocates what he calls 'ethical positivism', which he describes as 'an aspirational model of law according to which it is a presumptive condition of the legitimacy of governments that they function through the

and precise legislative rules rather than vague standards, 'judicial restraint' rather than 'judicial activism', precise legislative definition of rights not vague constitutional bills of rights, all the more not constitutionally entrenched bills of rights. These last, it might be observed from this viewpoint, are falsely called difficult to amend, for that only means that citizens have difficulty amending them. Judges are free to do so whenever they come to 'interpret' them. This would seem to offend the principles of democracy and liberalism at the same time.

Fear of uncontrollable judges might, for example, lead some to spurn bills of rights, even though it might have been fear of only loosely controlled legislatures which led others to embrace them. And this is an instance of a wider difficulty or source of tensions within attempts to realise the liberalism of fear. There are so many potential sources of fear that attempts to institutionalise antidotes to one such source might themselves build up powers in another, of which one has reason to be afraid. This, as we saw earlier, is where democratic and liberal commitments might strain against each other. A strong court might neutralise a strong legislature or executive, but then what about the court? So long as courts keep their heads down and can convince people that they are merely applying laws made elsewhere, this fear might lie dormant. However as soon as they seem to show some initiative, this is a source of disquiet to many, since there is no obvious way to impose extra-judicial control over that initiative without destroying the independence so precious to the role that fearful liberals require courts to play. And this is where the attack on judicial activism has its most potent source. For if the defences of fearful liberalism are to be rigorous they should leave no unguarded guardians. But that is precisely what law-making judges seem to be.

These are weighty considerations. It is certainly no answer to them to favour judicial or administrative activism on the grounds that one prefers the results in particular cases. For there will be other cases, and institutions are in for the long haul. Nor can a sceptic be happy to 'let justice be done though the heavens fall.' People who advocate that are unlikely to have experienced falling heavens. And demands that 'justice' should invariably triumph over 'blind adherence to rules' ignore at their or our peril just how contentious justice can be and how important the work of rules is. Liberals and democrats are right to emphasise the importance of rules, and they are equally right to insist that a serious political theory must reckon not merely with what results institutions should generate but equally with what institutions should generate them. They must have a theory of what institutions should have *authority* when values are in dispute, not merely what values they think should win.<sup>30</sup> There *are* strong democratic reasons to favour legislative sources for fundamental value decisions, strong liberal reasons for 'ruleness', and strong reasons to worry about unfettered discretions in the hands of unfettered decision-makers. But are they always and everywhere overwhelming, and more particularly should they uniformly override any other considerations? For there are such considerations, perhaps even strong enough to encourage us to chew some gum.

medium of specific rules capable of being identified and applied by citizens and officials without recourse to contentious personal or group political presuppositions, beliefs and commitments.', op.cit., 2.

<sup>30</sup> For a forceful argument on this and related points, see Jeremy Waldron, 'A rights-based critique of constitutional rights' in *Oxford Journal of Legal Studies* vol. 13, no. 1, 1993, pp. 18-51.

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First of all, one must reckon with the impossibility, now almost universally acknowledged among lawyers, of a gapless regime of totally, mechanically, applicable rules. No legal theorist pretends that such a regime can exist in practice, for there are so many unavoidable factors about law and about life that militate against perfect ruleness of rules. Just to mention one: rules, expressed in words, have to be interpreted and they cannot dictate the interpretation they receive. That comes from outside them, from those who interpret them.<sup>31</sup> It does not follow that meaning is necessarily unstable, at least among lawyers, since there is usually considerable consensus within interpretive communities on how they are to be interpreted. But that in turn depends, among other things, on canons of interpretation within such communities, which in turn are controversial, often inconsistent, and change, for the proper grounds, means and ends of interpretation are themselves complex and matters of dispute. And then rules of interpretation, even when agreed upon, have themselves to be interpreted, and so on. None of this is news to any legal theorist, though different theorists draw different conclusions from it, and popular polemics often ignore it. Other chestnuts of legal theory concern questions of what decision-makers should do if their understanding of the meaning of the rule, as applied in a particular case, contradicts what they understand the purpose of the rule to have been. Or what if the rule seems to dictate a conclusion out of line with values deep in the larger body of law? Or manifestly unjust? It is not obvious that such considerations should invariably trump respect for rules, but nor is it obvious that they should always lose.

The real dispute about the role of officials is rarely between those who think the law is or can be always plain and officials should/shouldn't ignore it. Rather it is a dispute of political morality as to what officials should do in those many cases when there is no simple and uncontroversial way of reading off a univocal result from the words of the legal rules. What approach by officials—at that point of decision—best serves democracy, fidelity to law, justice, institutional competence, and whatever other values are nominated, and then—if these values point in different directions—which should have what priority? These questions are particularly insistent at appellate levels, since odds are that the case would not be there if the answer were simple. And to such questions, as to most questions of institutional design, there is no one-size-fits-all answer that will do.

Thinkers who still are primarily concerned to cabin official acts might modify their original injunction that the law should simply be applied to say that officials should stick as close to the rules as they can when they apply them, and add as little of their own as they can. They should be systematically 'restrained', not 'activist', deferential to legislatures, cautious in any extensions of the law they might be driven to suggest. And, given the democratic deficit under which judges labour, there is a lot to be said for judicial restraint in many—perhaps most—circumstances, for judges' settling for 'incompletely theorised agreement'<sup>32</sup> short of the fully theorised 'moral reading' that some<sup>33</sup> demand from them. Modesty is, after all, a virtue, particularly from

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<sup>31</sup> For an exaggerated, repetitive, self-indulgent, and often dazzling series of essays which make this point, often, see Stanley Fish, *Doing What Comes Naturally*, Durham, NC, Duke University Press, 1989.

<sup>32</sup> See Cass Sunstein, *Legal Reasoning and Political Conflict*, Oxford, Oxford University Press, 1996.

<sup>33</sup> See Ronald Dworkin, *Law's Empire*, Cambridge, Mass., Harvard University Press, 1986, and *Freedom's Law: the Moral Reading of the American Constitution*, Cambridge, Mass., Harvard University Press, 1995.

incumbents of an institution which is deliberately cut off from democratic accountability and systematic access to information other than law. However, it is not the only virtue and where it is disingenuous it might not even be virtuous. That aside, the demand for ‘restraint’ rather than simple rule-application already suggests that the legal funnel is leaking. And if the leakage proves unstoppable, one might reconsider whether to try all measures to stem the flow. Instead it might be worth thinking whether it could be directed to good ends.

### **The realistic pursuit of ideals**

Among the primary virtues of the rule of law is that we can know what the law is in advance, and place significant reliance upon it. These are remarkable contributions that a stable and coherent legal order bestows on a society. However, *how much* predictability a legal order needs to successfully undergird a civil society, and what sorts of law produce it, are less simple questions than they appear. And the answers of many fearful liberals—the more the better, and a tight rule-based legal order—are less obviously compelling than they might seem.

An example might help here. The magisterial social theorist, Max Weber, argued powerfully that modern ‘sober bourgeois capitalism’ could not have developed in the absence of a highly predictable order of politics, administration and law. Where the ruler’s prerogative constantly threatened, or the administration was unsystematic and not based on rules, or the law was unclear or unascertainable or liable to arbitrary change, various forms of ‘adventurous and speculative capitalism and all sorts of politically determined capitalisms are possible, but no rational enterprise under individual initiative, with fixed capital and certainty of calculations’<sup>34</sup> and with it the enormous dynamism which the Western capitalist order uniquely displayed. Such an economic order needed ‘a calculable legal system and an administration in terms of formal rules’.<sup>35</sup> The key was the sovereignty of predictable rules.

This is a sociological thesis and a highly plausible one. Without at least a reliable threshold of predictability, of restraint on the arbitrary exercise of significant power, sober bourgeois capitalism won’t develop, though snatch-and-grab capitalism might. That is a lesson that contemporary Russia confirms. However Weber went further. As a trained German lawyer, Weber identified the Continental legal order, which had as its regulative ideal a gapless, coherent system of formal general rules, as the most predictable and hence the most suitable for capitalism. Weber knew that the ideal was unrealisable in practice, but he seemed to think that the determined attempt to approximate it would generate more predictability than would any alternative.

That, however, left him with a notorious problem. England and the United States had altogether messier, inductive, case by case methods; English legal thought, Weber wrote, ‘is essentially an empirical art ... One can also still observe the charismatic character of lawfinding, especially,

<sup>34</sup> *The Protestant Ethic and the Spirit of Capitalism*, London, Unwin, 1971, p. 25.

<sup>35</sup> *ibid.*

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although not exclusively in the new countries, and quite particularly the United States.’<sup>36</sup> Indeed, ‘[a]ll in all, the Common Law... presents a picture of an administration of justice which in the most fundamental formal features of both substantive law and procedure differs from the structure of Continental law as much as is possible within a secular system of justice.’<sup>37</sup> This is an embarrassment for Weber’s legal thesis, because it was precisely these countries which were the great engines of capitalism; not Germany and France with their far more systematic sets of rules. Worse still, Weber—who was nothing if not honest (and a genius besides)—acknowledged that where the two systems competed, as in Canada, ‘the Common Law has come out on top and has overcome the Continental alternative rather quickly.’<sup>38</sup> He might also have acknowledged that the English system of political rule was not obviously more arbitrary than the German, for all the latter’s formality and rules; nor—to add the liberals’ preoccupation—did the English have more reason to fear abuse of political power than the German or French.

Weber made a variety of *ad hoc* attempts to reconcile his thesis about Continental technical superiority with the facts of English and American success. These brief hypotheses were unsuccessful in that aim because they each undercut the special significance of formal rationality, but each was fertile. I will recall one here, and one in a moment. The first was that English law ‘while not rational [roughly: derived from a coherent system of general rules] ... was calculable, and it made extensive contractual autonomy possible.’<sup>39</sup> This saves the sociological thesis that capitalism requires predictable law, but not the legal one, that it requires ‘formally rational’ law on the Continental model. It appears that your law can be predictable *enough*—perhaps more than enough—even where predictability matters a lot, though it is—by some standards—quite unruly.

This suggests two important points for fearful liberals, committed to a law of rules. First of all, the attempt to realise an unrealisable ideal is not necessarily the best strategy for anchoring one’s values in the world. That is perhaps an illustration of the economists’ ‘theory of the second best’. As I understand it, this theory holds that if in an ideal theoretical model a combination of factors and circumstances would produce a particular optimal result, but some of these factors are missing in actuality, you won’t necessarily do best by simply seeking to maximise those of the stipulated factors that remain, in the circumstances that you have. Or to adapt an illustration made by the philosopher Avishai Margalit,<sup>40</sup> imagine you are desperate to fly for a holiday in Hawaii,

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<sup>36</sup> Max Weber, *Economy and Society*, vol. 2, New York, Bedminster Press, 1968, p. 890.

<sup>37</sup> *ibid.*, p. 891.

<sup>38</sup> *ibid.*, p. 892.

<sup>39</sup> Max Weber, *The Religion of China*, New York, Free Press, 1951, p. 102.

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<sup>40</sup> *The Decent Society*, Cambridge, Mass., Harvard University Press, 1996, p. 283. Margalit has another illustration of the theory, with which many might find it possible to empathize: ‘St. Paul believed that the human ideal for men is celibacy. But if someone has strong desires, he had better not remain a bachelor, trying to fornicate as little as possible and thus coming as close to the ideal even if he can never actually reach it. It would be better for him to get married.’

but only have enough fuel to drop you a few hundred miles short, somewhere in the Pacific ocean. Rather than try to fly as close to your goal as you can, you might do better to settle for Heron Island. Particularly if there are other benefits in doing so. In our context, also one of inevitable shortfall—in this case from formalistic perfection—it might not prove sensible relentlessly to urge approximation to an unattainable ideal, in the context of a world in which complete ruleness is unavailable, there is evidence that it is not necessary for what you want, and other considerations are also important. All the more since, as I will argue in a moment, legislators are not in control of many of the factors which will ultimately determine the effects of the laws they launch into the world, and they don't know much about them either.

The second point is this. The liberalism of fear can only distinguish itself from paranoia if it is prepared to take circumstances, and variations in institutional strength, support and resilience into account. Many who understand the power of evil and corruption in the world are genuinely and rightly reluctant to compromise on the rule of law and the autonomy from other pressures which a law of rules promises. Comparing relatively autonomous legal orders with repressive and arbitrary ones, they prefer the former. And rightly so. But these are not the only alternatives. For legal orders differ greatly in the extent to which the values and practices of the rule of law are strongly embedded within them. In strong legal orders, such as our own for example, there are large cadres of people trained within strong legal traditions, disciplined by strong legal institutions, working in strong legal professions, socialised to strong legal values. Western legal orders are bearers of value, meaning and tradition laid down and transmitted over centuries, not merely tools for getting jobs done. Prominent among the values deeply entrenched in these legal orders over centuries are rule of law values, and these values have exhibited considerable resilience and capacity to resist attempts to erode them. Not every legal order is so strong. That suggests that not every legal order is equally at risk from limited incursions on its 'ruleness': some will be much threatened, others less so.

Philip Selznick insists upon this point, in arguing for a legal order more 'responsive' to changing needs, particular circumstances, principles of justice embedded in legal traditions but often not formulated as hard and fast rules, and considerations of justice more broadly. Responsive law, in Selznick's theory, is not a horse for all courses, not equally salutary in every time and every place. On the contrary, he points out that it is sinister (or frivolous) to demean the values and institutions committed to restraining power, and that a system of 'autonomous' law, which gives a high priority to rules, is a potent complex of such values and institutions. However, he also observes that just as people exhibit what he calls 'moral development,' so the point can be generalised to institutions, systems, communities.<sup>41</sup> At certain stages in the career of an institution, for example, particularly formative stages, certain values rightly rank high—because they are not yet established or institutionalised, or because they are at risk, or because they face strong threats. Such values must be secured and it is dangerous to compromise them. When, however, they *are* secure, the balance of emphasis in our moral ambitions can change, and striving toward aspirations can more safely supplement the establishment of baselines of security.

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<sup>41</sup> See Philippe Nonet and Philip Selznick, *Law and Society in Transition. Toward Responsive Law*, New York, Harper/Colophon, 1978, pp. 18-27, 'A Developmental Model.'

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We can even take some risks. This is not because the baselines become less important, just that they are more firmly in place and risks are less risky. Thus:

For many institutions, a large measure of autonomy is especially important in its *formative* stages. When policies and perspectives must be nurtured—given a chance to become established and secure; in a word, institutionalized—they need the protection autonomy can give. Once the system or policy is secure, that need becomes less compelling. Then more precision is required as to *what kind of* autonomy and *how much* is required or desirable.<sup>42</sup>

But why would one want to compromise the ruleness of law? Basically because, while we need institutions and the rule of law to protect us we might want to enlist them for other purposes as well, and characteristics apt for one purpose might not be equally apt for others, however legitimate they both are. And so Selznick insists on the importance of attending to both baselines, conditions of survival, on the one hand, and aspirations, conditions of flourishing, on the other.

## Hopes

We ask a lot of things of law as of life, and not all of them are consistent with each other. After all, judges are sworn to do justice according to law, so there is something poignant when the two demands come apart. Sometimes our fondness for ruleness might seem outweighed by our wish to do justice in a particular case, sometimes simply by our wish to act sensibly in particular circumstances, sometimes by our wish to serve the purposes of a statute, even if that involves setting aside the implications of what we understand its words to require, because in a particular case the result of their application would lead to a foolish result. And judges are not the only officials who are bound by rules and bound to apply them. Regulators are sent throughout the society authorised by law to check on the performance of industries, hospitals, schools, and so on. How should they do their important jobs? Fear and hope will often point in different directions here. Fear is important enough to have considerable priority, maybe enough to raise a presumption in favour of moves to counteract it. But keeping fear at bay is not, nor need it be, the only game in town.

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<sup>42</sup> *The Moral Commonwealth*, op. cit., p. 335. As he writes elsewhere:

there is or should be a dual focus on *baselines* and *flourishings*. We hold fast to the vital minimum even as we reach for the more subtle, more elaborated, more problematic ideal. Without protection of baseline values and procedures, the rule of law loses focus, obscured in a utopian plea for a world untainted by power or authority. This is the danger in radical criticisms of ‘liberal legalism’. The criticisms are useful insofar as they show how the classical rule-of-law model undermines solidarity and delivers a cramped, impoverished justice. Such criticisms are misplaced, however, insofar as they lose purchase on the need for elementary constraints on the abuse of power.

There is nothing strange or exotic about the dual concern I recommend. It follows a familiar logic. In parenting and education, for example, we cannot act responsibly if we fail to address foundational needs for nurture, stimulation, and discipline, as well as elementary expectations with regard to learning and character. But we would fail as parents and educators if we did not encourage and support more complex virtues and higher competencies. (‘Legal Cultures and the Rule of Law’, op. cit., p. 34.)



This is something Weber hints at in another attempt to explain the embarrassing English advantage. In English law, he writes:

[s]afety valves are ... provided against legal formalism. ... the institution of the civil jury imposes on rationality limits which are not merely accepted as inevitable but are actually prized because of the binding force of precedent and the fear that a precedent might thus create 'bad law' in a sphere which one wishes to keep open for a concrete balancing of interests. ... It does in any case represent a softening of rationality in the administration of justice.<sup>43</sup>

Such 'safety valves', which allow escape from the excessive rigidity often associated with a single-minded devotion to rules, might be useful in other contexts as well. Paradoxically they might even deliver us more reliable legal consequences.

There are at the same time important sociological and moral dimensions to all this, and I will take them in turn. A confidence in the real-world consequences of precise rules, tight discretions, crisp definitions, judicial restraint and so on, assumes a lot about the ways that laws in the books and in the courts affect lives in the world. But much of this advocacy, whether by lawyers, legislators, economists, philosophers—even Max Weber!—betrays a remarkable sociological innocence. First of all, few of us are simply waiting to hear from the law. Law competes with many other signals, pressures and sources of normative guidance and dispute resolution in our life, many of them closer and more salient to us and the groups within which we move. Not only will they compete with the law for our attention, and often win, but they will be part of the context in which the law is understood, use is or isn't made of it, it is heeded or ignored.<sup>44</sup> Since people live most of their lives in such 'semi-autonomous social fields'<sup>45</sup> of which legislators know little, it is not surprising that the life of the 'law in action' is difficult if not impossible for the legislator, or anyone who merely relies on lawyers' folk understandings of human behaviour, to predict. So if we are concerned with how law actually affects people's lives and what is made of it there, any simple extrapolation from the technical character of laws and their official

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<sup>43</sup> *Economy and Society*, op. cit., vol. 2, p. 891.

<sup>44</sup> For an excellent discussion of how the law filters into the world, see Marc Galanter, 'Justice in many rooms: courts, private ordering, and indigenous law', *Journal of Legal Pluralism*, 19, 1981, pp. 1-47. As Galanter observes, '[t]he mainstream of legal scholarship has tended to look out from within the official legal order, abetting the pretensions of the official law to stand in a relationship of hierarchic control to other normative orderings in society. Social research on law has been characterized by a repeated rediscovery of the other hemisphere of the legal world. This has entailed recurrent rediscovery that law in modern society is plural rather than monolithic, that it is private as well as public in character and that the national (public, official) legal system is often a secondary rather than a primary locus of regulation' (at p. 20).

<sup>45</sup> A phrase from the seminal article by Sally Falk Moore, 'Law and social change: the semi-autonomous social field as an appropriate subject of study,' in *Law as Process. An Anthropological Approach*, London, Routledge and Kegan Paul, 1978, pp. 54-81.

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interpretation in particular hard cases, to their systematic effects in the world, is simply uninformed guesswork. One has to look at the play of law in the world.

When one does look, much that one finds would surprise those whose fear has led them to a law of rules. The literature of regulatory theory is full, for example, of accounts of the pathologies generated by attempts to ‘fix’ rules as precisely as possible. In their splendid and splendidly named work, *Going by the Book*,<sup>46</sup> Bardach and Kagan point to the ‘site unreasonableness’, unresponsiveness and ineffectiveness which systematically occur when over-inclusive rules are applied inflexibly to complex, variable and changing circumstances. They stress the ‘perverse effects of legalism’, among which are the dumbing-down effects of formal rules which ‘by their nature ... are enforceable only if they specify *minimum conditions* of performance or quality or whatever. They cannot be designed to bring about higher levels of *aspiration* or continuous improvement or concern about quality.’<sup>47</sup>

This is a theme echoed by the American sociologist, Carol Heimer, who explores regulation in a variety of contexts where there is reason for concern both to eliminate abuses and encourage excellence. Typically, regimes of legalistic rules are aimed at the former goal, and not only don’t serve but undermine support for the latter. As Heimer writes:

Ideally, two different sets of incentives should address the analytically separate problems of discouraging and punishing dishonesty and wrongdoing and encouraging and rewarding high-quality performances. Ideally these two incentive systems would be quite independent since incentive effects get distorted when the two problems are addressed by a single set of rewards and punishments. One doesn’t want rules designed to curb the abuses of the worst 1% to become the guidelines for an entire system.<sup>48</sup>

Or, as she remarks in the same piece, ‘[w]e would not have great symphony orchestras if conductors focused only on keeping musicians from playing out of tune.’<sup>49</sup>

One overriding danger of such officious negatively-inclined regulation, emphasised by Bardach and Kagan, is that ‘*accountability replaces responsibility*,’<sup>50</sup> a theme which Heimer’s studies vividly illustrate. This suggests, and it has suggested to Geoffrey Brennan—no hater of rules—that there might be point in discriminating among the targets of regulatory regimes and varying the mode and character of regulation accordingly<sup>51</sup>. If your major aim is to catch crooks, one sort

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<sup>46</sup> Eugene Bardach and Robert Kagan, *Going by the Book*, Philadelphia, Temple University Press, 1982.

<sup>47</sup> *ibid.*, p. 100.

<sup>48</sup> Carol Heimer, ‘Legislating Responsibility’, American Bar Foundation Working Paper No. 9711, p. 11

<sup>49</sup> *ibid.*, p. 13.

<sup>50</sup> Bardach and Kagan, *op. cit.*, p. 321

<sup>51</sup> See Geoffrey Brennan, ‘Institutionalizing Accountability: Comments on the Evans, Niland and Braithwaite Papers’ (unpublished ms, cited with the author’s permission).

of regime might (though even there it might not) be the regime of choice. If, on the other hand, among one's aims are improving the competence, talents, application, care, loyalty of actors in institutions one is regulating, a system of inflexible rules might be dramatically counterproductive.

Indeed, even if it is bad performance which worries you, such a system might still serve you ill. For strict rules lend themselves to what Heimer elsewhere calls 'creative compliance, in which people or organizations follow the letter but not the spirit of the law' and 'feigned compliance [where people] do not even bother with the letter of the law except to use it as a guide for creating an appearance of compliance.'<sup>52</sup> John and Valerie Braithwaite, for example, compared the regulation of nursing homes in the United States and Australia. The former is based on a large number of very precise and detailed rules; the latter on a small number of vague and value-laden standards. The Braithwaites demonstrate that, contrary to their initial intuitions, the Australian system of 'wishy washy and blunt' standards turns out to be far more reliable than the American law of detailed rules. There are many reasons for that, the most important of which is that conscientious staff are empowered and involved in the activity of particularising and satisfying the standards, rather than alienated and tempted to avoid or simply formally to conform to the host of detailed rules, while ignoring the goals which the rules were intended to serve. But there is a negative payoff as well: 'Detailed laws can provide a set of signposts to navigate around for those with the resources to employ a good legal navigator .... Marching under the banner of consistency, business can co-opt lawyers, social scientists, legislators and consumer advocates to the delivery of strategically inconsistent regulation of limited potency.'<sup>53</sup> Standards are often harder to evade.

There is a moral dimension, too, and I will conclude with it. Again and again, the language of the law, and aspirations people have for it, include distinctions which we should not ignore when thinking what might be gained from our institutions: the letter and the spirit of the law, legality and justice, rules and principles, baselines and aspirations, negative and affirmative ambitions, and of course fear and hope. Ideally we would serve them all, and practically we need security from fear to be able to pursue hopes with confidence. But securing the first is not the same as securing the second, and a single-minded devotion to one might undermine our chances to gain the other.

Since my wrestling with these problems is so deeply indebted to Philip Selznick's wise, uncomfortable and relentless determination to hold onto both horns of important dilemmas, let me quote him at length:

The virtues of clarity, certainty, and institutional autonomy are contingent, not absolute. They do not always serve justice; indeed, they often get in its way. Precise

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<sup>52</sup> 'The Routinization of Responsiveness: Regulatory Compliance and the Construction of Organizational Routines', American Bar Foundation Working Paper No. 9801, 6, 7.

<sup>53</sup> John Braithwaite and Valerie Braithwaite, 'The politics of legalism: rules versus standards in nursing-home regulation' *Social and Legal Studies*, 4, 1995, pp. 336-37.

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rules, accurate facts, and uniform administration are elements of *formal* justice, which equalizes parties, restrains partiality, and makes decisions predictable. These surely contribute to the mitigation of arbitrary rule. But legal ‘correctness’ has its own costs. Like any other technology, it is vulnerable to the divorce of ends and means. When this occurs, legality degenerates into legalism. Substantive justice is undone when there is too great a commitment to upholding the autonomy and integrity of law. Rigid adherence to precedent and mechanical application of rules hamper the capacity of the legal system either to take new interests and circumstances into account or to remedy the effects of social inequality. Formal justice tends to serve the status quo. It therefore may be experienced as arbitrary by those whose interests are only dimly perceived or who are really outside the ‘system’.<sup>54</sup>

We have a local example. In the *Mabo* case,<sup>55</sup> the Australian High Court acknowledged what no Australian court had ever acknowledged before: that Aborigines had original title over their lands, which the common law recognised, even though statute might override it. The reaction of most public commentators to this decision, as to the later *Wik*<sup>56</sup> decision, which held that native title was not automatically destroyed by grants of land use to pastoralists, could be read off simply from where they stood on the issue of native title. If they approved of its recognition, they approved the decision; if not, then not. However, there was also an institutional issue, which formed a strong theme in the debate. What was the proper role of the High Court in such a case? Opponents of the decision adopted the ‘law of rules’ approach to judicial decision. There was an established legal understanding (though never enunciated by the High Court) that Australia had been *terra nullius* when whites arrived here, and in consequence there were no rights to recognise. On this view, that is where the Court should have stopped. If the law were to be changed, the legislature should be the body to do it.

That seems to me an inadequate response to the Court’s predicament. Certainly the Court is not a legislature, but nor did it act as one. It recognised the previous understanding of Australian courts. It carefully considered the available law of property, the history of settlement, and in particular the empirical falsity of the doctrine of *terra nullius*, on which non-recognition of native title had been legally based. It noted that, on the evidence before it, the claim that this country was uninhabited or inhabited by peoples without laws, was false. It noted too, that the law governing settlement in the United States, Canada, and New Zealand—all members of the common law family of nations to which we belong—had not categorised the countries they occupied, and consequently the legal status of the indigenous occupiers, in this way. The Court was without doubt also clearly moved by the injustice of nonrecognition, its injustice at the time of settlement and the tragic injustices that ensued. Many of the values which led to this recognition—such as equality before the law, and others—are often-repeated principles of our legal tradition itself. Others they took to be values of our contemporary community. These entered, perhaps motivated, the decision, but they were not the whole of it. It was suffused with consideration of law, which was far from merely ceremonial. Indeed, the ultimate modesty of the

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<sup>54</sup> *The Moral Commonwealth*, op. cit., p. 437.

<sup>55</sup> *Mabo v Queensland No.2* (1992) 175 CLR, 1992, p. 1.

<sup>56</sup> *Wik Peoples v Queensland* (1996) 187 CLR, 1996, p. 1.

scope of that decision was derived from the existing law. The Court did not treat the modification of the law as a simple matter of invoking morality—as a legislature might, though ours hadn't—but wrestled with the bearing of the law as it was supposed to be, knowing that even in its own terms it had been based for two hundred years on a mistake of fact and had authorised shocking injustice. Certainly the Court did not simply apply an existing rule, but it did not invent it out of thin air either. It did something noble and appropriate to a court, particularly a High Court. It did justice, not as the crow flies but in the context of existing law and as mediated by the law, legal values—and moral ones too. And, happily, though they shook a little, the heavens didn't fall.



**Question** — I came here this afternoon not only to hear a good speaker, but hoping that you would allay my fears of interpretation. Am I to be saddled with interpretation of laws for the rest of my life as it is today?

**Professor Krygier** — Absolutely. There is no alternative to it, though there are many ways of interpretation. It is often thought that, in judging, the choice is between applying the law and doing something beyond it. For a range of reasons, simply applying the law, particularly at the appellate level, is unavailable. If it was that easy, it wouldn't have got up there, particularly since the High Court gives leave to appeal. Nothing that gets up there simply has an answer that every lawyer looking at it says, 'we know which way it's going to go'. That's the dilemma. It's a dilemma not made by activist judges, but one that all judges have to confront, and particularly at the appellate level. So the question then is really one of what I call in the paper political morality. How should they do that job which they can't avoid doing? And there, what I suspect your position would be, is, they should somehow be modest. And I think modesty *is* a virtue, as I say in the paper. But disingenuous modesty may not be so virtuous. That is, if people pretend to be modest, not to be doing what they actually are doing, and have to do, as a licence for doing something which is also interpretive, but silently so, then I think that is not necessarily so virtuous.

I think that on the issue of political morality, my distance from you is not that great. I think for all the reasons I gave in the first and longer part of the paper, that judges should be humble about what they do. They shouldn't go for overblown moral readings of constitutions or of legal development. They are confronted from time to time with real predicaments, however predicaments of a variety of kinds. It seems to me *Mabo* was one such predicament, and it seems to me the High Court responded to that admirably. I don't think that they should read every tax case before them in the same expansive and demanding way, however.

**Question** — You speak of law as being primarily about keeping fears at bay. I sense a lot of fear at the moment arises out of fear of litigation, for example. Could you just talk about that balance between laws being there to keep fear at bay and yet, on the other hand, people have become fearful because of perfectly fine laws, which are meant to achieve certain ends, but introduce an area of fear where perhaps there wasn't before.

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**Professor Krygier** — An American sociologist has written about criminal law, in a book called *The Process is the Punishment*, and anybody who has been involved in litigation discovers that. It seems to me that that's a terrible worry. But it's a worry that is not easily rectified. It's a worry too because, as the title of one very famous, classic article in legal sociology tells us—and asks us why, more often than not in litigation—the 'haves' come out ahead. His is not a grand Marxist theory, it simply looks at the resources available to people who are 'repeat players', to use the term that he uses, in a legal system. They have so many resources and so much familiarity and so much less fear of litigation, than people who suddenly find maybe once or twice in their lives that litigation comes out of the sky to hit them. The process and the result can be terrifying. I don't have any magic solutions to that. I don't have any *unmagic* solutions either. I think there are obviously things one can take seriously, like legal aid, and all sorts of micro-developments, but many of them have been tried and the fear has not disappeared. The liberal of fear is a sceptic, and the reaction that he would have is, perhaps, that while improvement must properly be sought, perfection must not. The court is the wrong place to go to enjoy yourself, particularly if you are threatened by something, but it may still be a very valuable place to go to protect yourself or vindicate your rights. Maybe.

**Question** — I think there are a lot of optimistic liberals, but a lot of people have given up on the law because of the fear you have mentioned. They want to settle their disputes privately. They recognise this is not Bosnia; they think our society is strong enough to do so. Any comments?

**Professor Krygier** — Again, it is always the case that I spend longer on the first part of my paper than the last part, and as I was galloping through the last part, I didn't mention the context in which I was saying that legal orders differ in strength. The context was an argument in Selznick's, in favour of what he called 'responsive law'. An argument which encompassed a liberalism of fear, though he doesn't use those terms. There is a real issue about protecting people against other people and against state functionaries. It has to be implanted in all sorts of ways and one should never trivialise it. But he argues that institutional orders go through what he calls 'moral development', like children. You might simplify morality, work on the basis of clear, exceptionless rules, when you talk to a very young child—but when the child is older, more complex, more sophisticated, you may allow more exceptions, qualifications, complexity in your injunctions. He says institutions are the same. When they are stronger, more robust, well-implanted in legal and political order, not everything that might be dangerous in more precarious circumstances will necessarily be so now. Given that situation, the sorts of arguments that people often have against alternative dispute resolution (saying, for example, 'there is no precedent' and 'how can you adjust people's activities by it'), are, for me, less compelling than they would be in a more fraught situation where, for example, you don't have a strong legal order. Revolutionary regimes very often immediately put in place 'people's justice', which is a terrifying thing. So one must guard against such terrifying possibilities, but they are not always equally threatening.

There are other arguments about alternative dispute resolution which are more complicated, and which have to do, for example, with the equalising capacities of formal legal orders. This comes back to the earlier question. Courts don't do it particularly well, but they have all sorts of techniques to equalise litigants once they are in the court. OK, if you're rich you can get a better lawyer, if you're poor you get a worse lawyer. But in the court you can at least *have* a lawyer, and 'haves' don't always come out ahead. There are a lot of institutional attempts to equalise, and

some writers about alternative dispute resolution say: ‘these restraints on the power of the powerful are absent from mediation’, etc. The winners outside can readily and directly become the winners inside. How that works out in practice, however, really is an empirical matter, and I don’t have any firm answer there.

**Question** — Professor, during your address you made some references to the former Yugoslavia and the former Soviet Union, and you also mentioned differences between legal interpretations on the Continent and the English-speaking people. But with those references to one side, you drew very few examples and made very few interpretations as to how societies have performed under the various mix of factors that you have presented to us, except towards the end, when you referred to Australia and spoke about the *Wik* legislation. Drawing on your reference to Australia, I’d like to ask you to comment a little further if you would, by taking you back to the year 1924. That was the year that Stalin came to power in Moscow, a couple of years after Mussolini had taken power in Rome, and the year after Hitler, or the Nazis, had attempted a putsch in Germany. It was also the year that the people who work in this place imposed compulsory voting on Australians, interestingly. People at that time might well have looked on electoral compulsion, and indeed I know they did, as a wave of the future, like other authoritarian and even totalitarian forms of governance. In the event however, it hasn’t worked out that way. Almost nobody else ever adopted it subsequently after the Australians did, and nearly every country that did embrace it subsequently has gotten rid of it—excepting Australia. I wonder what that tells you about this country in relation to questions of fear and of hope and of a state that needs to do what it has to do, but no more than what it has to do, and a number of the other factors you mentioned which make up good governance of a country.

**Professor Krygier** — I’m quite fond of compulsory voting, for no good reason of principle that I can justify to myself, except one, maybe. That is (and this again would have to bear empirical research) it seems to me plausible that in societies where voting isn’t compulsory—that is, most democratic societies—a lot of effort is taken simply to get out the vote, rather than to make people choose which way to vote. And, it appears, it is easier to get the ‘haves’ I mentioned earlier to vote than the ‘have nots’, for reasons which can be sociologically explained. If such a bias exists where voting is voluntary, I don’t see compulsory voting as a terrible way of seeking to counter it. I don’t think, in any event, that compulsory voting is a large price to be forced to pay to participate in the governance of your country. Since I’m not a philosopher who likes to take principles to their limit, I can live with compulsory seatbelt laws, I don’t find that an intolerable violation of my freedom, but even more can I live with compulsory voting. I think it’s a civic obligation and I don’t know that there is anything that I find wrong with it and I think the results have been salutary.

If I can, I’ll use your question as an excuse to answer a question I was hoping you’d ask but didn’t, for which I have an answer. In terms of the questions you asked, one of the things that strikes me, and has struck me as a result of a very fine book written a few years ago by a friend (David Neal, *The Rule of Law in a Penal Colony*), is the question of how a penal colony became, in a very short time, what he is prepared and happy to call a ‘free society’? And the argument is that this is not simply a question of public politics. This is a question of the cultural baggage which convicts brought with them to Australia; the notion that they had rights, that the law was there to vindicate them, that they could sue. He begins the book with the epic tale of Henry

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Kable—and maybe there is a descendant of his here, because there seem to be descendants of his everywhere; he seemed to be good at propagating as well as doing many other things in a remarkable life. He was gaoled in Britain, as was the woman he met there in the gaol, and they gave birth to child. When they were put onto a boat, the child wasn't allowed, so a sympathetic warder galloped to London to see Lord Sydney, had difficulty seeing him, but got permission. So the three of them get on the boat, Henry Kable gives a package worth fifteen pounds to the captain of the ship and when it arrives he asks for it back, but doesn't get it back. So the first civil case in Australia is a case by a convict against an important person for the return of his property, and he wins.

Now I study Eastern Europe and a bit the Soviet Union. I think that if first settlement of Australia had come from those countries, we wouldn't be telling that story, and I think it's a remarkable story.

**Question** — I won't give all the arguments for and against, just one argument for, and that is, to enable people to do their job properly, there should be an absolute maximum tenure for all politicians and all holders of high bureaucratic office.

**Professor Krygier** — There are many things on which I don't have views, and this is one of them.





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## **The Senate and Good Government\***

*Campbell Sharman*

Now that the dust from the federal election of last October has settled, a new phase in the cycle of government has begun. We have a freshly elected government, even if with a reduced majority in the House of Representatives, keen to implement its program for new legislation. Some key components of this legislative program were part of the election platform of the parties now in office, and the government believes that it has the right to implement its election promises with little hindrance from the parliament. The government claims it has a mandate.

This raises, yet again, the question of what is the nature of this mandate that governments claim to acquire when they win office. In a parliamentary system with a single chamber and disciplined parties, the government, by definition, has the support of a majority of members, and the question of an electoral mandate has little meaning—if the governing party or parties want to pass a law, there is little that a parliamentary opposition can do to stop them. In these circumstances, the term ‘mandate’ becomes part of the political rhetoric about whether there was sufficient prior public discussion of a proposed law rather than whether the government should be able to pass the legislation.

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House on 11 December 1998.

The issue is more complicated in a bicameral system since the governing parties may not control a majority in the upper house. In Australian federal politics, the issue appears very complicated indeed. We have a bicameral parliamentary system with the two chambers, the House of Representatives and the Senate, having similar powers. Both chambers are directly elected by the people but in ways that give each a claim to be more representative than the other. When the balance of power in the upper house is held by a few members none of whom belong to the largest two parties, we have the most complicated situation of all—everyone can claim to have a mandate for something. The government claims it has a mandate because it has won a majority of seats in the lower house. The opposition claims that it has a mandate to oppose the government's legislation because that is what oppositions are for, and because more voters voted against the government than voted for it. And the minor parties and independents in the Senate can claim that they were elected precisely because their supporters wanted to modify the government's legislative program.

But perhaps it is not as complicated as it seems. The issue may be simply the extent to which governments must compromise when they make new laws—from this perspective no-one has a mandate to do anything except enter into negotiations. The present situation in the Commonwealth Parliament requires governments to compromise so that a larger group than the governing party, perhaps even a body of parliamentarians representing a real majority of voters, supports a proposed measure. This means that, quite apart from any amendments that may be required, legislation is closely scrutinised, and the government of the day and its supporting bureaucracy must publicly justify every proposed law to a legislative body whose support cannot be taken for granted.

Whatever one's perspective on politics, the virtues of such a system are at least arguable. This is why the hostility of sections of the news media to the Senate and to the need for governments to compromise is puzzling to the point of being worrying. It is understandable for governments to feel frustrated by the Senate, but why should some editorial writers and columnists feel such continuing antipathy to the chamber? Partisan preferences may explain animosity to the Senate on particular issues, but persistent criticisms of the Senate must spring from something deeper, some idea about good government that is inconsistent with legislative compromise. At base, the real question is whether the Senate is an important component of good government or an obstacle to it.

Much of the editorialising in the press presumes the Senate is an impediment to good government, but the assumptions on which this judgement is made are rarely discussed. It is the purpose of this talk to unpack these assumptions and to look at the implications of a view of government which is critical of the Senate's current role. The Senate, I believe, is much too important an institution to be subjected to a constant stream of press criticism based on a view of good government that is rarely, if ever, articulated.

One of the problems with the debate over the role of the Senate is that it is not really a debate. It is not as though competing views of the role of the Senate were analysed and discussed, and their merits weighed. All too often, comments about the Senate in the news media are framed in the context of a series of assertions, the truth of which is taken for granted and rarely justified, let

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alone put in the context of rival views and alternative perspectives. These comments often revolve around phrases which encapsulate the conventional wisdom on the topic, phrases which sound incontestable but which slide over all the tricky questions. I have picked the six most common of these for examination.

### **The government is elected to govern**

A good one to start with is ‘the government is elected to govern’. This sounds so obviously true that it is impossible to dispute, but it is often used in a context which smuggles in several more meanings than the ostensible one. When the Senate is considering amendments to government legislation or proposes to send a measure to a committee for scrutiny, the phrase ‘the government is elected to govern’ is used as a way of attacking the Senate’s action. The phrase becomes shorthand for the view that, the government may not always be correct, but it has the right to have its legislation passed without undue interference from Parliament. A stronger version is that the country needs a government that can take action without having to go through the paraphernalia of parliamentary scrutiny and amendment.

The plausibility of the phrase is based on a confusion over the role of executive government. Of course the government is elected to govern in the sense that, once the ministry is commissioned, the government can use the vast range of legislation on the statute book and deploy all the resources of the public service to pursue its policies. It does not mean that the government can make any new law it wants by the stroke of the Prime Minister’s pen. Governing is not the same as legislating and, while the role of government includes making proposals for legislation, the only body that can make laws is the Parliament. So, even though it is true that governments are elected to govern, it is not true that they are elected to have passed any law they fancy. In fact, the whole point of parliamentary democracy is that governments are forced to submit proposals for new legislation to a representative assembly to gain consent for them. While party discipline may ensure that this consent can be taken for granted in the lower house of parliament, this is hardly something to be celebrated unless, of course, you are the government and don’t want your legislation scrutinised by anyone who is not of your partisan persuasion.

So, the reply to the statement that ‘the government is elected to govern’ is to ask whether this means that parliament should be abolished. The response will be a startled ‘of course not’ but, from that point, the discussion should begin to move in a more substantive and fruitful direction, focussing on the merits of particular policies and the plausibility of objections to government legislation.

It must always be kept in mind that the whole point of aphorisms like ‘the government is elected to govern’ is to preempt discussion of the merits of a particular government policy by appealing to a generality which is supposed to foreclose any further discussion or make opposition to the government’s policy appear illegitimate.

## **The government has a mandate for this policy**

There is no clearer example of this than the familiar claim by a government that it has a mandate for a particular policy. The subtext of this phrase is that no-one has a right to force the government to make amendments to a piece of legislation because the policy on which the legislation is based was widely canvassed at the election which returned the current government. To oppose such legislation, the mandate approach claims, is to deny the will of people, to thwart democracy or, at the very least, to make parliamentary government unworkable. In other words, opposition to the legislation or attempts to amend it by the Senate, are illegitimate. This is not a claim about the merits of the proposed law, but an attempt to forestall any such discussion.

The idea of the mandate and its ambiguities have been well canvassed elsewhere<sup>1</sup> but there are three aspects that have special relevance to the Senate. The first is that the mandate theory is another version of ‘the government is elected to govern’ approach. Parliament is to be excluded from the process of making laws if the executive claims a mandate. As the House of Representatives is a slave to the governing parties, parliament in this context means the Senate.

The second aspect is that it implies a view of voting for the House of Representatives which is breathtaking in its scope. It presumes that, by ranking some numbers on a ballot paper to elect a local member of the House of Representatives, each voter who voted for the Coalition parties endorsed the full sweep of the Coalition election platform and, in particular, all the details of its principal policies. This is as logically flawed as it is factually incorrect. And this is without the fact that the Coalition parties won only 40 percent of the popular vote earlier this year, and that the same election that re-elected the government also elected a Senate which will be even further from partisan control by the government than the current Senate.

But this doesn’t really matter because—and this is the third aspect—the claim of mandate has little to do with logic or fact but a lot to do with bluff. It is a psychological device to challenge the opponents of the government to a form of political chicken. The government, having recently won an election, feels the self-assurance that springs from being three years away from another election and believes it has a psychological advantage over its opponents. And it is a good move for the government to think this way because, at the very least, it will help it with the bargaining in the Senate that will inevitably take place when compromises have to be made.

This being said, it is a serious mistake to treat a debating tactic or the opening move in a long series of negotiations as though it were a serious commentary on our system of parliamentary government. The idea of the mandate has only the most tenuous and indirect application to parliamentary democracy. Claims made in the name of a mandate have the same purpose as other catch phrases used by government—to put its opponents at a psychological disadvantage by pretending that the government has secured the moral high ground on a matter of principle which, coincidentally, relieves the government of having to discuss the particular merits of the

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<sup>1</sup> Hugh Emy, ‘The mandate and responsible government’ *Australian Journal of Political Science*, no. 32, 1977, pp. 65-78.

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policy or legislation. Put in this way, the mandate theory of government does not seem a very attractive one.

### **House of review**

The previous two phrases deal with objections to parliamentary involvement in shaping legislation. While these are used predominantly as a way of attacking upper houses that are not under the partisan control of the government, the sentiments can also be applied to the lower house of Parliament on those rare occasions when there is a minority government.<sup>2</sup> But the next phrase to be dealt with is explicitly concerned with the role of the upper house. That phrase is, ‘we should have a house of review not a house of obstruction.’

Again, there is a certain plausibility to this claim. It implies that reviewing the government’s legislative policy is acceptable, but a stubborn refusal to pass legislation or an unreasonable insistence on amendments is undesirable. The problem is, what is the use of review if it doesn’t include the ability to insist on change? And one person’s commitment to a reasonable amendment is another’s stubborn refusal to see sense. The whole point of reviewing legislation is to take control of the reviewing process away from the government of the day. Otherwise, the reviewing process is of limited use and subject to partisan control by the governing parties. This is graphically illustrated by the ineffectiveness of lower house committees in reviewing legislation.

The real point of the ‘house of review’ comment is to attack the power of the Senate to amend or refuse to pass government legislation. The phrase implies that any use of the power to alter the government’s legislative policy is unreasonable. In effect, this is a direct attack on the role of the Senate as an equal partner in the legislative process and as the only component of parliament that can act independently of the government to scrutinise its activities. To be brutal, the only way governments are going to be persuaded to negotiate with their partisan competitors is through the use of a powerful sanction, and the Senate’s veto over legislation is the most powerful sanction it possesses. If that sanction were to be removed, the Senate’s review of legislation would be largely ignored and the requirement for the government to negotiate over the final form of legislation would be removed.

It should be noted that the removal of the Senate’s power to block legislation would have major consequences for all its other functions. Its committee system, its scrutiny of bills, and its power to keep governments accountable for their actions would all be seriously impaired. A house of review is not a house of review unless it has teeth. To pretend that the reviewing function would continue to work effectively if it were entirely dependent on the sweet reasonableness of governments is a fantasy.

What at first glance looks like an innocuous comment is really an attack on a view of government that values strong and effective parliamentary scrutiny of legislation and the continuing review of

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<sup>2</sup> Jeremy Moon, ‘Minority governments in the Australian states: from ersatz majoritarianism to minoritarianism’ *Australian Journal of Political Science* no. 31, 1995, Special Issue, *Consensus Policy Making*, pp. 142-163.

government administration in general. It is a view which rests on the assumption that the executive branch of government knows best and the ministers and their advisers should not be forced to amend their legislation, irrespective of the merits of change.

### **Unrepresentative (swill)**

Closely associated with challenges to the Senate's role in scrutinising legislation, are comments which describe the Senate as unrepresentative, with or without Paul Keating's additional epithet of 'swill'. If the previous phrases attack the ability of the Senate to challenge the government's legislative program, this phrase is a direct attack on the legitimacy of the Senate.

Once again, the comment is partially correct, or rather, it is explicit about one characteristic of the Senate even though it ignores several others. The Senate is not elected under a system of representation by population where roughly equal numbers of electors are grouped into electoral districts each returning one member. Instead, each state political community returns an equal number of senators even though the largest state, New South Wales, has more than ten times the population of the smallest, Tasmania. This means that each Tasmanian senator represents about 27,000 voters compared with each New South Wales senator who represents about 324,000 voters. This, as the popular but ambiguous phrase says, is not one vote one value.

Let us put the historical explanation of the composition of the Senate on one side, ignore the place of the Senate in the federal system, and concentrate on another aspect of representation. If elections were only about electing individuals, the criticism of the Senate as being unrepresentative might have some force, but if elections are about electing party representatives, the picture changes dramatically. The coalition parties won just under 40 percent of the vote for the House of Representatives at the last election, but gained a fraction over 54 percent of the seats. This means they won a third more seats than their vote would entitle them under an electoral system that fairly represented the party vote. The Senate election in contrast, produced a result at which the Coalition parties won 42.5 percent of the seats. Even including those senators who began their terms in 1996, the composition of the new Senate gives the Coalition 46 percent of the seats, a figure which is a much more accurate reflection of the party vote for the House of Representatives at the last election than the House of Representatives result itself.

This situation is the result of the Senate's use of proportional representation for the last fifty years, and the fact that support for the largest two party groupings is spread fairly evenly across all states and territories. As a consequence, the variation in the populations of the states and territories does not prevent the Senate from representing much more accurately and more fairly the pattern of party voting across Australia. It is the House of Representatives that is unrepresentative, not the Senate. This should be the response to anyone who claims that the Senate is unrepresentative. The Senate is certainly more than representative enough to have its actions underpinned by a powerful sense of popular legitimacy.

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## **Minor party senators have only a small fraction of the vote**

Because representation is a complex issue, the question of fairness can arise in a number of forms. One that has recently acquired popular currency is the issue of the popular support for minor party senators who hold the balance of power in the Senate. In some respects this is a variation of the previous criticism—that senators from the smaller states represent very many fewer electors than those from the large states, and most minor party senators are elected from outside New South Wales and Victoria. But the point has also been made that minor party and independent senators have much more limited support than do senators chosen for the large parties and that their election is heavily dependent on the transfer of preferences from other candidates, including those from the large parties.

This is true as far as it goes, but it ignores the fact that large party senators are dependent on the flow of preferences too. In fact, if one wants to quibble, minor party and independent senators have more voters who make them their first choice than half the senators elected on major party tickets, that is, anyone elected second on a large party ticket. And this is true no matter which states are compared. So, Senator Harradine had over 24,000 Tasmanian voters who voted for him as their first preference, compared with under 3,000 New South Wales voters who chose Senator Faulkner as their first choice for the Australian Labor Party, and under 1,500 who chose Senator Tierney first for the Liberal/National Party ticket.

Once arguments descend to this level of detail, it is easy to lose sight of the main point. That is, that 25 percent of the electorate voted for parties other than the largest two party groupings at the last Senate election. This component of the electorate is always under-represented, even with proportional representation.<sup>3</sup> An extreme case is that of Pauline Hanson's One Nation Party which gained nine percent of the Senate vote but only 2.5 percent of the Senate seats contested at the last election, and will hold only 1.3 percent of the seats when the new Senate meets in July 1999. Even though minor party and independent candidates collectively won more than 20 percent of the House of Representatives vote and 25 percent of the vote for the Senate, they have ended up with a solitary member in the House (0.7 percent of the seats), and less than 16 percent of the seats in the new Senate.

All this means that minor party and independent senators speak for a quarter of the electorate and that, whatever principle of representation is used, they have a right to be heard and make their opinions felt. To undermine the legitimacy of the Senate is to deny a substantial portion of the Australian electorate the only effective voice they have in Parliament.

## **Held to ransom by a few minor party senators**

The final phrase, and one that has been getting a lot of play recently, is 'the government is being held to ransom by a few minor party or independent senators.' This is a special favourite of cartoonists whose message is the great power of these senators and the mendicant position of the government in dealing with them. It is common for editorials and press commentators to make

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<sup>3</sup> Campbell Sharman, 'The Senate, small parties and the balance of power' *Politics* vol. 21, 1986, pp. 20-31.



much of the unreasonable influence that a few senators can have on government legislative policy, and the capricious nature of the power they exercise on the shape of legislation. This is an especially powerful attack on the Senate since it can be easily dramatised for television news as a few senators wielding arbitrary and unaccountable power.

The first response to such descriptions is to point out that minor party and independent senators have no power unless one of the large party groupings permits them to exercise it. There is no point in holding the balance of power unless there is a standoff between the government and the opposition. It is always possible to neutralise the power of the small parties and independents if the largest two party groupings get together. Nor is this unusual, since there are occasions when both the Coalition and Labor parties have enough in common to outvote all other parties by a large margin.

Minor party and independent senators have influence only if the two largest partisan blocks refuse to compromise. An unwillingness to compromise, especially with the opposition, is an unfortunate side effect of the parliamentary process in the House of Representatives. There, the brutal fact of having the numbers encourages the government to have an arrogant disregard for the views of the opposition. This is reciprocated by an opposition that sees no reason to compromise when its major goal is simply to embarrass the government and keep its powder dry for the next election.

This may be the kind of strategy that is induced by the present structure of the House of Representatives, but it is not the way to make the most of the circumstances to be found in the Senate. By simply opposing the government, the opposition provides the opportunity for minor party and independent senators to negotiate with the government over the shape of proposed legislation. Because the opposition makes a habit of opposing government legislation, minor parties have been able to exploit the balance of power in a way which is now a major characteristic of the way the Senate operates. The power of a Senator Harradine or a Senator Colston is no more than the power given them by the opposition. It might also be noted that, if legislation is passed with votes of minor party and independent senators, the legislation will have broader support in the community than would be the case if it were passed by the governing parties alone—remember the 25 percent of the electorate who did not vote for either the government or the opposition.

At times it appears that the hostility directed at independent and minor party senators is fiercest among backbench members of the large parties who see members of parliament just like themselves having a major impact on the shape of legislation. Representatives of the large parties are bound by the iron bands of party discipline and trade off the freedom to vote according to the merits of legislation for the comfort of endorsement by a major party, and the possibility of the rewards of executive office. The freedom of action of minor party and particularly independent senators, and their high public profile, can be a source of resentment to other backbench members. This attitude is understandable, but it should not be adopted by anyone else.

There are other points that need to be made. Governments are not bound by the form of legislation passed by the Senate, nor are they passive actors in the legislative process. They have control of the majority in the House of Representatives and they can veto any bill that passes the

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Senate just as the Senate can veto any bill that passes the House. But that is less than half the story—governments have a privileged position with the initiation of legislation and have all the resources available from the public service and a well oiled publicity machine to persuade and cajole the Senate of the reasonableness of the government's case. As a result, governments can usually get most of what they want through both houses of parliament, given strong justification and the time necessary for proper scrutiny. It is only when governments are impatient or see partisan advantage in passing legislation without amendment that they become openly hostile to the actions of the Senate in forcing compromise.

This is particularly the case with the composition of current Senate that continues until June 1999. The Howard government has a particularly favourable disposition of minor party and independent senators so that there are many opportunities for the government to find a successful compromise. A colleague at the University of Western Australia and I have devised an index which shows that the present Senate is more likely to be amenable to compromise with the government than at any time since the early years of the Hawke government. That is why the government is anxious to pass the GST legislation before July 1999, and why it will be successful in achieving this goal.

Another aspect of the legislative process that is often ignored, is the major compromises that have occurred before the legislation is introduced into parliament. The views of the relevant interest groups, the competing concerns of ministers and government departments, not to mention the considerations of the cost, constitutional validity, legal effect and partisan impact of the proposed law, all have to be accommodated. The major difference between these compromises and the ones that take place in the Senate is that the negotiations in the Senate are public, while the earlier compromises have been made out of the public view. It is a case of the Senate being criticised for doing in public what the government has been doing in private.

Some might argue that all the compromising that has gone on before the legislation is introduced is proof that further compromise in the Senate is unnecessary, but this is to miss the point entirely. All the compromising that goes on in the corridors of the public service is essentially harmonising the private interests of all those groups who have the political clout to make the government listen. Even the government, whose position is supposed to be to look after the public interest, is acutely concerned with its own partisan interest and in accommodating the rival perspectives within the government itself. When a minister introduces legislation into the parliament and claims there is no need for amendment, the government is trying to be judge and jury in its own case—it has not had to justify the provisions of the bill in public before all those interests who were excluded from earlier consultation have had a chance to examine the fine print of the measure. And this is without mentioning the need to justify the legislation to the broader public.

There is no question that the scrutiny of bills that occurs in the Senate can improve their technical coherence—all kinds of unforeseen issues are raised once legislation is open to the full glare of public scrutiny—but the main virtue of the process that is so painful to the government is that it permits the views of large constituencies outside the charmed circle of the executive and its advisers to have a say in shaping legislation. When a few senators are criticised for 'holding the government to ransom' the reason for this impasse is that these few senators are voicing the

concerns of a large section of the community. They are safeguarding the public interest in the strict sense of the term—they are requiring the government to give a principled justification of the details of its legislation, and to do it in public. Whether the government amends the legislation in the light of Senate requests is a matter for the political judgement of all the parties concerned, but the process of public scrutiny and justification is a vital one if legislation is to be seen as legitimate by the public at large.

Do the critics of the current role of the Senate want this process to be abolished? There is little doubt that political responsiveness and public accountability would be lost if the Senate could be overawed by the governing parties. It would be a brave person who argued that the legislative process in the commonwealth Parliament would be strengthened if the Senate could not force governments to negotiate over legislative policy. Holding to ransom in this context simply means holding the government to account for the detail of its legislation.

### **The broader issues**

There is a common theme running through all six aphorisms just discussed. This is that executive government and the partisan majority in the House of Representatives should be trusted to get on with the job of making laws without the possibility of formal obstruction during the legislative process in parliament. Public statements of disapproval are welcome and vigorous lobbying to amend legislation is perfectly legitimate but, once the objections move from the sphere of political commentary to that of parliamentary veto, disagreement with the wishes of the government loses its legitimacy. This is a well-established opinion but it rests on some key assumptions that those who often voice the view may not have thought about. In particular, the view comes down firmly on one side of a longstanding debate about two major difficulties that have beset democratic government as we know it.

The first difficulty is the problem of the scope of government. The liberal individualist tradition which is a vital strand in our political culture treats government with suspicion. While government is necessary to achieve those goals that require collective action, too much power will enable a government to act tyrannically and follow its own preferences rather than those of the citizens it is supposed to represent. From this perspective, government needs to be kept under constant scrutiny because of the extent of the power of the state and its ability to deprive citizens of their liberty and property. That is why a constitution is required as a higher law to protect the individual rights of citizens and to force governments to follow specified rules before the actions of the government are accepted as legitimate. Quite where to draw the line between giving the government enough power to discharge the wishes of the community, but not so much power so that it will tyrannise the community, is a tricky question over which opinions will differ. But the point to note is that those in the 'let the government govern' school are drawing the line very much in favour of the government and against the interest of the community in being able to check government.

What is more, it seems to me to be particularly inappropriate to give the government of the day a free hand in making new laws. There is a strong chance that much legislation will enhance the interests of the government itself, either politically or administratively, and this is precisely the

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danger that the procedures of limited government are established to prevent. To complain about the obstructive role of the Senate and to argue that its ability to block legislation should be removed, is to give the government of the day monopoly power over the shape of new laws. This is a breach of the principle of limited government and would reduce parliament to being little more than a forum for discussion rather than an active participant in the legislative process.

Too often, the consequences of reducing the Senate's power are ignored in the heat of argument over the Senate's action so that, instead of focussing on the particular issues raised by the legislation, a broad brush condemnation of the Senate is provided. This is particularly noticeable when comparing the attitudes of the major parties when they are in opposition to their position when they are in government. A miraculous transformation occurs so that a willing acceptance of the Senate's ability to check government legislation when a party is in opposition, is translated into a hostile view of the Senate's role in blocking government legislation when the same party is in government. This is the worst kind of opportunism because it attacks the legitimacy of the whole system of representative democracy purely for partisan gain.

Of course governments will justify their position by arguing, as we have seen, that they have majority support for their policies demonstrated by their majority of seats in the House of Representatives, and that to deny the government the ability to pass its legislation is undemocratic. Let us forget, for the moment, that governing majorities are usually manufactured ones and assume that a government did in fact have the support of a majority of votes at the last general election. This raises the second major problem raised by our system of representative democracy—how important are majorities and where do they fit in a system that values the rights of individuals and minorities?

The founders of the United States constitution were acutely aware of this problem. In the debate over the design of the Constitution it was pointed out that a majority is simply a faction, even if a large one. That is, a majority is only a part of the community and not the entire society, and there is no guarantee that a majority will make decisions in the interest of all. Accordingly, it should not be possible for the majority to make decisions which prejudice the interests of the community as a whole. Now this is all very well, but how do you design a system of government to ensure that this won't happen? The answer is that it is impossible, and would be undesirable even if it were possible. At some stages of the governmental process, decisions have to be made, and a rule which prescribes that a majority will prevail is a vital part of all democratic systems. But—and this is a very big but—decisions made by majorities need to be in a context of institutions so that majorities in one forum can be harmonised with the views of minorities and rival majorities. The United States is an example of a system of government that goes out of its way to circumscribe the damage that majority factions can do to the community—some would say too far. Power is dispersed among many governmental institutions which must negotiate with each other and compromise if laws are to be passed and policy implemented.

Parliamentary systems like ours, although springing from the same basic traditions as that of the United States, give much greater play to majorities. Governments are chosen on the basis of a controlling majority of seats in the lower house of parliament. This means that majorities are not just a convenient way of passing legislation but are vital to the life of the government itself. Is it any wonder that governments are obsessed with majorities? This has always been a feature of

parliamentary systems but the stress on majorities has been greatly accentuated with the rise of the disciplined mass political party in the early years of this century. Party politics has helped to dichotomise political life and, when coupled with a parliamentary system, has the power to divide every question into two parts, a majority and a minority.

This makes for a highly combative and adversarial style of politics where compromise is seen as a sign of weakness. Unfortunately, this approach does not sit well with other components of our political system. The federal system and the tradition of strong upper houses, not to mention the courts and our entrenched constitutions, all work on the assumption that government action requires a process of weighing up a number of arguments and harmonising a variety of views. In this respect, the Australian tradition has more in common with that of the United States than it does with the United Kingdom. Power is dispersed among a number of institutions, agreement between which is necessary before policy is settled and action taken. This tradition has been labelled ‘consensus democracy’ by the American political scientist Arend Lijphart,<sup>4</sup> in contrast to majoritarian democracy where power is concentrated in a single institution, the parliamentary executive, which can take action on its own in the name of the majority.

The problem for Australia is that majoritarian and consensus democracy coexist in the same governmental system.<sup>5</sup> This is not just a practical problem that makes it difficult for a government to get its legislation through the Senate; it also represents a clash between two competing views of what good government is about. For the majoritarians, it doesn’t matter that there are significant minorities opposed to a measure, all that is necessary for legitimate action is that the government has the numbers in the legislature. For those who support consensus democracy, majority support in a single forum is not enough. Good government requires that there is an institutional structure that compels governments to gain the support of more than a simple partisan majority, especially when, on most occasions, the majority that is supposed to legitimate government action is usually only a large minority and a transient one at that.

This is the reason why a clash between the government and the Senate is more than a simple case of disagreeing over the details of legislation. It is a clash of views over what legitimates government action. Unfortunately, the rash of editorials and newspaper commentary attacking the Senate never spell out their majoritarian assumptions. The authors hide behind one or more of the conventional wisdoms I have mentioned in this talk. In part this may be because they have not been forced to articulate their views of good government, but it is also a reflection of the fact that a majoritarian view of democracy is not particularly attractive once its features are spelled out. It presumes an all-powerful central executive in Canberra with no formal checks on the ability of the government to enforce existing laws or pass new ones. Not many Australians would relish this.

This is why, to my mind, talk of reforming the Senate to remove its potential to force governments to compromise is mind boggling, and could be ignored if it were not taken seriously

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<sup>4</sup> Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries*, New Haven, Yale University Press, 1984.

<sup>5</sup> Campbell Sharman, ‘Australia as a compound republic’ *Politics* vol. 25, 1990, pp. 1-5.

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by sections of the news media. Here we have an institution that is working in precisely the way most of us want our legislature to operate, the only disgruntled players being the government of the day and those interest groups who believe they can do better lobbying the government than persuading minor parties in the Senate. It is the last institution that needs reform, and I hope that there is enough vocal support for its activities to ensure that no government would be rash enough to try to change it.

This talk is intended to show that the strongest support the Senate has is the powerful example of the good work it can do in making legislation more responsive to the range of views in the community. And, given the quality of the attacks on the Senate's role, it may be a case of the Senate not needing to worry too much when all its critics have in their armoury is a bundle of clichés. Still, changes to the structure of government have been made for less cause, and for those who value good government, the price of maintaining the Senate's current role may be a more vigorous public defence. Let that, as the government would say, be our mandate.



**Question** — I have a question about the Democrats and the position they take in elections and the positions they take when they actually perform their role. The Democrats say that they're there to keep the so-called bastards honest. Yet it seems to me that the Democrats really are running a party that has an ideological position and policies that it wants to push, which aren't necessarily in line with keeping the bastards honest. No more so than often the Greens or other parties. So my question is, do you think that brings the Senate into disrepute when the one party that claims to keep the bastards honest, in fact often doesn't. For example, I would like to see the Democrats say, well we'll agree to a third of the sale of Telstra on the condition you have a fixed term of government—you put a referendum up, which gives more honesty and transparency to the Government's timetable. Or a demand that we will agree to some GST reform, on the condition that prior to an election, budget figures are released so we don't have a whole election campaign based on incorrect figures, which just leads to complete dishonesty in an election campaign.

**Professor Sharman** — I'm old enough to remember the days when the Democrats didn't want to be a political party like other political parties. But time, habits and the need to get elected on a regular basis has made the Democrats a party like any other party except possibly the Greens. I think the role of minor parties in the Senate is a bit like elections themselves; that is, what happens *because* of them is more important than what happens *at* them. I agree that there all kinds of things that, if you wanted to take parties at their word or you wanted to force governments to be more responsive or more accountable, you would hope that Senators and parties would do. But I'm not really justifying the particular role or position of any party or any senator. My point is that it's very important to have them there, and that the logic of their position and the structure of the Senate will guarantee that outcomes are very much more likely to be in the public interest with them there, than with them not there, whatever their stated intent.

**Question** — I'm just wondering how much you might be able to tell us about the processes that have involved actors both within and outside the Parliament in arriving at the compromise just last night on the health insurance legislation. Because it seems to me that that perhaps is a good case study in the way the parliamentary system operates at the moment, with the outside pressure groups and the composition of the Parliament that you've described.

**Professor Sharman** — There is definitely a good honours thesis in that. One of the things I try and tell my students, and why we changed our name from the Department of Politics to Department of Political Science, was to make sure that we had a reasonable case for disclaiming any knowledge about how things actually went on in any practical case. In general, I know what happened, but I have no more practical knowledge about the detail than anyone else who hasn't read the paper properly. I should say it's a good question, it's a good example of the way the system works, but I don't know the details.

**Question** — That was a strong defence of the Senate. Would you be prepared to translate that to the Senate of 1975?

**Professor Sharman** — The short answer is, yes. Perhaps I should expand on that. The interesting thing about the Senate in any institutional change—and you can see this occurring in the upper house in Western Australia—is the move from a situation where a senate or an upper house doesn't have a sense of legitimacy to a situation where it does. The Senate, for a variety of reasons say before 1949, was seen as very inferior bodies, full of party hacks; you only have to look at the extent of the *Hansard*. There was very little the Senate felt much assurance in doing. Then, because of proportional representation and various other fortuitous events, the Senate gradually realised that it not only had constitutional power, but the political authority to make changes. First it amended legislation, then it got round to setting up a committee system, and knocking back the odd piece of legislation. This was occurring in the late 60s.

So my view of 1975—quite apart from talking about the merits of it—is the logical point that the Senate finally, as an institution, came to the realisation that it had an awful lot of power and that, on occasion, it could exercise it. So quite apart from the merits, the Senate's feeling is that it knows it can do this, and that it has done it. There was enough fun and games after 1975 to make the Senate think twice about doing it again. I'll not say it may never occur, but it was a learning curve, it was adolescence, if you like, and it has been a mature body since then.

Western Australia's upper house is still very much in the 'I'm not sure how much I should knock back' phase. It's only had proportional representation for a couple of elections or so, it only just has a committee system, and it's beginning to decide what it can do and how far it can push the government. Most upper houses are very apprehensive about offending governments. They fear the commentary they get in the press. I think to look at the Senate as though it is a group of prancing people who are just waiting to strike down government legislation is probably inaccurate. I think minor parties and the independents are aware that they have some credit, they have political capital which they can use, but they can use it with great care, and they can't go using it up all the time.

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So what I'm basically saying is that it seems to me the Senate in 1975 was a one-off, but it represents the coming of age of the Senate, and the public recognition that they actually had a parliament with two chambers that were powerful.

**Question** — I would have thought that a possibility, constitutionally, would be for a government to be elected that had a majority in both houses. From listening to you, I wonder if that's something that you'd prefer to prevent.

**Professor Sharman** — You're spot on. My preference temperamentally is basically for minority governments and hostile upper houses. Although, I've realised since I looked at the Tasmanian example, that is a dangerous combination for upper houses—perhaps I'll come back to that.

If there is a genuine majority vote in both houses, then I would say that people are silly, but that's fine, that's their choice, and as long as they have the choice of voting for differential majorities in the next election—that the Government doesn't change the system so that they lose their choice about the future—that's fine. But I must admit I would like a system as we have now, by accident more than by design, a system where it's very unlikely that a government is going to get a majority in both houses. And I would resist a campaign, very strongly, against any attempt to fiddle with the Senate's electoral system to ensure that governments could easily get majorities.

You're right—if the governing party has fifty percent of the vote in each state and territory, they would have a majority, but they're not likely to do that. If they did that I'd say, OK, well, something has changed in the water, but that's fine.

Another interesting example is Tasmania. If you have a political system which is very responsive in the lower house, as happened with the Greens in Tasmania, the upper house then loses a fair proportion of its power and public support, because people say, we've seen all the public compromising that occurred in the lower house, why do we need to go through the process again in the upper house? And in Tasmania it was a little complicated because the upper house is a little different. I've come to the conclusion that probably minority governments in the lower house in Tasmania contributed to the weakening of parliamentary representation in Tasmania. I should say that the Tasmanians still have a pretty good system, it's just not as responsive as it was.

**Question** — In relation to 1975, would you by any chance favour an amendment to the Constitution which would make the Senate bound to consider a budget, or an appropriation bill at least, within a certain time, and a further constitutional amendment which, if it rejected an appropriation bill twice, meant that it had to go to the people at the same time as the lower house?

**Professor Sharman** — The short answer is no. I don't see the possibility of deadlock as being a bad thing. I think if the houses disagree, that's fine. Nothing gets passed, money runs out and after a while people will start complaining about this. Unfortunately the money, I understand, is not likely to run out as it should. I like the US system where the House of Representatives and the Senate may disagree over the budget and for a week or two public servants may not be paid. They have credit notes and people do not starve on the streets; provisions are made. But I like



that because, first of all it concentrates the minds of the two houses, and secondly it points out that they provide the authority for public expenditure. There is a nice, clear link between the two.

In our system it's all pretty vague, complicated and diffuse. They know the money eventually comes from the Parliament, but quite how is fairly obscure. So the short answer is that I wouldn't like to see anything which made life easier for the Government to pass its financial legislation, no.

**Question** — You expressed the view that you thought that the GST would pass the Parliament by 30 June [1999]. I'm just curious as to what led you to that conclusion.

**Professor Sharman** — Well, no-one gains if it doesn't. Really the GST is a race to compromise with the government. Senators Harradine and Colston want to compromise with the government, on their terms. The Democrats would like to compromise with the government, on their terms. The Greens would like to compromise with the government on their terms. And they know that if they don't compromise, the other lot will, so it's a classic case of game theory. The government wants to compromise; everyone wants to compromise. What we're seeing now is the opening phases of a long, but inevitable, process which will end in a compromise, and the GST will be passed.

Now, you can't say that in the press, because it takes all the excitement away from it. But, that's what will happen.

**Question** — My understanding was that the Senate was originally intended to be a house representing the states. Now, I don't think it in any way does represent the states, but in fact it provides a forum for, as you were saying, the minor parties to exercise power in the legislative process. Would you agree that the role of the Senate has changed to that from what it was intended to be by the framers of the Constitution?

**Professor Sharman** — Well, one of the nice things is that no one knows actually what the framers intended. It is true they were very apprehensive about the disproportionate power of the voters in New South Wales and Victoria, with cause, and to that extent the Senate is still discharging its function. It over-represents the smaller states. As a West Australian, whenever that question has come up for referendum, the people in the smaller states value the Senate because it does over-represent their views, and keeps the less-reasonable people in New South Wales and Victoria suitably checked.

The Senate is also a state's house in different kinds of ways; the difference in the way senators are chosen means you tend to get party notables from within the state. But since parties have strong party discipline, the Senate really doesn't work on a state block voting basis. To somehow make this the basis for criticising the role of the Senate however, I think is mistaken. I think the Senate, right from the word go, had two roles; one was the price the smaller states and those interested in states' rights required, for the formation of federation, and the other one was that everyone was used to strong upper houses, even Queenslanders. And it was taken for granted that you needed a strong bicameral system. The Senate was unusual, and it has been right from its inception, in that it has been directly elected. So the Senate, I would argue, is the epitome of the

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most Australian institution of government we have. It was the first directly elected upper house with a broad franchise in a parliamentary system. That's another reason it should be regarded as a heritage item. The House of Representatives is just your standard, British-style parliamentary lower house. There are dozens of them—Canada's got one, New Zealand's got one, all the states have got them. But the Senate and the state upper houses that are now directly elected are very unusual and provide that essential flavour and punch in the legislative process which is distinctly Australian and worth keeping.

**Question** — I should preface this by saying that I work for the House of Representatives. Most people dismiss the House of Representatives on the basis of party discipline. Do you have anything positive to say about the House of Representatives as a legislature?

**Professor Sharman** — I think the short answer is yes. I think we need a House of Representatives and I've overdrawn the contrast between the two. I think there are a lot of things that could be done to make the legislative process more effective and the lives more pleasant for the members of the House. We have a parliamentary internship scheme for our honours students, in which we encourage them to talk to MPs and they become involved in the Australian legislature. It is very clear from their research that, upper or lower house, but particularly lower house MPs, do not see their time spent in Parliament as being pleasant or particularly valuable. The thing they get most pleasure from is dealing with their constituency work and helping people solve their problems. Now this is a common problem with legislatures, and I think there are all kinds of useful things the House of Representatives can do. But the most important one is to try and give back benchers, particularly government back benchers—because at least the Opposition back benchers know they are there to oppose, whereas government back benchers are there to become ministers, with any luck—is to give them a more formal role, a more effective role in the parliamentary process in general. Besides, if you didn't have a House of Representatives, you wouldn't have a Senate. Although in Nebraska, when they abolished a house—I think there is only one unicameral legislature in the US, and that's Nebraska—they abolished the lower house.

**Question** — Campbell, you hung the case for this lecture on an analysis, it appeared to me, of various editorials. But there is a more permanent expression of many of the views that you're putting, in the myriad of textbooks from which possibly even the editorial writers get the seeds of their views. I think one case in particular, is a paper emanating from the Constitutional Centenary Foundation, which definitely saw effective bicameralism as a much greater danger to the state than ineffective unicameralism. Another volume of this character emanating from a journalist is of course the Souter history of the parliament, which adopts a very aggressive attitude to any activity by the Senate. I just wondered why you picked on the editorialists who seemed to me to be relatively easy to knock off, rather than taking on more substantial figures like Professor Cheryl Saunders, who is the author of the Constitutional Centenary Federation document which, as I say, remains much more available than these rather ephemeral editorials.

**Professor Sharman** — Well I was going to say no one reads textbooks, but not many people read editorials either. But a lot more people read editorials and press commentary than textbooks. The thing that worries me, and I think why I was given my brief, is a pervasive theme in current debate, written debate, commentary—not the news, but the commentary. I think that is much more a threat than textbooks. The interesting thing with textbooks is that many of the current

textbooks are now much more sympathetic to the role of the Senate than they were, and in fact one or two of them are advocates of the role of the Senate. I'm thinking of Brian Galligan's book.

I think it is an interesting point that, just as academics are always maybe a year or two behind what's going on, one of the things I was thinking about these editorials is, what was the formative experience in their attitude to the Senate or government in general? And if you look at textbooks anywhere, you can see waves of attitudes. You can say, for example, the textbook by the late Finn Crisp was very majoritarian, with the belief that executive government was the only branch worth having, formed in large part by his experience as the director of the Department of Postwar Reconstruction, and his strong involvement with both the Labor Party and the executive branch. And then of course you had this swing; there was Whitlam, then you had the realisation that federalism actually existed and was important, and then you discovered the fact that the Senate exists and there's a thing called the Governor-General. I mean, the number of people who were taught about the Governor-General before 1975 was relatively small, I think. So you get these changes in attitude, and what worries me is that I think the editorial and commentary represents, if you like, an un-reconstructed view—I think the views of most of the community have moved on and what we're left with is some editorial writers who were feeding off textbooks and discussions as students ten or twenty years ago, even though the circumstances that they are describing have radically changed.

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## Biographical Dictionaries of Parliamentarians: Considerations and Examples

*R.L. Cope*

That the Australian Senate has embarked on the production of a multi-volume biographical dictionary of its members should be widely welcomed as a further indication of the growth of parliamentary studies in Australia. The dictionary will add to our knowledge of senators of bygone days and will provide an incentive to further studies of this important parliamentary body. We still await the definitive history of the Australian Senate: gradually the indispensable foundation of source materials and reliable reference works is being laid for such purposes. The biographical dictionary will be awaited as a valuable aid to our understanding of Australian political and parliamentary history.

Biographical dictionaries of parliamentarians and legislators are no novelty. There are already a number in existence. The US Congress issued in 1997 its *Biographical Directory of the United States Congress 1774-1989: Bicentennial Edition*, a massive work of some 2108 pages.<sup>1</sup> The introduction to this work briefly surveys earlier biographical compilations of US federal legislators, starting with Charles Lanham's *Dictionary of Congress* (1859). Since each House of the US Congress has its official historian, this must greatly facilitate the production of such authoritative and large-scale works.

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<sup>1</sup> *Biographical Directory of the United States Congress 1774-1996*. Washington, Government Printing Office, 1989. (Senate Document no. 100-34) 2108 pp. Another edition was published in 1997.

The History of Parliament Trust in Britain has ongoing objectives of documenting the history of parliamentary government there and recording details of the membership of the House of Commons. In 1964 it published its now famous three-volume set *The House of Commons 1754-1790*, by Sir Lewis Namier and John Brooke.<sup>2</sup> This work, recognised as ground-breaking in its detailed analysis of a not fully understood period, contains biographical entries for the members of the Commons as well as constituency histories. Mention might be made at this point of another work of different value, a four-volume biographical compilation, derived from *Dod's Parliamentary Companion* and entitled *Who's Who of British Members of Parliament ... A Biographical Dictionary of the House of Commons*, compiled chiefly by Michael Stenton.<sup>3</sup> The first volume covers the period 1832-1885, whilst the last volume covers 1945-1979.

The objective of the present paper is to consider the nature and purposes of parliamentary biographical dictionaries, drawing observations from the items already mentioned. In particular, however, a detailed examination of yet another parliamentary biographical dictionary, one in German dealing with the fate of the members of the parliament (Reichstag) of the Weimar Republic after Adolf Hitler came to power in 1933, will serve to focus attention on points which might be applied to the Australian Senate's project. Before proceeding with this intention, it is useful to consider briefly the nature of national biographical dictionaries in general. Parliamentary biographical dictionaries may be considered a sub-genre of this more embracing type of dictionary.

### **National Biographical Dictionaries**

One of the great British publishing ventures of the nineteenth century was the *Dictionary of National Biography* (DNB). There have been supplements issued this century and the work is by its nature virtually without end. Edited initially from 1882 by Sir Leslie Stephen, the set had some 66 volumes by 1901. Counterparts to it exist in other European countries. In 1896 Stephen, by then no longer editor of DNB, wrote a short essay, entitled *National Biography*, distilling his experience and thoughts on the enterprise. It is still well worth reading. In it he explains his view of the purpose of national biography, how the selection of entries is made, and how the entries are crafted. He provides illustrations of what even obscure lives can contribute to historical understanding of a period. Indeed, it is just such lives, rather than those of the great and famous, which offer insight into the everyday and minute particulars which often provide the underlay for the broad, more generalising pictures historians may wish to draw.<sup>4</sup>

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<sup>2</sup> *The House of Commons 1754-1790* [vols 1-3, by] Sir Lewis Namier and John Brooke. (The History of Parliament) London, HMSO for History of Parliament Trust, 1964.

<sup>3</sup> *Who's Who of British Members of Parliament: ... a Biographical Dictionary of the House of Commons Based on Annual Volumes of 'Dod's Parliamentary Companion' ...* [ed. by] Michael Stenton, Volume 1, 1832-1885 [to Volume 4, 1945-1979] London, Harvester Press/ Humanities Press, 1979- .

<sup>4</sup> *National Biography*, pp. 1-36 in *Studies of a Biographer* [vol. 1], by Sir Leslie Stephen. London, Duckworth, [1929]. Originally published in 1898.

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National biography, even in multi-volume compilations, represents, of course, only a tiny fraction of a country's population. Selection of these representative individuals for inclusion may offer a useful key for understanding values, prejudices and expectations of the era in which the compilation takes place. In 1998, the announcement of the publication on the Internet of the world's largest biographical reference database indicates what the trend may be. The German-based *International Biographical Index* has published on the World Wide Web data on approximately 1.7 million individuals. The project envisages that by the year 2000 information on six million individuals from a period of some 2800 years will be placed on the Internet. One is not immediately sure whether to be appalled or grateful that all this will be available to us. Are the entries to add to what has been termed the 'sludge' of the Internet, or will they be of a more refined quality? Judgment must be held in abeyance.<sup>5</sup>

Is national biography the most difficult of all biographical undertakings? Some may believe that it can never be wholly satisfactory because it involves value judgments in such basic matters as who deserves inclusion (or exclusion) and the treatment and scope of entries. Since there are no universal standards available for guidance on such matters, differences of opinion will inevitably arise. What suited the nineteenth century does not always suit us today. Some critics believe that our century, with its strong awareness of psychological factors in explaining human behaviour, has better claims for understanding personality and motivation than was possible in previous times. Views such as these will have some impact on what is expected of a national biography. The rise of psychobiography in political and historical studies is a sign of this modern trend, but it has not passed without challenge. However, agreement will be readily found for the necessity of accuracy and completeness in core factual information (e.g. correct names, dates, family relationships, career details). Soundness in the interpretation of historical events would also be expected. Interpretation of behaviour, character or motives is much more contentious since such things cannot generally be objectively validated. In certain cases such interpretation may be unavoidable in the interests of historical truth and understanding.

It is perhaps significant that there have been in recent years a wide range of biographical dictionaries published on people who did not always find themselves listed in DNB. These are often persons who were religious and political radicals, women, and persons from 'vulgar' popular culture and sports backgrounds. The publication in 1993 of *The Dictionary of National Biography: Missing Persons*, edited by C.S. Nicholls is an attempt of the twentieth century to rectify oversights or prejudices of the nineteenth century.<sup>6</sup> The Preface to this volume is extremely illuminating on these oversights: over 100,000 extra names were suggested by scholars and the general public for inclusion. In the upshot 1086 names were successful, 12 per cent of them being women. Only 3 per cent of the entries for the numerous DNB volumes are for women [Preface, p. vii].

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<sup>5</sup> See report in *Kulturchronik*, no. 3, 1998 [English language edition], p.50. Published by Inter Nationes, Bonn. The URL for the work mentioned is <<http://www.saur.de>>

<sup>6</sup> *The Dictionary of National Biography: Missing Persons*, edited by C.C. Nicholls. Oxford, Oxford University Press, 1993.

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Since national biographies (as distinct from Who's Whos of contemporary worthies) deal with the dead, this influences the range of information offered. Hindsight operates in this context. But what about the more recently deceased whose families and descendants may be still active or even in public life? Obituaries are generally short and not expected to be other than respectful. Sensitivities are likely to be important in obituaries and biographical compilations of the recently deceased (with possible legal implications) which are absent when we deal with the long dead. The views of Sir Leslie Stephen provide us with further points to consider and weigh up:

A dictionary [i.e. of national biography] ought, in the first place, to supply you with a sufficient indication of all that has been written upon the subject; it should state briefly the result of the last researches; explain what appears to be the present opinion among the most qualified experts, and what are the points which seem still to be open; and above all, should give a full reference to all the best and most original sources of information. The most important and valuable part of a good dictionary is often that dry list of authorities which frequently costs an amount of skilled labour not apparent on the surface, and not always, it is to be feared, recognised with due gratitude.<sup>7</sup>

We might wonder what is implied by his phrase, the result of the last researches. Obviously Stephen was aware of the influence of historical scholarship and of fresh interpretations of action and events coming to light. Correctives to understanding emerge in this manner and the biographical entry cannot ignore this.

Stephen's words cannot apply evenly to all biographical dictionaries, but they seem particularly applicable to those scholarly, national compilations which aim to make an authoritative contribution to the knowledge and understanding of chosen individuals in the context of earlier times. We would have different expectations from works which are simply sources of basic information about contemporaries and which have no aims of scholarly analysis or explication. Whatever we might think of Stephen's words, there is evidently scope for more matters to be considered in compiling biographical dictionaries than might be obvious at first blush.

### **Parliamentary Biographical Dictionaries**

Dictionaries of parliamentarians may be considered a sub-genre of national biography. Almost every parliamentarian might be expected to be later included in a national biography, so it is necessary to consider the relationship between the two sorts of compilation. Firstly, they aim at different audiences and each has a different focus. The parliamentary biographical dictionary has primarily an institutional association and a known group of persons, some perhaps still alive, to cover, whereas the national biographical work might be expected to convey a picture of deceased individuals in the round against an historical background. In other words, the institutional work is concerned with what might be a narrower range of personal information, whereas the national biography would have a broader conception of its task and it is open-ended in its coverage. Its level of treatment would possibly point both to the past and, with the benefit of hindsight, in

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<sup>7</sup> Stephen, *op. cit.*, see reference 2, p. 19.

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some instances to the future. The more specialised parliamentary work would have the possibility of a level and depth of treatment which would be unrealistic in most national biographies. In addition, a parliamentary biographical dictionary has the opportunity to provide, possibly in supplementary tables, graphs and lists, analytical information, commentary and even interpretation, which would be inappropriate in a national biography. Special additional considerations arise if the parliamentary biographical dictionary is commissioned or produced by the legislature concerned. Political correctness and internal institutional considerations may play a role in shaping the work.

The producers of the Australian Senate's biographical dictionary will doubtless have given much attention to the work's objectives and what its potential readership (senators as well as the world outside Parliament) might legitimately expect. Consideration of what the present state of information and knowledge on its members is, and what is practical in cost-benefit terms, will be equally valid concerns. A working database will need to be built up which, like the tip of the iceberg, may be only in part discernible in the final published volumes. This unpublished material will presumably be data for future researchers and new reference works. The dilemma of what space to allot to entries will need to be confronted: should major figures, especially those who are already well researched and the subject of a biography, merit lengthy treatment? Of course, lesser lights, now scarcely known to the world at large, must receive briefer notice. But it is precisely such minor figures who call for detailed, if necessarily shorter, treatment. Balance of treatment and uniformity of method and style might need clear guidelines as well, especially if many different hands are involved in preparing entries.

*The House of Commons 1754-1790* by Namier and Brooke contains a section entitled Method which sets out the principles which are followed in compiling that work. Of interest is the comment about length of entries:

The biographies vary in length, from one or two sentences to over seven thousand words ... Particular attention has been paid to second-rank figures, men who never reached the front bench ... yet whose names occur over and over again in the correspondence and memoirs of the period ... (v. 1, p. xiv)

Should a parliamentary biographical dictionary go beyond being a rather 'value-neutral' record of the existence and parliamentary activity of senators by providing some insights into the nature of the political process and functions of the institution itself? Perhaps in the eyes of some this is neither appropriate nor even feasible. If, however, the view is taken that the understanding of the institution is inseparable from an interpretation of the character and behaviour (political and personal) of the parliamentary representatives, there is obviously need for attention to far broader issues of context. This is a crucial point which needs close examination since it has far-reaching implications and contains some dangers. Prudence may dictate a course that steers clear of these all too obvious shoals, especially in works which emanate from the parliamentary institution itself. Independent scholars may choose to take quite different paths.

It is not difficult to argue a case for an undertaking that is either entirely devoid of interpretation or commentary, or one that squarely faces political and parliamentary realities. The former may be useful, and not necessarily easy to compile, but it will be limited in its ultimate value. The



latter undertaking with its aspects of political and institutional sociology, may be unable to avoid controversial aspects of balance and interpretation, but it promises to be fruitful and valuable in a way denied to the self-denying, more limited approach. It also promises to be closer to the reality experienced by the members in their own careers. It also recognises the undeniable fact that some members were of great importance in the extra-parliamentary life of their political parties, but played scarcely any notable role within Parliament. Is it proper to overlook such facts in biographical entries? Each approach is defensible; each has virtues and deficiencies. Perhaps there is a middle course available, but that seems less likely.

While the primary objective of a parliamentary biographical dictionary is not concerned with the character and personality of members, some such information may well become essential if we wish to have insight into the inner life of the Senate. This assumes, of course, that the work in question is not simply an exercise in image massaging. In addition, we may ask whether knowledge of the parliamentary institution is required or even expected in users of a parliamentary biographical dictionary. Few would deny that the lack of basic knowledge is a drawback if a full appreciation of circumstances and context is desired. Recent investigations of political and parliamentary literacy in Australia indicate that the national level of understanding is alarmingly low and widespread.<sup>8</sup>

Is it unreasonable to ask compilers of parliamentary dictionaries in Australia to give thought to how they might contribute to assisting the political and parliamentary educational task as a by-product of their endeavours? Appendices could be one possible place to locate such information without overloading the biographical dictionary unduly. Of course, entries should have indications of where further information can be found (such as in published biographies of individuals; where there are autobiographies available, this will be indicated, but some assessment of their reliability might also be included). These matters for decision require considerable professional judgment from the compilers of such works, especially if they are officially commissioned.

Michael Stenton, the chief editor of the *Who's Who of British Members of Parliament* contributes Prefaces to three of the volumes of the set which are of relevance to points made above. While this work is based on Dod which in turn may, in some cases, have derived information from members themselves, editorial intervention has become necessary because differences in detail for long-serving members were occasionally detected in entries over the years. As Stenton remarks: More perversely, there are a fair number of earlier entries [i.e. in Dod] which are actually longer and more revealing than for the same MP ten or twenty years later! Stenton adds:

Dod supplies the need for a means of rapid reference to absolute essentials very well indeed, but beyond that the historian cannot expect complete satisfaction because entries are not history but pieces of contemporary utterance. (v.3, p. ix)

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<sup>8</sup> The publication in 1994 of the report of the Civics Expert Group entitled *Whereas the People ... Civics and Citizenship Education* stimulated much public and media comment on the deficiencies of political education in Australia. Comment focused on how little is understood about political institutions and the Australian system of government by a large number of Australians.

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In his Preface to the last volume of the set, Stenton points out that the editors have added a larger amount of 'post-parliamentary' and 'extra-parliamentary' information, but have had to rely on published sources for this purpose. The details are consequently not complete and connections with interest groups or commercial bodies may remain unmentioned. However, these non-parliamentary connections 'may be at least as important as the more public ones'. Stenton also discusses some questions for further research which perusal of the four volumes may inspire. He remarks, for example, on the strong representation of railwaymen in parliament: 'thus this Biographical Dictionary, whilst fulfilling its function as a chronicle of Parliamentary membership, points beyond Parliament as well as at it.' (v.4, p. vii). The Australian Senate's dictionary staff might find further observations by Stenton worth pondering:

It would be a pity if this Who's Who were used only for reference. Even in smaller and more parochial matters of the Parliamentary stage there is some profit to be had in browsing through its pages looking for quirks of public life. It is, for instance, remarkable how informative MPs are about their membership of Parliamentary delegations. (v.4, p. viii)

All in all, his Prefaces can be very helpful to compilers of similar works and give them some points to consider in determining their objectives and where the limits must be set.

In 1991 appeared *Dictionnaire des Constituants 1789-1791*, a French parliamentary dictionary of the members of the National Assembly of 1789-1791, the first deputies of the French Revolution.<sup>9</sup> The introduction by the chief compiler, Edna Hindie Lemay, gives details of the purpose and history of this two-volume co-operative venture as well as of its methodology. Mention of an Australian contributor, Alison Patrick of the University of Melbourne, indicates a local connection which may not be widely known. Entries follow an established pattern, setting out in alphabetical order of name, basic personal dates and family details, details of education and studies, career before 1789, parliamentary career 1789-1791, and career after 1791. Not all entries contain all these rubrics where the information is lacking. Sources and references are also indicated. In the section on the parliamentary career, there is a brief abstract of activities, including reference to the dates of parliamentary speeches and their content. This work, dealing with a short but very significant period in European history, has chosen a standardised structure and approach to its task of recording a considerable range of basic material. It is partly a ready reference tool and partly an aid to further research. It has a composite nature and represents an interesting variation in the field of parliamentary biographical dictionaries. Works such as this indicate how much scope exists for very specialised parliamentary biographical works, especially in significant eras.

The year 1789 is not only the year of the French Revolution but also the year when the First US Congress met. The *Biographical Directory of the United States Congress 1774-1989: Bicentennial Edition* commemorates this anniversary, but its coverage takes in the Continental Congress from 1774-1788. Like the British *Who's Who of British Members of Parliament*, the American work includes both living and dead members of Congress. A lengthy introduction by

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<sup>9</sup> *Dictionnaire des Constituants 1789-1791* [vols. 1-2, by ] Edna Hindie Lemay [and others]. Paris, Universitas, 1991.

the Editors in Chief, both associate historians in each House of the Congress, goes into illuminating detail concerning their procedures and editorial policies, the difficulties they encountered with determining party affiliations in early times and on the ongoing need to verify and update information. Reliance in earlier editions of the *Biographical Directory* on 'family legends and personal recollections ... introduced dubious information ... .' (p.2). The *Bicentennial Edition* has entries for 700 living former representatives and more than 100 former senators as well as each sitting Member of Congress: these persons reviewed their entries, so there is possibly still a need to be cautious about such entries. The Editors in Chief tactfully do not say whether any revisions themselves required 'amendment'.

The purpose of the *Bicentennial Edition* is, in the words of the House and Senate chairpersons of the respective Bicentennial Commissions, to 'promote a richer understanding of the contribution that the men and women of the Congress have made over the 200 years of national growth, challenge, and change'. (p. xi). Those words set up expectations which seem to go beyond the simply biographical. Possibly they are a merely a pious counsel of perfection which the work in question cannot reasonably attain. However, the Editors in Chief do point out (p.3) that the 'review of existing entries [from earlier editions] made clear the need for substantial revisions and additions in order to bring the new *Biographical Directory* into line with current historical scholarship and accepted standards of accuracy and consistency.' Here we see the same problems that Stenton confronted when drawing upon existing editions of *Dod*. There is likewise an echo of Sir Leslie Stephen's words.

It is not proposed to examine here sample entries from all these works although that is a job well worth someone's time. One entry from the *Biographical Directory* will, however, be briefly commented on, the entry for a near contemporary, Adam Clayton Powell (1908-1972). This entry of thirty lines (p.1667) is chosen because it highlights some of the shoals which may be present when contentious contemporary or still living figures have to be covered. The first thing that springs to notice is that the non-informed reader has to read down to line 14 to learn that Powell was a Negro: we are told that he was a co-founder of the National Negro Congress. Perhaps American readers would deduce from other information earlier in the entry that Powell was a Negro, but non-Americans might not be expected to be so aware. The matter of colour is an extra factor for US works requiring sensitive handling. Powell's exclusion from, and his re-election to, Congress is mentioned as is his important position as chairman of the House Committee on Education and Labour. He is described as 'a Representative from New York', but the word 'Harlem', so crucial to understanding his political survival, does not appear. The fact that his ashes were 'scattered over South Bimini in the Bahamas' has significance which may not be immediately apparent. Part of the scandal surrounding this member were allegations that he was a frequent visitor to this area in the company of young female staffers at the cost of the public purse. The entry has references to a book on the Powell case (*Rebellion, Racism and Representation*), and to what is apparently his autobiography (*Adam by Adam*, 1971). Entries such as this are to some extent 'in code': they cannot be fully explicit, yet they must indicate somehow that not all is quite as it appears on the surface. Entries in future presidential biographical reference works will possibly require 'coding' too, to judge by reports of White House activities in recent times.

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Without going into further examination of the problems and procedures which the respective compilers and editors have had to resolve, it does not seem too far off the mark to observe that problems of the same general kind will recur in such works, whether they deal with the dead, the living or a mixture of both. This makes the task of compilation challenging, but the final word cannot be said at any given point in time. At this point it is appropriate to quote from *The House of Commons 1754-1790*:

Future research will fill in the gaps which we have left and may modify the picture which we have presented. No work of this nature can be final; though much is known, much is yet to be discovered. Here is a foundation on which other scholars will build. (v.1, p. xvi)

### **A Biographical Dictionary of the Weimar Republic's Parliament (1919-1933)**

The discussion so far has touched on a number of disparate points, not all of which may be applicable to any one work. Most of them, however, seem pertinent for consideration by the compilers of the Australian Senate's biographical dictionary. In turning now to a more detailed analysis of a German work of parliamentary biography, we will find ourselves again meeting some issues already briefly touched on. Additional points of interest also arise from the unusual objectives of this work and the depth of research that has been necessary to realise these objectives.

The work's title may be translated as follows: *MPs: The Members of the Parliament [Reichstag] of the Weimar Republic in the National Socialist Era: Political Persecution, Emigration and Loss of Citizenship, 1933-1945: A Biographical Documentary Compilation ...*, edited by Martin Schumacher (1994).<sup>10</sup> This work has now reached its third, greatly enlarged and revised edition. It has, in other words, evolved since its first edition in 1991. It is complex in its organisation, extremely detailed in its documentation, and is accompanied by a masterly survey by Dr Schumacher of the results of scholarly research into the fate of non-Nazi parliamentarians of the Weimar era. This survey (Forschungsbericht) is itself 105 pages long with double columns on each page. In passing, it is appropriate to mention that there is a parallel to this research report in the 200-odd pages of the Introductory Survey by John Brooke in *The House of Commons 1754-1790*.

As well as text, the Schumacher volume, which is the product of team enterprise, contains a generous number of photos of persons and places, and illustrations (some in colour) of material

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<sup>10</sup> *M.d.R. Die Reichstagsabgeordneten der Weimarer Republik in der Zeit des Nationalsozialismus. Politische Verfolgung, Emigration und Ausbürgerung, 1933-1945. Eine Biographische Dokumentation. Mit einem Forschungsbericht zur Verfolgung deutscher und ausländischer Parlamentarier im nationalsozialistischen Herrschaftsbereich.* Herausgeben von Martin Schumacher. Dritte, erheblich erweiterte und überarbeitete Auflage.

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Düsseldorf, Droste Verlag, 1994. 187pp., 656pp. ISBN 3 7700 5183 1 [*M.d.R. The Members of the Reichstag in the Weimar Republic during the Era of National Socialism. Political Persecution, Emigration and Loss of Citizenship. With a Review of the Scholarly Literature on Persecution of German and Foreign Parliamentarians in Territories under Nazi Rule*]. All translations from the German are by R.L. Cope.

relating to the political climate (antisemitism, anticommunism, Nazi propaganda, posters, etc) of the 1930s. There are numerous tables and comprehensive indexes to facilitate use. The main body of the work, that is the individual biographies, follows the survey mentioned above, but pagination starts again from page one. These pages (from 3-575) are likewise in double columns with a rather small but still legible typeface. Obviously a considerable body of text has had to be accommodated by this device.

The editor, Martin Schumacher, is Secretary General of the Kommission für Geschichte der Parlamentarismus und der Politischen Parteien [Commission for the History of the Parliamentary System and the Political Parties, which is based in Bonn], a body subsidised by the State of Nordrhein-Westfalen, the Federal German Government and some other donors. The Bundestag has commissioned and subsidised the present publication which has a Foreword by the present President of the German Bundestag.<sup>11</sup>

This work is unlike the parliamentary biographical dictionaries mentioned earlier in that its orientation is towards the members of the Reichstag who suffered persecution under the Nazis. But there is an entry for every member, irrespective of party or of demise before the Nazis came to power. In this sense it is a full documentary record of membership from the first postwar Reichstag in 1919 until 1933. There are entries for 1795 members in all, covering members who were Nazis as well as those from all other parties. But unlike national biographies and a number of other kinds of biographical reference works, the present work aims to present as full and explicit a picture as possible of what befell the members whom the Nazis persecuted. Remarks by Sir Leslie Stephen that ‘the writer [i.e. of a biographical entry] must be full of knowledge, which he must yet hold in reserve, or of which he must content himself with using to suggest serviceable hints’ do not apply in the present case.<sup>12</sup> It would seem that very little is left unsaid, but there are still numerous ‘serviceable hints’ for further research.

When the reader considers entry 628 for Adolf Hitler, he realises the full import of the work’s orientation:

Hitler, Adolf, born 20. 4. 1889 Braunau on the river Inn, died 30. 4. 1945 Berlin; Catholic. Member of the [elected] Reichstag March-November 1933; constituency 24, Upper Bavaria-Swabia. National Socialist German Workers Party. [membership continued in the non-elected Reichstag] November 1933-1945. National Socialist German Workers Party. Chancellor of the Reich in Berlin March 1933.

The Hitler entry above gives an idea of the basic reference structure chosen for each member: dates of birth and death, religious affiliation, periods when an elected member or, after the Nazi regime came to power, when a member of the appointed Reichstag, the name of the electorate represented, and profession in 1933. By contrast, the entry for Theodor Heuss (no.610), who became the Federal Republic’s first and very popular President, takes up four columns in small print. In addition to the basic data (similar to that in the Hitler entry), the Heuss entry has a

<sup>11</sup> Fuller details about the Commission are given in the review-article listed in note 13.

<sup>12</sup> See reference 2, page 26.

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chronological synopsis of important events in his career, with lengthy footnotes going into particular points. A number of these footnotes refer to archival holdings of the Federal Archives at Koblenz. Footnote 16, for instance, is 22 column lines long and gives information about Heuss being fined for publishing three works without the permission of the Reich Chamber of Writers. Footnotes contain quotes from official files on Heuss and the information is far from cursory. Finally, there are two full-page illustrations which reproduce a letter to Heuss, dated 22 September 1936, with a strong warning about his editorials from the Ministry for Education and Propoganda, and a page from an official police wanted list (Steckbrief).

Entries for other Nazi notables (Hess, Himmler, Goebbels, Göring) are just as schematic as the Hitler entry. Their existence as members of the Reichstag is simply noted with the standard details supplied. But the main purpose of the compilation and its remarkable contribution to historical and institutional knowledge lie in the ways it documents the fate of those parliamentarians persecuted by the Nazi regime. These were mostly communists and socialists. Hindsight is very evident in a work of this kind and our knowledge of the course of events in this period lends perusal an extra edge. The compilers have brought together an astonishing record of fact, with very full references, which can only be described as exhaustive, scholarly, and appalling in the picture they build up of efficient brutality, murder and the practice of injustice under, or even despite, the law. The details are often highly individual and personal in a way that differentiates this work from the biographical works already commented on. There is much drama and suffering revealed throughout and in a number of cases one sees all too clearly the painful path these men and women had to go down.

Schumacher's compilation is consequently of prime importance for its insight into how the Nazis used their power, how they were assisted by the pliant, at times scandalously prejudiced legal professional and judiciary, and by the bureaucracy. In addition, the minuteness of detail in entries often provides an extraordinary panorama of how control over German society was organised. A complex understanding of the period emerges from all this material which is, of course, in addition to the often harrowing facts about what members experienced in concentration camps, or under police supervision. Curtailment of freedom of association, freedom of movement and practice of vocation, even for members who were not actually imprisoned at some time, are all recorded and create a picture which cannot be easily conveyed in words. Some photographs are also highly graphic in showing what awaited those the Nazis saw as enemies of their regime.

This work is thus not, strictly speaking, of interest primarily because of the parliamentary aspect, but rather as a major contribution to the study of an historical period seen through the prism of the membership of one important institution. Still, this is not to downplay the insights which the reader can gain on politics and government in Germany after the First World War. For further insights into the way the Reichstag operated after 1933, another volume, also published under the aegis of the Commission on Parliamentary Government in Bonn, can be recommended. It is a massive work by Dr Gerhard Hahn which places the history of the Reichstag Library in the institutional and historical context. It supplies rich detail and insights which excellently supplement the Schumacher volume: the two go well side by side.<sup>13</sup>

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<sup>13</sup> *Die Reichstagsbibliothek zu Berlin--Ein Spiegel deutscher Geschichte ...* by Gerhard Hahn. Düsseldorf, Droste Verlag, 1997, 759 pp. (Issued by Die Kommission für Geschichte des Parlamentarismus und der Politischen

The editor's lengthy introduction, with its numerous analytical tables and copious footnoting, is the key to understanding the import of what the individual biographical entries convey in totality to the reader. The tables contain a considerable number of breakdowns of members by party showing how many were arrested, the concentration camps they were sent to, how many died in custody and where, the length of sentences, etc. Scholars interested in the history of German communists and socialists will find the work indispensable. Also important are details given of how the Reichstag in the Weimar and Nazi eras was constituted. After November 1933 the Reichstag was a one-party parliament, but there were some 22 members who were 'guest' members of the regime. The editor, listing their names on p. 41, notes that there is still dispute about this situation. One of these 'guests' was Alfred Hugenberg (1865-1951), whose press and political activities were so damaging to the young Weimar Republic.

An aspect of this work which has not yet received comment is the information it brings together on persecution of members of the German State parliaments (Länderparlamente) and of the legislatures in countries occupied by the Nazi regime. This additional information would not be easy to find readily and further assures the compilation of an important place in any reference collection on twentieth-century European history.

An enterprise as vast as this can only be achieved if the necessary infrastructure and expertise are gathered together and maintained. The creation alone of the databases of personal data, bibliographical and other references is a task which must stretch over years. Cross-checking, verification and interpretation of data also absorb considerable time. One wonders, for example, how much time went to visiting official archives in Berlin and Koblenz. The results are a tribute to the best traditions of painstaking scholarship and the search for truth. Depressing and shocking as the evidence and the fate of many individuals are, the importance of having an objective and exhaustive record of events cannot be underestimated. The possibility of similar works of analysis and record from other European countries springs to mind. The twentieth century offers, regrettably, all too much scope for them.

The Schumacher volume demonstrates unmistakably that biographical dictionaries are capable of contributing to scholarship and historical understanding in imaginative ways. Furthermore, the material he and his associates have amassed, opens up fresh vistas for further historical research. The work is indispensable to any library concerned with documentary evidence on twentieth century German and more broadly, European history. It is hard to imagine that its analysis and richly referenced material could be bettered.

## **Conclusion**

The Australian Senate's proposed biographical dictionary is an ambitious project. If it is to stand comparison with similar products, perhaps some of those dealt with above, it will prove a testing exercise of skill. But there is no reason to suggest that it will be any less impressive than those

Parteien). A detailed review of this work by R.L. Cope appeared in *Legislative Studies*, Spring, 1998. The work's title may be translated as *The Library of the Reichstag in Berlin—A Mirror of German History*.

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we have looked at. The Senate already has an impressive publication record to its credit, benefiting both citizens and scholarly pursuits in Australia. The examples of such dictionaries reviewed in this paper indicate that there are a range of possibilities in treatment and scope. We await the results with high expectations in the belief that the biographical dictionary should be a fitting crown to the Australian Senate's existing range of reference and historical material.





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