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## EDITORS' NOTE

The editors are pleased to present Volume 15 of the University of Western Sydney Law Review.

This edition presents some wide ranging concerns of the legal academy, demonstrates the rich contour of legal debate and emphasises both the diversity of law and its dynamic nature. The topics addressed in this edition include the future of the common law, how the 'rights of man' discourse has been considered by Iranian and Ottoman Islamic scholars, Australia's response to its international human rights death penalty abolition obligations, clinical legal education, and US power and transnational governance.

This edition was made possible through the hard work, co-operation and collegial spirit of the editorial committee and the student editors. The editorial committee and student editors embraced the task with enthusiasm and determination to produce what we believe to be a quality publication. Such standards could only be achieved through the dedication of all those involved in the editorial process.

The editors were fortunate to be able to attract high quality submissions from academics covering a diverse range of topics. We wish to thank the academics from around Australia and abroad who generously gave of their time to double blind peer review the articles contained herein.

The editors also wish to thank the contributors for their articles, case notes and commentaries, and for helping to make this edition of the University of Western Sydney Law Review a publication that contributes to vibrant legal discussion. As the Honourable Mr Sully indicates in this edition, there is always something new to learn and discuss.

Dr Elfriede Sangkuhl and Margaret Hyland



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## OCCASIONAL ESSAY

# **THE COMMON LAW: WHITHER OR WITHER? OCCASIONAL ADDRESS TO AUSTRALIAN LAWYERS ALLIANCE ACT BRANCH CONFERENCE, 24<sup>TH</sup> JUNE 2011**

THE HONOURABLE BRIAN SULLY QC\*

Every year, and normally between Christmas and New Year, I find myself asking, sometimes family members, sometimes friends, whether they happen to have caught that year's broadcast of the Queen's Christmas message. The forms of the answers vary from the exasperated through the scornful and incredulous to the frankly obscene. The substance of the answers is, as of course you have divined, in general, no. Yet, if there is one lesson that a life in the law teaches, it is, surely, that there is always something new to learn albeit sometimes from a source that seems at first blush to be less than promising.

So it was that several years ago, and during the course of that year's Christmas Message, the Queen recounted some advice that had been given to Her Majesty early in her reign and by her first Prime Minister, Sir Winston Churchill. It seems that Churchill gave this advice: 'Always remember that the further back you can look, the further forward you can see.'

I imagine that one could be confident that both Churchill, when he gave that advice, and the Queen when Her Majesty received and later recalled it, did not advert in any particular way, indeed probably did not advert at all, to the Common Law. Yet it has always struck me that Churchill's aphorism explains simply and comprehensively the essence of the Common Law; the technique of the Common Law; the durability of the Common Law and the continuing relevance of the Common Law.

When I was provided with the first draft of the Conference agenda and asked whether I would be the first speaker at the Conference, I could not but notice that a good deal of the programme is to be devoted to a

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panel discussion about what their proponents are pleased to call 'reforms' of the Common Law in connection with certain categories of compensatory damages in civil cases and in connection with the current law respecting workers compensation. I felt that it was not quite appropriate for one who might be described as a blast from the past, and a New South Welshman at that, to plunge enthusiastically into the particular controversy. I did perceive, however, that it might be useful to set the scene for what is to follow in the panel discussion, by saying something more general about the Common Law in the 21st Century.

The unashamed Common Lawyer, of whom I am certainly one, who takes the Churchillian advice and looks back, can see in fact a very long way. He/she can see a continuum in the development of the Common Law that begins, to take a convenient starting point, in 1154 when Henry II succeeded to the English throne. The measure for present purposes of the reign of Henry II is summarised thus by Mr WJV Windeyer, (later Sir Victor Windeyer, a Justice of the High Court of Australia), in his lectures on legal history:

[H]e established a permanent court of professional judges who were royal servants. This made the administration of justice the task of the central authority in the kingdom and thus led to the uniform development of a true common law, common to all Englishmen, whether of English or Norman ancestry, and common to all England.<sup>1</sup>

From that initiative, and continuously throughout the 850 years that separate Henry II from us, there has developed a system of Common Law that is one of the greatest achievements of Western civilisation and that is as much a part of our Australian history, culture, identity and inheritance as it is of English history, culture, identity and inheritance.

It is, of course, not possible to discuss in any decent detail the highs and the lows of that 850 years of development of the Common Law. It is, however, possible to attempt a summary of the principal legacies of that development. Professor A R Hogue in his work *Origins of the Common Law* is admirably succinct: 'The rule of law, the development of law by means of judicial precedents, the use of the jury to determine the material facts of a case, and the definition of numerous causes of action – these form the principal and valuable legacy of the medieval law to the modern law.'<sup>2</sup>

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<sup>1</sup> WJV Windeyer, *Lectures on Legal History* (Law Book Co, 2<sup>nd</sup> ed, 1949) 53.

<sup>2</sup> Arthur R Hogue, *Origins of the Common Law* (Liberty Fund Inc, 1986) 246-247.



Let us take the first of those four topics and think for a few minutes about what we can see when we turn from looking back and look to the present and to the immediate future. It is useful to begin by borrowing again from Professor Hogue:

What is required in the 20th century is a much wider understanding of legal rights, how they have been gained and how they may be lost. For programmes promising social justice and economic justice are certain to be unfulfilled unless the programmes can be translated into legal rights protected by courts free to apply known rules. Many lawyers understand this; many laymen do not .... Problems of the government of complex industrial societies present serious threats to the continuance of the common-law system. The doctrine of the supremacy of law now confronts competition with a doctrine of government regulation by administrative orders. In the 20th century many European nations have shown how easily 'statism' can replace the rule of law. It is a peculiar quality of the Anglo-American legal system that it still retains respect for due process and for courts administering known rules.<sup>3</sup>

What, still looking forward, are the factors respectively favouring and not favouring that last proposition? There are, I suggest, obvious factors against. They concern: first, society generally; secondly, government and public administration; thirdly, the Courts themselves; and, finally, the legal profession.

As to the current condition of society, as good an assessment as any other is that of Aleksandr Solzhenitsyn: 'hastiness and superficiality are the psychic disease of the twentieth century.'<sup>4</sup> They are fully as much a psychic disease in the 21st century; indeed more so as more and more people become more and more addicted to more and more electronic gadgets which are destroying whatever concentration span has been left by television, while retreating ever more into a state that is at once wired up and fenced off.

That state of affairs offers a golden opportunity to those legislators, political hangers-on and troublingly ambitious senior bureaucrats, all of whom seem to get their only true pleasure and fulfilment out of an unremitting determination to micromanage other people by means of programmes that are said to be works of social inclusion but are in

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<sup>3</sup> Ibid 252.

<sup>4</sup> Gore Vidal, *Point to Point Navigation* (Random House, 2006) 223 quoting Aleksandr Solzhenitsyn, 'A World Split Apart', Commencement Address Delivered at Harvard University, 8 June 1978.

truth works of social engineering. Underlying those programmes is, at least as it seems to me, a truly poisonous concept, namely that there is no standard, no principle, no value, the worth of which cannot be expressed in bare dollar terms. We should never forget in that connection something said by one of my own all-time favourite jurists, Mr Justice Brandeis of the US Supreme Court, in a celebrated dissenting judgment:

Experience should teach us to be most on our guard to protect liberty when the purposes of government are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.<sup>5</sup>

It is a cosmic insight. It is to political science what God and Adam touching fingers on the Sistine Chapel ceiling are to art and the opening chords of Beethoven's Fifth Symphony are to music.

As to the Courts themselves it cannot be denied that in many instances, although of course by no means all or as yet even most, appointments are now made upon the basis that the Courts should be turned into some kind of social laboratory in which breadth and depth of learning in and practice of the law, and a sound judicial temperament, are fine as optional extras but are not to be preferred over the remaking of the Bench in the image of some ideological fantasy of social inclusion. This is not an approach likely to produce much needed modern successors to the great Common Law Judges of the past.

And what are we to say of the profession itself when in far too many instances, although of course not by any means in all instances, professional pride and professional commitment deriving in large part from a living awareness of the mighty inheritance of the Common Law, have been hollowed out by the billable hour and the overarching obligation to 'make budget'?

All of these matters are, I suggest, matters that demand the urgent and resolute attention of, in particular, the Judges and the members of the practising profession. To the extent that those concerns remain uncorrected, then to that extent the Common Law and the protections which it has built up over the centuries for all of us, are very much at risk.

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<sup>5</sup> *Olmstead v United States*, 277 US 438, 479 (1928).

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There are, however, two great forces available as weapons for those of us who will not simply lie by while the achievements of the centuries are shredded by people whom no correctly functioning society would let within touch of the levers of power, much less endow with a licence to operate those levers.

The first force is that sufficient of the great Common Law Lawyers have always been both willing and able to speak truth to tyranny whether actual or threatened. We can go, for example, to the beginning of the 17th Century and listen as Lord Chief Justice Coke tells James I, the very embodiment of the doctrine of the divine right of kings, that the King is subject to the law and so may not approach the Courts save as a litigant like any other.<sup>6</sup>

We can jump forward 150 years or so and listen to another Chief Justice, Lord Mansfield. He is telling James Somersett, a fugitive black slave who is being held in chains on a ship moored in the Thames en route to Jamaica from Virginia, that he will not be deported back to slavery because, property or no property, sale or no sale, contract or no contract, no man who is within the protection of the Common Law of England even if formally a slave, will be forced to abandon that protection against his will.<sup>7</sup>

We can move a little further forward and listen to a conversation between Lord Ellenborough and John Erskine, already one of the best advocates of the time and destined to become a Lord Chancellor. Erskine has accepted the brief to defend Thomas Paine, the pamphleteer and polemicist, on a charge of treason arising from things said in his now celebrated treatise *The Rights of Man*. Lord Ellenborough, a courtier close to the Sovereign, George III, tells Erskine that the King is 'much displeased' with Paine and that Erskine must not take Paine's brief. Erskine at once replies: 'I have taken it and, by God, I will hold it.' Erskine correctly perceived that to do otherwise would compromise his professional integrity and independence, and notwithstanding that his refusal was virtually certain to cost him the plum appointment, which he then held, of Attorney General to the Prince of Wales.<sup>8</sup>

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<sup>6</sup> JH Baker, *An Introduction to English Legal History* (LexisNexis Butterworths, 4th ed, 2002) 98.

<sup>7</sup> See *R v Knowles, ex parte Somersett* (1771-72) 20 State Tr 1 as discussed in JH Baker, above n 7, 476.

<sup>8</sup> For the Erskine incident, see Mr Justice John Phillips (later Phillips CJ) of the Supreme Court of Victoria in John Phillips, *Advocacy with Honour* (Law Book Co, 1985) 1, 2.

The second force is that the Common Law has never been fazed by change. It is true that the Common Law has not always been in the vanguard of change; but the Common Law has always been both able and willing to accommodate change, change being understood in the celebrated statement of Disraeli, not himself a lawyer but somebody who knew a thing or two about how the real world operates:

In a progressive country change is constant; and the great question is not whether you should resist change which is inevitable, but whether that change should be carried out in deference to the manners, the customs, the laws and the traditions of a people, or whether it should be carried out in deference to abstract principles and arbitrary and general doctrines.<sup>9</sup>

The first of those options is the way of the Common Law; the second is the way of modern legislative and bureaucratic interference with the Common Law. At the turn of the 19/20th Centuries one of the US Senators for New York, a man with the arresting name of Roscoe W Conkling, said 'When Dr Johnson described patriotism as the last refuge of the scoundrel, he was unconscious of the then - undeveloped capabilities of the word "reform".'<sup>10</sup> Quite.

In New South Wales the Rules of the Supreme Court now contain an overarching requirement that litigation be conducted at every stage of its course in such a way as will achieve the just, quick and cheap disposal of the litigation. Gleeson CJ once commented that the most important part of that Rule was the comma separating the word 'just' from the words 'quick and cheap'. In like vein, when you ask, as I have this morning invited you to do: 'whither the Common Law?', keep in mind that the most important part of the question is the first aitch.

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<sup>9</sup> Benjamin Disraeli, 'Speech on Reform Bill of 1867' (Speech delivered at Edinburgh, 29 October 1867).

<sup>10</sup> Matthew Parris, 'Patriotism', *Features, The Times* (London), 29 June 2006, 23.

# THE FIRST GENERATION OF MUSLIM INTELLECTUALS AND THE 'RIGHTS OF MAN'

SADEQ Z. BIGDELI\*

*Generally speaking, men are influenced by books which clarify their own thought, which express their own notions well, or which suggest to them ideas which their minds are already predisposed to accept.*

*Carl Becker*<sup>1</sup>

## I. INTRODUCTION

Long before the birth of the contemporary human-rights discourse, the 'rights of man' found an interesting fate in the nineteenth century. On the one hand, natural rights doctrine was propagated through the French Revolution 1789, which despite its controversial aftermath, continued to inspire the 'global intellectuals'<sup>2</sup> in many parts of the world. At the theoretical level on the other hand, as the process of secularization of natural law was completed by the late eighteenth century, the philosophical foundations of Lockean rights doctrine were put into serious doubt by all sides of the philosophical spectrum, from Bentham to Marx. Bentham wrote a harsh critique on the French Declaration of the Rights of Man and the Citizen 1789 and described the underlying principle of equality claimed in the Declaration to be a *natural* right as "absurd and miserable nonsense!" The critique of natural rights was not confined to utilitarian or legal positivist theories which flourished in the nineteenth century but it also came from Karl Marx, whose early works *On the Jewish Question* similarly contains a comprehensive critique of the French Declaration and its underlying individualism.

Muslim intellectuals of the nineteenth century were mostly political activists, rather than theorists, to whom the idea of the 'rights of man' had particular appeal. They, however, employed, and often skewed,

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<sup>1</sup> Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (Vintage Books, 1942) 28.

<sup>2</sup> Charles Kurzman, *Democracy denied, 1905-1915: Intellectuals and the Fate of Democracy* (Harvard University Press, 2008) 5.

the abstract notions of the 'rights and liberty' language in ways that fostered, rather than undermined, their advocacy for constitutionalism given the specific political, social and cultural context in which they operated.

It is, thus, crucial to appreciate the contextual differences that existed between the nineteenth century Islamic world and the Western world on the eve of the Glorious Revolution 1688 or eighteenth century France before the dawn of the French Revolution in which the absolutist sovereign had been weakened by the force of a new and emerging social order. There is also a lack of a European-style Reformation that needs to be considered as a significant factor in explaining the dominant role that religion played in the public sphere of the Islamic world. The Ottoman sultan had considered itself the legitimate successor to the Abbasid caliphs since the conquest of Baghdad by 'Suleiman the Magnificent' in mid-sixteenth century. Similarly in Persia (Iran), the Safavid shahs gained theocratic legitimacy by claiming to be the descendants of Imam Ali, the first Shia Imam and Prophet's cousin.

Despite these characteristic differences between the West and the Islamic East, the impact of the French Revolution was profound in both Sunni and Shia-ruled territories of the nineteenth century Islamic world, respectively the Ottoman Empire and Persia (Iran). Just like Fichte and Hegel, Muslim intellectuals were impressed by the French Revolution and, later, with Napoleon's sophisticated character. It is of note that Muslims particularly in the Ottoman Empire, thanks to the formation of a Franco-Ottoman alliance since 1536, did not carry any significant hostility towards the French as they did vis-à-vis other European powers, particularly the tsarist Russia against whom they had fought constant battles. Napoleon's 1798 invasion of Ottoman Egypt, which was under the brutal rule of the Mamluks (the local aristocracy), hardly changed that friendly attitude towards France. Hence General Bonaparte's manifesto, which was cunningly flavoured with rights language, appealed to Muslim masses:

Peoples of Egypt, you will be told that I have come to destroy your religion. [This is an obvious lie]; do not believe it! Tell the slanderers that *I have come to you to restore your rights from the hands of the oppressors* and I, more than the Mamluk, serve God...and revere his Prophet Muhammad and glorious Quran... Tell your nation that the French are also faithful Muslims... Furthermore, the French have at all times

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declared themselves to be the most sincere friends of the Ottoman sultan and the enemy of his enemies.<sup>3</sup>

Later in the century, Ottoman and Persian intelligentsia invented an Islamic-flavoured rights language, which had distinct characteristics across the Sunni and Shia-ruled territories. This paper explores such distinct formulation of the rights talk across the Islamic world in an attempt to redress the generalisations made in the existing scant literature in Turko-Persian comparative research.<sup>4</sup> In order to contextualise the theoretical debate, the paper begins with a snapshot of the status of the rights debate (and its critique) in that period marked by the faltering foundation of the rights doctrine as a coherent philosophical system on the one hand and the utility of the rights language as a political vehicle for transition to a new social order on the other.

It is also important to avoid a trap of viewing the treatment of the rights discourse by Muslim intellectuals in the nineteenth century through the lens of the twentieth century human rights debate, as this is often done in the literature.<sup>5</sup> Thus, it is crucial to put a few things in perspective: At the height of colonialism, the phrase 'rights of man' literally excluded women; the slave trade was still being phased out and religious minorities, especially the Jewish people, were only beginning to gain equal rights and equal citizenships in Europe. It is in

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<sup>3</sup> *Déclaration du général Bonaparte au peuple égyptien 1798* in Arthur Goldschmidt Jr., *A Concise History of The Middle East* (Westview Press, 7<sup>th</sup> ed, 2002) 161, 161–2.

<sup>4</sup> See Fariba Zarinebaf, 'From Istanbul to Tabriz: Modernity and Constitutionalism in the Ottoman Empire and Iran' (2008) 28(1) *Comparative Studies of South Asia, Africa and the Middle East*, 154 in particular at 163 in equating the roots of Islamic talk in the writings of the Young Ottomans such as Kemal on the one hand and Iranian intellectuals such as Mostashar al-Dowle and Malkam Khan on the other. This stands in opposition to what the paper demonstrates to be the distinct formulations existing across the Islamic world. For more on comparative studies of the Islamic world in the nineteenth century see, Thierry Zarcone and Fariba Zarinebaf Shahr (eds), *Les Iraniens d'Istanbul* (Peeters, 1993); Nader Sohrabi, *Constitutionalism, Revolution, and State: The Young Turk Revolution of 1908 and the Iranian Constitutional Revolution of 1906 with Comparisons to the Russian Revolution of 1905* (PhD thesis, University of Chicago, 1996); Nader Sohrabi, 'Historicizing Revolutions: Constitutional Revolutions in the Ottoman Empire, Iran, and Russia, 1905–1908' (1995) 100(6) *American Journal of Sociology* 1383; Nader Sohrabi, 'Global Waves, Local Actors: What the Young Turks Knew about Other Revolutions and Why It Mattered,' (2002) 44(1) *Comparative Studies in Society and History* 45.

<sup>5</sup> See Pelin Helvacı, 'A Critical Approach: Political Thoughts of Young Ottomans' (2010) 16(3) *European Journal of Social Sciences*, criticizing Namik Kemal for being against women's rights; Berdal Aral, 'The Idea of Human Rights as Perceived in the Ottoman Empire' (2004) 26(2) *Human Rights Quarterly* 454. Aral, despite his claim to the contrary, uses the twentieth century discourse of human rights to evaluate the nineteenth century debates in the Ottoman Empire.

this context that David Urquhart, the influential secretary of the British embassy in Istanbul in the 1830s and the prominent figure known for his stance against Westernization reform, criticised *Islahat Farmani*<sup>6</sup> that was imposed by the European powers on the Ottomans:

If the Porte consulted the Dissenting Gentlemen in England before it agreed on that firman they would have explained that no foreigner was allowed to possess land in England, that England, like Turkey, punished blasphemy, that Roman Catholics were still ineligible for certain offices, and that till about forty years ago disabilities also affected Protestant Dissenters, that still later it had been impossible for Dissenters and Roman Catholics to contract marriage, except by submitting the forms of the established clergy; and that considerations of religious belief still determined the admissibility of evidence in British Courts of Law.<sup>7</sup>

Examining the critical rights debate put forward by the Young Ottomans (1865 – 1876), Section II highlights the historical context in which this first generation of mostly liberal-minded Muslim intellectuals operated, which is marked by a deep Westernisation reform process known as Tanzimat. These reforms, which started to progress in a reasonable pace in 1839, were later increasingly taken hostage by European powers in 1856 and lasted until 1876 – the beginning of the Hamidian era. Section III proceeds to explore the ambivalence of Iranian intelligentsia towards the Westernisation of Ottoman Tanzimat. First, it demonstrates deep envy for such reforms followed later by a change of strategy, with the dawn of Pan-Islamism of the Hamidian era in the post-Tanzimat Turkey. Guided by Afghani, this new strategy led Iranian intellectuals to use the language of rights and constitutionalisation in Islamic terms to lure the influential Iranian ulema into a coalition against the Shah. Section IV provides two cases in point to demonstrate the extent to which the Iranian intellectuals felt compelled to pay lip service to Islam and the ulema in their *eclectic* adoption of the ‘natural rights’ language.<sup>8</sup>

## II. THE NINETEENTH CENTURY CRITIQUE OF THE ‘RIGHTS OF MAN’

There are various opposing theories about the philosophical influences of the eighteenth century revolutionary thought. The extent to which,

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<sup>6</sup> See Section II.

<sup>7</sup> David Urquhart, ‘Parliamentary Paper on the conditions of the Christians in Turkey’, *Diplomatic Review*, 4 September 1867, 139-140.

<sup>8</sup> I have mostly used original Farsi writings of Iranian intellectuals while the views and writings of the Young Ottomans are solely based on the English literature and/or English translations of the literature.



for instance, the 'general will' theory of Jean-Jacques Rousseau in *Du Contrat Social* (1762) was embodied in the US Declaration of Independence (1776) and even the French Declaration on the Rights of Man and the Citizen (1789) has been contested.<sup>9</sup> What is certain, however, is that the 'natural rights' theory of Locke's *Second Treatise of Government* (1689) won the heart and soul of American revolutionaries. Whatever the influences, the political manifestos of both revolutions contain similar rhetoric of natural rights and freedom. Part of the reason behind that lies in the well-known history of the close friendship and shared enthusiasm of Marquis de Lafayette, a young nobleman who had participated in the American War of Independence, and Thomas Jefferson, the American Minister in Paris at the time.<sup>10</sup>

Yet, while the revolutionaries across the Atlantic were making the 'rights of man' central to their cause, the 'natural rights' doctrine could hardly survive the process of secularisation. The philosophical foundation of this doctrine was being theoretically undermined by a disconnection from its medieval Christian roots. Of course, this was less of a problem earlier, when Locke was formulating the rights treaties in the immediate aftermath of the 1688 revolution to provide a philosophical justification for its 'gloriousness'. As Sir Frederick Pollock wrote, the Stuart partisans had taken their stand 'on a supposed indefeasible right of kings, derived from a supposed divine institution of monarchy...The Whigs needed an antidote, and Locke found one in his modified version of the original compact.'<sup>11</sup> In the late eighteenth century, however, when the idea of human 'reason' replaced the idea of a divine order, the meager deism that remained proved inadequate to form a sound basis for 'natural' rights<sup>12</sup> - and hence the nineteenth century critique.

Despite similar intellectual bases, the US and the French revolutions each had distinct characters and sparked different reactions among other nations. Mostly due to its radical nature and chaotic aftermath, the French, rather than the American, Revolution became the centre of intellectual attacks in the nineteenth century. In England, Edmond

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<sup>9</sup> See, eg, Joan MacDonald, *Rousseau and the French Revolution, 1769-1791* (Athlone Press, 1965). See also Daniel Mornet, *Les origines intellectuelles de la Révolution française, 1715-1787* (A. Colin, 1933).

<sup>10</sup> See Louis Gottschalk and Margaret Maddox, *Lafayette in the French Revolution: Through the October Days* (University of Chicago Press, 1969).

<sup>11</sup> See Sir Frederick Pollock, *An Introduction to the History of the Science of Politics* (Beacon Press, 1960) 28.

<sup>12</sup> Jeremy Waldron (ed), *Nonsense upon stilts: Bentham, Burke, and Marx on the Rights of Man* (Methuen, 1987) 14.

Burke (the father of conservatism) and Jeremy Bentham (the father of utilitarianism) were among prominent critics of the French Revolution. While Burke supported the American Revolution as a Member of the House of Commons, he strongly opposed its French counterpart. In *Reflections of the Revolution in France* he not only formulated his refutation of the French radical break with the 'tradition order', but also attacked the 'pretended rights of these theorists' as extreme; he wrote, 'as they are metaphysically true, they are morally and politically false'.<sup>13</sup> He stated that the 'rights of men in governments are their advantages; and these are often in balances between differences of good; in compromises sometimes between good and evil, and sometime between evil and evil.'<sup>14</sup> Burke's most extreme predictions were confirmed as the Terror of the 1790s unfolded, just as Burke had suggested in his letter to a gentleman in Paris ('you may have subverted Monarchy, but not recovered freedom').<sup>15</sup>

Bentham was among the early enthusiasts that became disillusioned with the French Revolution in the wake of its violent aftermath. He forged a direct attack on the 'rights of man' in his *Anarchical Fallacies*.<sup>16</sup> The text served as an examination of the Declaration of Rights (the 'Declaration') issued during the French Revolution, in which he provides an article-by-article examination of the Declaration Bentham examines, for instance, Article I of the Declaration ('Men (all man) are born free and remain free, and equal in respect of rights...'), asking:

All men are born free? All men remain free? No, not a single man: not a single man that ever was, or is, or will be. All the men, on the contrary are born in subjection, and the most absolute subjection - the subjection of a helpless child to the parents on whom he depends every moment for his existence.<sup>17</sup>

He then asks even if one sets aside the child's dependence on his parents:

All men born free? Absurd and miserable nonsense! When the great complaint - complaint made perhaps by the very same people at the same time, is - that some many men are born slaves!<sup>18</sup>

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<sup>13</sup> Edmund Burke and JCD Clark, *Reflections on the Revolution in France* (Stanford University Press, 2001) 221.

<sup>14</sup> Ibid.

<sup>15</sup> See Waldron, above n 12, 95.

<sup>16</sup> Jeremy Bentham 'Anarchical Fallacies', in John Bowring (ed) *The Works of Jeremy Bentham Vol. 2* (Edinburgh, 1843) 498.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

Under Article II of the Declaration<sup>19</sup> Bentham opines that:

[A] reason for wishing that a certain right were established, is not that right – want is not supply – hunger is not bread. That which has no existence cannot be destroyed – that which cannot be destroyed cannot require anything to preserve it from destruction. *Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts. But this rhetorical nonsense ends in the old strain of mischievous nonsense: for immediately a list of these presented natural rights is given, and those are so expressed as to present to view legal rights. And of these rights, whatever they are, there is not, it seems, any one of which any government *can*, upon any occasion whatever, abrogate the smallest particle.<sup>20</sup>

Bentham's critique of natural rights fits in well with his principle of utility. For Bentham, in line with the rationalism of the enlightenment philosophy, pleasure and pain, instead of a divine or natural order, are the only intrinsic values that a society should uphold. By maximising average utility, Bentham balances the interests of the individuals with the greater interests of the society. From this standpoint, Bentham rejects the absolutism in the rights language of the Declaration in which the necessary constraints or qualifications are missing. He asserts:

[D]ictates of reason and utility are the results of circumstances which requires genius to discover, strength of mind to weigh, and patience to investigate: the language of natural rights require[s] nothing but a hard front, a hard heart and an unblushing countenance. It is from beginning to end so much flat assertion: it neither has anything to do with reason nor will endure the mention of it. It lays down a fundamental and inviolable principle whatever is in dispute.<sup>21</sup>

Bentham is, however, not ignorant of the political usefulness of the language of rights for the people on behalf of whom rights are claimed.<sup>22</sup> Rather, he warns that such a language would be detrimental to the society which 'is held together only by sacrifices that men can be

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<sup>19</sup> Article II of the Declaration: 'The end in view of every political association is the preservation of the natural and imprescriptible 'rights of man'. These rights are liberty, property, security, and resistance to oppression'.

<sup>20</sup> Bentham, above n 16, 498.

<sup>21</sup> Ibid 74.

<sup>22</sup> Waldron likens Bentham to 20<sup>th</sup> century logical positivists who appreciate the use of the language despite claiming that it might be devoid of meaning. See Waldron, above n 12, 36.

induced to make of the gratifications they demand'.<sup>23</sup> According to Bentham, 'to obtain these sacrifices is the great difficulty, the great task of government'. Then he asks:

[W]hat has been the object, the perpetual and palpable object, of this declaration of pretended rights? To add as much force as possible to these passions, already but too strong,—to burst the cords that hold them in,—to say to the selfish passions, there—everywhere—is your prey!—to the angry passions, there—everywhere—is your enemy. Such is the morality of this celebrated manifesto.<sup>24</sup>

Despite his position as a firm legal positivist, Bentham does not deny the moral evaluations of the law. To him it was sensible to argue what the law *ought* to be.<sup>25</sup> Yet, by noting that 'hunger is not bread', he warned about confusing 'ought', which is a question of morality, with 'is', which is the question of law.<sup>26</sup> Hence Bentham is deeply troubled by the Declaration's use of the terms 'can' and 'cannot' in various articles (e.g. 'social distinctions *cannot* be founded, but upon common utility' (Article I); 'Whatever is not forbidden by the law *cannot* be hindered' (Article V); 'Property being an inviolable and sacred right, no-one *can* be deprived of it...' (Article XVII)).

In contrast with its impact in Britain, the French Revolution became a defining event for German romanticism. Two of the most prominent figures of German idealism, Johann Gottlieb Fichte and Georg Wilhelm Friedrich Hegel, were deeply impressed by the revolution.<sup>27</sup> Yet, even Hegel was skeptical about the 'rights of man' as an expression of true human freedom and regarded them as empty, abstract and fanatical, reducing 'the union of individuals in the state to a contract and therefore to something based on their arbitrary wills, their opinion, and their capriciously given express consent.'<sup>28</sup> The most critical account of the French Revolution among the nineteenth century German philosophers is offered by Karl Marx. In *Towards a Critique of Hegel's Philosophy of Right: An Introduction*, Marx agreed with Hegel's identification of the 'individual in isolation' which would inevitably result 'in the maximum frightfulness and terror' as the central problem

<sup>23</sup> Bentham, above n 12, 497.

<sup>24</sup> *Ibid.*

<sup>25</sup> Waldron, above n 12, 37.

<sup>26</sup> *Ibid.* 53.

<sup>27</sup> See Hegel's *Philosophy of Right* (1821) and Fichte's *Beiträge zur Berichtigung der Urteile des Publikums über die Französische Revolution* (*Contributions to the Correction of the Public's Judgment concerning the French Revolution*) (1793).

<sup>28</sup> Georg Wilhelm Friedrich Hegel and Stephen Houlgate, *Outlines of the Philosophy of Right* (Oxford University Press, 2008) 230.

in a rights-based state.<sup>29</sup> Yet, instead of greater participation in the 'ethical life as a remedy' suggested by Hegel, Marx proposes greater involvement with the messy business of material life.<sup>30</sup> Therefore, not surprisingly, while Marx famously theorised the idea of a revolutionary overthrow of the existing order by the proletariat, he could only see the French Revolution as a 'failure' for the masses, 'whose real conditions for emancipation were substantially different from the conditions within which the bourgeoisie could emancipate itself and society.'<sup>31</sup> Marx's earlier work *On the Jewish Question* contains a rather comprehensive critique of the 'rights of man'. There, he analyses various articles of the French Declaration on the Rights of Man and the Citizen to highlight the fact that 'the so-called "rights of man", ... as different from the rights of citizen, are nothing but the rights of the member of civil society, i.e. egoistic man, man separated from other men and the community.'<sup>32</sup> Marx characterizes private property rights (Article 16) as 'a practical application of the "rights of man" to freedom ... as the right of selfishness'. The thrust of Marx's critique is encapsulated in the following passage:

Man was therefore not freed from religion; he received freedom of religion. He was not free from property, but he received freedom of property. He was not freed from the egoism of trade; he received freedom of trade.<sup>33</sup>

Overall the above selective account of the nineteenth century critique of rights should demonstrate that all the critics, though coming from opposite poles, share similar concerns over the 'abstraction' of the rights of the 'individual' at the expense of the 'community'. The crucial differences among them remain in their distinctive conception of 'community' which lies, as Waldron suggests, in 'the altruism of Bentham's principle of utility, the intergenerational wisdom of Burke's traditions, and the co-operative fulfillment of Marxian species-being.'<sup>34</sup> Yet, it was exactly this 'abstraction' of the 'rights of man' that found appeal in the Islamic world.

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<sup>29</sup> Waldron, above n 12, 122.

<sup>30</sup> *Ibid.*

<sup>31</sup> Karl Marx, 'The Holy Family' in David McLellan (ed) *Karl Marx: Selected Writings* (Oxford University Press, 1977) 140, 140-1.

<sup>32</sup> Karl Marx, 'On the Jewish Question' in David McLellan (ed) *Karl Marx: Selected Writings* (Oxford University Press, 1977) 140, 140-1.

<sup>33</sup> *Ibid.*

<sup>34</sup> Waldron, above n 12, 44.

### III. THE YOUNG OTTOMANS' CRITICISM OF 'EQUAL RIGHTS' UNDER TANZIMAT

The numerous military defeats of the Ottomans in the eighteenth century, particularly by the rising Tsarist Russia, made it clear to the Ottoman sultans that their declining Empire was in desperate need of fundamental reform. In the same year of the French Revolution, the most important Ottoman reformer of the eighteenth century came into power: Salim III (1789-1807), whose 'New Order' (*'Nezame-Cedid'*) aimed at the Europeanization of the Ottoman military. And yet, by 1829 and upon the unsuccessful Russian war of 1828, it became clear to his successor Mahmud II that for any reform to be effective, not only did the influential Janissary corps, who had been the main impediment to modernisation of the military, have to be washed away from the face of the Ottoman society, but there was also a need for radical transformation of the governmental apparatus. In particular, the higher ranking ulema, who had been traditionally holding high governmental positions with no education suitable for a modern bureaucracy, were to be gradually replaced by a rising class of government bureaucrats – the so-called 'men of the pen'.<sup>35</sup> Mahmud II's reforms set the stage for the beginning of an era of secularization in the Ottoman Empire known as Tanzimat which was implemented by his successor Sultan Abdülmejid I and his Grand Vasier Reshid Pasha (1800-1858).

The era of Tanzimat – meaning 'regulation' in Turkish – ushers in a series of top-down Westernisation reform policies marked by *Hatt-ı Hümayun of Gülhane* (Gulhane Rescript) of 1839. The Tanzimat era officially ends with the dawn of the Hamidian era, marked by the establishment of the short-lived Ottoman constitution of 1876 by Sultan Abdülhamid II but most notoriously known for a change of direction towards anti-Western Pan-Islamism. Over a few decades of Tanzimat however, there were progressive steps in the direction of Ottoman secularization: 1840 (penal code), 1847 (modern secular tribunals, 1850 (a secular commercial code), 1856 (Ottoman Bank), 1845-1868 (secularization of education), 1856 (equal rights and even positive discrimination in favour of Ottoman Christian subjects), 1861 (a secular code of commercial procedure), 1864 (a new law regarding provincial administration), 1867 (foreigners' right to own land), 1868 (a new *Lycée* [a French public secondary school] was established where teaching was to be in French).<sup>36</sup>

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<sup>35</sup> Serif Mardin, *Genesis of Young Ottoman Thought: a Study in the Modernization of Turkish Political Ideas* (Syracuse University Press, 2000) 133 -155.

<sup>36</sup> *Ibid* 163.

As one of the most significant Westernisation reforms ever accomplished in the Islamic world, Tanzimat not only sparked reactions of the first generation of Muslim intellectuals known as Young Ottomans (1865 – 1876) in Turkey but it also continued to feed the debates on modernism and secularism in the twentieth century. At the time, these reforms were enthusiastically embraced by the likes of Auguste Comte, the father of positivism, who commanded the Ottoman Empire for such a remodelling of the society in which Islam was not necessarily seen an impediment to reform.<sup>37</sup> Despite Reshid Pasha's views as its principle architect to the contrary, the Gulhane Rescript and its embedded promise to respect the "life, honour and property" of all Ottoman subjects, including the non-Muslims, was initially seen by some Europeans as a statement of individual liberties.<sup>38</sup> The architect of the Rescript believed however that the dearth of modern education in Turkey stood in the way of Ottoman liberal constitutionalism. Years after the Rescript, the situation of inequality of non-Muslim subjects persisted: their testimony was not fully accepted in courts, they were not appointed to the offices of the state in proportion to their numbers, and they did not profit from the educational facilities established under the Rescript.<sup>39</sup>

The direction of the Tanzimat fundamentally changed in favour of Ottoman Christian subjects in the aftermath of the Crimean War (1853 – 1856) in which an alliance of the French, British and Ottoman Empires and the Kingdom of Sardinia managed to defeat the Russian Empire. In the course of peace negotiations, the European powers imposed the most radical policies on their 'victorious ally' in favour of their Christian protectorates. The *Hatt-ı Hümayun* of 1856, known as *Islahat Firmani*, was forced into the Paris Treaty via Article IX, which stated:

His Imperial Majesty the Sultan, having, in constant solicitude for the welfare of his subjects, issued a firman, which, ameliorating their conditions without distinction of religion or of race, records his generous intentions towards the Christian population of his Empire, and wishing to give further proof of his sentiments in this respect...it is clearly understood, that it cannot in any case give to the said powers the right to interfere, either collectively or separately, in the

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<sup>37</sup> Auguste Comte, *A son Excéllent Rechid Pacha, ancien grand visir [sic] de l'Empire Ottoman Systém de Politique Positive ou Traité de Sociologie Instituant law Relegion de l'Hummanité* (Paris, Carillan-Goeury et Dalmont, 1853), III, xlvi-xlix.

<sup>38</sup> Mardin, above n 35, 157.

<sup>39</sup> *Ibid* 15.

relations of His Majesty the Sultan with his subjects, nor in the internal administration of his Empire.<sup>40</sup>

It was obvious from the start that the latter part of the provision above (the principle of non-interference) was merely a pledge on paper. Right before the conclusion of the Treaty which caused Muslims to bemoan the loss of their 'sacred national rights' that their 'ancestors gained with their blood'<sup>41</sup>, Reshid Pasha issued a serious warning to the Sultan. He predicted that *Islahat Firmani* would cause disturbances between the two races and would eventually pave the way to the dissolution of the Ottoman Empire.<sup>42</sup> The firman would risk the integrity of the Empire and its annexation to the Treaty would give way to foreign intervention and cause the dismemberment of the Empire. Rashid Pasha foresaw that the new reforms promised in the firman cannot be fulfilled in the short term 'without frustrating Muslims and overly indulging non-Muslims'. He wisely recommended that these policies 'should be carried out gradually and without the shadow of European manipulation.' However, Reshid Pasha's own protégés, i.e. Fuad Pasha and Ali Pasha who had taken over the Ottoman administration, seemed to be so impatient to please the Europeans that they 'hastened to grant new rights that go beyond even the demands of non-Muslims.'<sup>43</sup>

With the rise of nationalism in the Balkans and other Christian-populated Ottoman territories in the 1860s, Fuad Pasha and Ali Pasha did increasingly more in the way of placating European powers. A prominent example in point was the Lebanese crisis of 1860 in which French troops, in disregard of the Paris Treaty's principle of non-interference, were sent to Lebanon. In response to the mishandling of the sectarian violence between Muslims and Druses, Fuad Pasha executed the Turkish commanding general and his two aides and appointed a Christian government for Lebanon at the recommendation of the European powers. These and other similar events were causing disgruntlement among Muslim Turks at a time when a number of reforms were being hastily implemented to redress the long standing problem of Christian equal rights in the Ottoman Empire.

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<sup>40</sup> For the text of the treaty see *General Treaty between Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey, for the reestablishment of Peace*, signed at Paris, March 30, 1856 BFSP 1855-56 XLVI, 8-22.

<sup>41</sup> Ahmad Cevdet Pasha, *Tezâkir 1-12* (Cavit Baysan, Ankara Turk Tarih Kurumu Basimevi (eds), 1953), 68 Mardin (trans), above n 35, 18.

<sup>42</sup> Nazan Çiçek *The Young Ottomans: Turkish Critics of the Eastern Question in the Late Nineteenth Century* (Tauris Academic Studies, 2010) 113.

<sup>43</sup> *Ibid.*



A quota system, for instance, was put in place to address the problem of past discrimination against non-Muslims in government employment. The controversial question of admitting non-Muslims into the army also remained unresolved despite the stipulations of the 1856 firman that all Ottoman subjects had the duty to serve. The unfairness of the system of *bedel-i askeriye*, whereby Muslim youth were conscripted to army (unless they paid huge sums of money) while non-Muslims paid a minimal exemption tax, became the subject of criticism by the Young Ottomans such as Ziya Bey.<sup>44</sup> Moreover, a series of privileges such as capitulation rights<sup>45</sup> followed by tax exemptions were granted to European citizens in the Ottoman Empire. This was later followed in 1867 by granting foreigners the significant right to own land. Many Ottoman Christian tradesmen took advantage of these privileges by virtue of obtaining European passports which were granted to non-Muslims in great numbers. On top of that was a reduction of import tariffs for European products which was not reciprocated by Europeans. Muslim business and manufacturing were on the brink of bankruptcy. This bizarre situation is well described by a British traveller to Turkey who recollects the views of a 'Frenchman residing in Istanbul'<sup>46</sup>:

Force them (the Turks) to give effect to the clauses in the Hatt-i Humayoon which permits foreigners to buy land, force them to allow foreign companies to make the roads which they will not make themselves. Turkey, once opened to European enterprise, industry and capital, will be a new America, with a better climate and a better soil. Anglo-Saxons and Germans will soon drive these savages off the face of the country. They hold it only by frightening, plundering and oppressing the civilized races. Even the Greeks and the slaves, armed with equality of rights would drive them out.

Urquhart's words, which came in the introduction to this paper, about the equality of rights with respect to religious minorities in Europe at the time, especially his alluding to the discrimination against Roman Catholics in the English judicial system and the prohibition of land ownership by foreigners in England, will put these issues in perspective. Therefore, it was not so much the granting of equal rights

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<sup>44</sup> Ibid 124.

<sup>45</sup> In the history of international law, capitulation is referred to any treaty whereby one state permitted another to exercise extraterritorial jurisdiction over its own nationals within the former state's boundaries. See Online Britannica Academic Edition <<http://www.britannica.com/EBchecked/topic/94037/capitulation>>.

<sup>46</sup> Senior, *A Journey Kept in Turkey and Greece*, 44, cited in Çiçek, above n 42, chapter 3 note 100.

to Christians but granting them 'more equal rights'<sup>47</sup> (or the appearance of it in the perception of Ottoman public) that disenfranchised Muslim populations of the Empire. 'Gearing of Turkish reform to the wishes of the Christian populations of the empire', as Mardin describes, resulted in a lopsided system in which Muslim populations had no share.<sup>48</sup>

Rather than being a cure for the 'Sick Man of Europe'<sup>49</sup>, the Tanzimat reforms and its main message of religious equality piled up resentment among the Muslim Ottomans. It is in such a hostile nationalist context that the Young Ottomans emerged. The (multi-narrative) stories of the Young Ottomans' forming of 'Patriotic Alliance' in exile and their eventual success in establishing the short-lived Ottoman Constitution of 1876 has been thoroughly investigated in the literature.<sup>50</sup> As protégés of Reshid Pasha and part of the rising class of bureaucrats born out of the Tanzimat, former civil servants such as Ziya Pasa (1825-80) and Namik Kemal (1840-88) rebelled against the alienating impact of the Tanzimat. Their central claim was that, instead of lopsided reforms, the Porte should have redesigned the whole administrative system through the introduction of a representative system (*usul-ii meshvoeret*).<sup>51</sup>

These excluded members of the elite became the first Muslim intellectuals who attempted to develop a theory for centralised modern institutions based on, what Karpat describes as, an 'Islamic political tradition and Ottoman principles of government'.<sup>52</sup> What is key for the purpose of this paper is that, in the pro-Western Tanzimat environment, the 'liberal' rights talk would prove highly unpopular within Muslim nations. Hence, the Young Ottomans made use of a nationalist version the rights language in order to foster their constitutionalist political cause. Being cognizant of the symbolic

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<sup>47</sup> Çiçek, above n 42, 169.

<sup>48</sup> Mardin, above n 35, 18.

<sup>49</sup> The Ottoman Empire was described as 'the sick man of Europe' in the mid-nineteenth century due to its declining power and internal problems.

<sup>50</sup> Kemal H. Karpat, 'The Transformation of the Ottoman State, 1789 - 1908' (1972) 3(3) *International Journal of Middle East Studies* 243. For a more elaborate study see Serif Mardin, *Genesis of Young Ottoman Thought: a Study in the Modernization of Turkish Political Ideas* (Syracuse University Press, 2000); Niyazi Berkes, *The Development of Secularism* (McGill University Press, 1964); Ernest Ramsaur, *The Young Turks: Prelude to the Revolution 1908* (Princeton University Press, 1957); Jacob Landau, *Pan-Turkism: From Irredentism to Cooperation* (Hurst and Company, 1995); Carter V. Findley 'The Advent of Ideology in the Islamic Middle East' (1982) 56 *Studia Islamica* 147-180; Ahmad Feroz 'The Young Turk Revolution' (1968) 3(3) *Journal of Contemporary History* 19.

<sup>51</sup> Namik Kemal, *Hurriyet*, No. 4, 29 July 1868, Çiçek (trans), above n 42, 116.

<sup>52</sup> Karpat, above n 44, 266.

quality of *Islahat Firmani*, they tried to exploit the population's distaste of Tanzimat to the full.<sup>53</sup> The criticism of the principle of equality between Muslims and non-Muslims were to become a distinctive aspect of Young Ottoman opposition.<sup>54</sup>

The most liberal mode of the rights language was used by Prince Mustafa Fazil, the Egyptian supporter and a prominent sponsor of the Young Ottomans in his famous letter to Sultan Abdilaziz published in 1867. In particular, Mustafa Fazil emphasised 'rights to property and security' and advocated a 'check' on the rights of the sovereign (the sultan).<sup>55</sup> On the other hand, Namik Kemal (1840 -1888), a prominent poet and the most important thinker among the Young Ottomans, moulded the concept of liberty with a nationalist notion of 'fatherland' (Vatan), in which the 'Muslim' identity was central. Hilmi Ziya Ulken, an authority on Turkish intellectual history, maintains that 'Namik Kemal in his articles on the Turkish economy highlighted the notions of Ottoman-Muslim enterprises such as *Muslim Bank*, *Muslim Corporations*, and protecting and supporting the *Muslim* merchants.'<sup>56</sup> This is due to Kemal's critique of the absurdity of pro-Western economic policies in the Ottoman Empire:

Today, when an Englishman buys immovable estate in France, he pays tax to the French government for his property, and in the event of a legal dispute he applies to the French courts, if he cultivates agricultural product he employs French workers and also pays tax out of the value of the product to the French government. In short, this measure does not damage the country's economy or weaken the sovereignty, on the contrary, it by all means contributes to the general welfare... Whereas in our Empire there is no such a thing as national economy, foreign products have already flooded our markets, native Ottoman merchants have become unable to compete against foreign merchants, who, thanks to the capitulations, are exempted from a series of taxes and duties... today there is no work for Muslims other

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<sup>53</sup> Çiçek, above n 42, 115.

<sup>54</sup> Ibid.

<sup>55</sup> See translation by M. Colombe in *Orient*, no. 5 (1958), 29, cited in *Ibid* 262 note 2. ('[f]our centuries ago the Turks "submitted to their leaders on the virtue of a freely accepted principle" and had a "moral virility". But now, there was a feeling that pride and honor were diminishing subject to the injustice, whims, exactions of subordinate officials who depend only nominally on your [sultan's] authority...Your subjects [sultan's] of all faiths are consequently divided into two classes: those who oppress without checks and those who are oppressed without mercy... The cause of all these lay in the political system's lack of freedom and of a constitution that would guarantee the people "their sacred religion, fortune, and property, as well as the security of home'.)

<sup>56</sup> Cited in *Ibid* at 266.

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than trading wood and coal for domestic heating or becoming a state employee and living a parasitical life.<sup>57</sup>

Similarly, Ziya Bey takes note of a class of Turkish-Ottoman traders known as *Hayriye Tüccari*, who existed at the beginning of the century and were out-competed by European corporations, eventually vanishing by the 1860s. In reaction to the *Firmani*'s equal rights, both Kemal and Ziya attempted to promote the view that all those rights already exist in the Islamic law of Sharia. The basis of their critique was that the Tanzimat statesmen were so eager to portray themselves as liberal revolutionaries in the eyes of Europe that they deliberately showed Islam in a bad light as a despotic and intolerant religion.<sup>58</sup> Kemal and Ziya each argued separately that talking of equal political rights under the circumstances was meaningless until there was a system of political representation established under Tanzimat. According to Ziya 'any reference to the political rights of the Ottoman subjects was absurd while no one was allowed to establish or join in a political party or elect their representatives and have a check upon the government.'<sup>59</sup> Kemal had also constructed an Islamic principle of *usul-ii Meshveret* (the principle of consultation) as the right to political participation. Starting with a premise that freedom was a divine right, his 'system of *meshvere*' involved two types of rights: personal rights which could only be upheld through an impartial and competent court system; and political rights which depended upon the separation of powers and the establishment of representative government.<sup>60</sup>

In an essay on the 'Question of Equality' (*Mesele-yi Müsavat*), Ziya constructs a model later followed by Kemal in which two types of equality are formulated: 'equality in rights' and 'equality in honours'.<sup>61</sup> The 'equality in rights' is a negative principle of non-discrimination according to which all subjects regardless of race or religion must hold equal civil rights including equality before the courts of law. The 'equality in honours' (all citizens should be equal in wealth, status and prestige) is a positive principle of non-discrimination which implies, *inter alia*, that all ethnic and religious groups have to be represented in governmental bodies in proportion to their numbers. Ziya and Kemal advocated the former and were opposed to the latter because it would, according to them, only exacerbate tension among minority groups.

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<sup>57</sup> Namik Kemal, *Hurriyet*, 16 November 1868, Çiçek (trans), above n 42, 149.

<sup>58</sup> Çiçek, above n 42, 117.

<sup>59</sup> *Ibid* 118.

<sup>60</sup> Mardin, above n 35, 308.

<sup>61</sup> Çiçek, above n 42, 118-9.

It is of note that there are differences between Ziya's views (coming from a political insider to the Ottoman government apparatus) and Kemal's who was a more robust theorist.<sup>62</sup> The latter often expressed much more nuanced views on the question of equality. What is key in reading these prominent young Ottomans is that they approached Sharia as a social vehicle, or in the words of Mümtaz'er Türköne 'as a means of opposition'<sup>63</sup> in furthering their constitutionalism project.<sup>64</sup> Moreover if one is convinced that they had the interest of the Ottoman community as a whole at heart rather than the one of their own ethnical and religious affiliations, it could be argued the Young Ottomans' critique of the rights language has some commonalities with the contemporary critique of Lockean natural rights doctrine as described in the previous section.

#### IV. IRANIAN INTELLECTUALS, THE OTTOMAN TANZIMAT AND PAN-ISLAMISM

In response to the growing power of the West, as it was noted in the previous section, the nineteenth century became an era of constant attempts for reorganization across the Islamic world. In parallel to Ottoman reforms, the Iranian Shahs of the Qajar Dynasty conducted a series of military reforms in the hope of, in the main, countering the Russians' growing military power. Early in the century, sultan Selim III's *Nizam-i Cedid* (New Order) inspired the Crown Prince Abbas Mirza (1789 - 1833) to become the first Iranian ruler to send missions to Europe to acquire military techniques and modern sciences. Later, Amir Kabir (1807 - 1852), the historically acclaimed chief minister of the Qajars, was impressed by the Ottoman Tanzimat while he devised his short-lived, but the most influential, reforms ever implemented in the Qajar era.

Istanbul was not only a significant trade gate to Europe especially before the opening of the Suez Canal in 1859 that gradually diverted

<sup>62</sup> See Christiane Czygan, *Reflections on Justice: A Young Ottoman View of the Taninmât* Middle Eastern Studies, 46:6, 943-956 (Routledge, 2010).

<sup>63</sup> Ibid 949, citing Mümtaz'er Türköne.

<sup>64</sup> Ziya and Kemal's view was not shared by the likes of Sauvi who represented a minority view of the Young Ottomans. Sauvi, who unlike the other two came from humble origins, associated himself with the ulema and viewed Islam as such as a goal to emancipate the Muslim nations. Thus Sauvi's idea of democracy did not go beyond an Islamic system of consultation, and 'he was shocked to find that in Europe butchers were given the vote'. While Ziya and Kemal remained civil servants at heart, Sauvi became a radical political activist who theorised the notion of Islamic civil disobedience which cost him his life in the Çırağan incident in 1878. See Çiçek, above n 42, 156-7. On Sauvi also see Mardin, above n 35, 360-384.

trade to the Persian Gulf, but also an intellectual hub of the Islamic world over the nineteenth century. Many Iranian intelligentsia were based in Istanbul and actively published political pamphlets. Newspapers such as *Akhtar* (News) (1876) or books such as Talebov's '*Ketabe-e Ahmad*' (The Book of Ahmad) (1905) are the examples in point. In the traditional society of Iran however, reformers faced more daunting challenges in pursuing Westernisation projects than the centralised Ottoman government. This was due to the fact that the ulema's role was more entrenched in the Iranian public sphere than that of their Sunni peers in Turkey. There was also a lack of a strong political will for implementing fundamental reform, such as the one existing in the Ottoman Empire, in the Qajar Iran. Whatever the reasons, none of the Westernisation reforms similar to the Ottoman Tanzimat ever took root in Iran.

The contextual differences between Iran and the Ottoman Empire inform the comparative debate on the rights and liberty discourse across the Islamic world. At the time when the Young Ottomans were actively advocating for a constitutional government in opposition to Tanzimat, the Iranian intelligentsia such as Mirza Malkam Khan desperately advocated for a 'rule of law' minus a constitution. Maklam upon a meeting with Reshid Pasha (the original architect of Tanzimat) in 1859 wrote extensively advocating for a duplication of Tanzimat reforms in Iran.

Mirza Malkam Khan Nazem al-Dowleh (1833 - 1908) was born into a Christian-Armenian family in Esfahan. His father Mirza Ya'qub Khan (1815 - 1881) had actively advocated for equality of religions inspired by the Tanzimat reforms<sup>65</sup>:

Iranians should be thankful that in Europe and the Ottoman Empire people are not aware of how religious minorities are treated in Iran, otherwise they would not consider Iranians worthy of 'rights and equality'.<sup>66</sup> ... Who is the unjust person who has commanded that the blood-money of a non-Muslim is equal to the price of an Egyptian donkey? Who is that "learned and just" person who has [made the ruling] that a convert to Islam has priority over his/her non-Muslim relatives in inheritance?

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<sup>65</sup> Ya'qub Khan has written one of the earliest Persian texts demanding for a constitutional government. See Cyrus Masroori, 'Mirza Ya'qub Khan's Call for Representative Government, Toleration and Islamic Reform in Nineteenth-Century Iran' (2001) 37(1) *Middle Eastern Studies* 89.

<sup>66</sup> Mirza Ya'qub Khan, *Tarh-e Arizeh-i Ast keh beh Khakpayeh Mobarak Mahramaneh Bayad Arz Shawad*, Bibliotheque Nationale, (Paris 1874), no. 1996, Masroori (trans) *ibid*.

Mirza Ya'qub Khan's son, Mirza Malkam Khan played a highly influential role in Iran's pre-constitutional history.<sup>67</sup> He was sent to Paris to study engineering where he developed an interest in political philosophy, especially in Saint Simon's idea of social engineering and Auguste Comte's *Religion of Humanity*. Upon his return to Tehran, he designed a joint campaign (along with a secret association based on the Freemasonry model called the Oblivion House [*Faramoush-Khaneh*]) through which he tried to persuade the king, Naser al-Din Shah, to initiate Tanzimat-type reforms. The Shah eventually became suspicious of Malkam's activities and exiled him to Baghdad and later to Istanbul. In three of his early writings in the period between 1860 and 1862, (*the Book of Tanzimat [Daftar-e-Tanzimat], the Assembly of Tanzimat [Majlis-e-Tanzimat]; and the Book of Law [Daftar-e-Qanun]*)<sup>68</sup> Malkam openly described his project as 'the adoption of Western civilization absent any Iranian intervention' by which he intended 'a total submission to European civilization'<sup>69</sup> in all aspects of life including political and economic in a one-size-fits-all fashion. In this period, Mirza Malkam Khan asserted that 'European sciences are flooding the nations around the world and the more we give way to them, the better we can benefit from them.'<sup>70</sup>

Through mediation with Shah's ambassador to Istanbul, the young Malkam was granted permission to return to Iran from Istanbul. After a period of ups and downs in the start to his political career, and as a result of his acquaintance with Iran's chancellor of the time, Malkam was eventually promoted to the post of ambassador in London (around 1873). He was also awarded the royal title of Prince due to his accomplishments in the Iranian mission. This stage of Malkam's life, at

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<sup>67</sup> See Fereydoon Adamiyat, *Ideologiyeh Nehzate Mashrootiyat, (The Ideology of Constitutional Movement)* (Roshangaran, 1971); for more on Mirza Malkam Khan see Fereydoon Adamiyat, *Andishehayeh Miraza Aqa Khan Kermani (The Thoughts of Mirza Agha Khan Kermani)* (Payam, 1978); Hasan Ghazi-Moradi, Nazariyeh Pardaze Nosaziye Siyayi dar Sadre Mashrooteh, *The Theoretician of Political Modernization in Early Era of the Constitutional Revolution* (Akhtaran, 2008); Hamid Algar, *Mirza Malkam Khan; A study in the History of Iranian Modernism* (University of California Press, 1973); Homa Nategh, *Ma va Mirza Malkam Khanhaye Ma (On us and our 'Mirza Malkam Khan's)* (Agah, 1975); Mashallah Ajoudani, *Mashrouteyeh Irani va pishzaminehay nazariyeh-ye Velayate Faqih (Iranian Constitutional Monarchy and the backgrounds for the Theory of the Guardianship of Islamic Jurists)* (Fasle Ketab, 1997); Abdol-hari Haeri, *Tashayeh' va Mashroutiyat Dar Iran (Shi'ism and Constitutional Monarchy in Iran)* (Amir Kabir, 1981).

<sup>68</sup> In the *Book of Law*, Malkam tried to reconcile the principles of French penal law with the Iranian monarchic regime; see Hojatollah Asil, *Resalehay Mirza Malkam Khan Nazem al-Dowleh (The Essays of Mirza Malkam Khan Nazem al-Dowle)* (Nei, 2002).

<sup>69</sup> Adamiyat, above n 66, 114.

<sup>70</sup> Malkam, *The Essay on the Bureaucracy [resaleye dastgahe divan]*, quoted in Asil above n 68.

which he is part of the political elite, coincided with advocacy for top-town reform in the fashion of Ottoman Tanzimat.

A new stage of Maklam's political life begins when he and Naser al-Din Shah fall out over a business dispute which led to Malkam's being discharged from all his official posts and humiliation as a result. This was about 1890, by which time Malkam started to rebel against the Shah and brought his political ideas, including a demand for a constitutional monarchy, into action. He established the newspaper *Qanun* (the Law) which was based in London. *Qanun* was published between 1890 (coinciding with Afghani-driven Tobacco movement) and 1898 (eight years before the establishment of a constitution in Iran). *Qanun* no doubt had a significant role in Iran's awakening and quest for a constitutional government and the rule of law. After the assassination of Naser ad-Din Shah by a servant of Afghani and the coronation of his successor Mozafar ad-Din Shah, Malkam was offered a post as ambassador to Rome. He held that position for ten years before he passed away later in 1908 at the age of seventy-six in Switzerland. He had asked for his body (in disregard of Sharia) to be cremated.

Malkam's departure from advocacy for a reform in the fashion of Tanzimat occurred at a time when the pro-Western policies of the Tanzimat and the Young Ottoman's constitutionalism had both faded from the Ottoman politics. Instead Sultan Abdülhamid II had championed Pan-Islamism and brutally crushed Christian revolts in order to save his deteriorating Empire from dissolution. It is striking that in such an anti-Christian environment of the Ottoman Empire in the 1890s, Malkam did not view his Armenian origins as an impediment to joining forces with Afghani and his Pan-Islamist circle of friends in Istanbul. During this time, he advocated for an Islamic dressing of liberal positivist thought. At the same time, Malkam's most influential political writings appear in the *Qanun*, his ground breaking newspaper:

'Our claim is not to adopt Parisian, Russian or Indian laws. The principles of all the good laws are everywhere the same, the best of which are laid out in God's Sharia.'<sup>71</sup>

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<sup>71</sup> *Qanun*, issue 1, (1890) quoted in Homa Nategh, *Rooznameye Qanune Mirza Malkam Khan* (Amir Kabir, 1976). For an account on *Qanun* and the role of other intellectuals such as Afghani in it see Shiva Balaghi 'Constitutionalism and Islamic Law in Nineteenth-Century Iran: Mirza Malkam Khan and *Qanun* in Human Rights With Modesty, The Problem of Universalism' in Andras Sajo (ed) (Martinus Nijhoff Publishers, 2004).



The Pan-Islamist project of the late nineteenth century mastered by Sayyid Jamal-ad-Din Afghani (1838 – 1897)<sup>72</sup>, had found practical appeal among a number of Iranian intellectuals. Pan-Islamism represented ideas that were partly in line with a strand of Young Ottoman's idea of Islamic unity against the European encroachment (marked by Sauvi). Pan-Islamists were firmly supported by the Ottoman sultan Abdul Hamid II. The project, however, was doomed in Iran from the beginning, due to historic ideological rivalry between the Sunni Ottoman and Shia Iran that was bound to frustrate any meaningful unity in the Islamic world. What made it particularly unappealing to the Iranian audience was that the Islamic unity was propagated under the auspices of the Ottoman 'Supreme Caliphate of Islam' – a self-proclaimed leadership of the Islamic world that had even found its way to the suspended 1876 Ottoman constitution.<sup>73</sup>

Despite the eventual failure of Pan-Islamism, the significance of Afghani's project remained in his political expediency and his legacy of emphasizing the social function of Islam and particularly the ulema who exerted enormous influence, not only on the masses but also on the nascent Iranian merchants. Afghani encouraged his reform-minded Iranian peers to form alliance with these centres of gravity in the Iranian society.<sup>74</sup>

Mostly upon Afghani's influence, a group of Iranian intellectuals started to adopt Islamic language in their approach to liberal constitutionalism. Yet, this was mainly done on the part of these intellectuals as a matter of political expediency to lure the influential ulema into a coalition against the Shah rather than a genuine belief or an affirmation of their 'Islamic self'. This is an important difference between nineteenth-century Iranian intellectuals and their Turkish peers to whom Islamic identity had always been a unifying theme from

<sup>72</sup> On Afghani see Kudsî-Zadeh, *Sayyid Jamal al-Din al-Afghani* (Tehran, 1970). In his book, Professor Kudsî-Zadeh presents about 700 pieces of literature, documents, etc. relating to the life of Afghani. See also Nikki R. Keddie, Hamid Algar and Jamal al-din al-Afghani, *An Islamic Response to Imperialism: Political and Religious Writings of Sayyid Jamâl ad-Din "al-Afghâni: including a Translation of the "Reputation of the Materialists" from the Original Persian* (California U.P., 1968).

<sup>73</sup> Art. 3 provided 'The Ottoman sovereignty, which includes the person of the Sovereign the Supreme Caliphate of Islam, belongs to the eldest Prince of the House of Osman, in accordance with the rules established ab antiquo.' See the translation of The Ottoman Constitution (23 December 1876) <<http://www.anayasa.gen.tr/1876constitution.htm>> .

<sup>74</sup> This put him in paradoxical shoes acting as a Luther of Islam (as he attempted in different occasions to rationalise Islam to the dismay of the existing religious institutions) on the one hand and seeking to unite the Muslim world around the existing religious institutions on the other. For more on this see Margaret Kohn 'Afghani on Empire, Islam, and Civilization', (2009) 37(3) *Political Theory* at 398.

liberal-minded Young Ottomans such as Kemal and Ziya to the Sauvi as an Islamist. This could be partly due to the fact that Ottomans took pride in the Islamic heritage of their Empire in the Middle Ages while Iranians never managed to restore a fraction of the legacy of the Ancient Persian Empire since the Arab conquest. It could also be more readily explained by the lack of a centralised Westernisation reforms such as Tanzimat on the consciousness of Iranians to force them into creating an alternative indigenous theory of government based on their Islamic identity. Either way, this disingenuity towards Islamic beliefs is noticeable not only in the case of Malkam but also Mostashar al-Dowleh who, as will be seen in the next section, wrote the first treatise on Islamic human rights. In a frank speech for an English audience, Malkam states:

The main reason for clothing Western ideas in Islamic terms, and stating that Western institutions had originally been borrowed from Islam, was that only in an Islamic form were new ideas likely to reach the Muslim masses. Most Muslims had long believed that Western Christians were enemies out to undermine Islam, enemies from whom nothing doctrinal should be borrowed.<sup>75</sup>

Even Afghani, as the father of pan-Islamism, has at times adopted a very critical approach towards Islam. Emphasising social and philosophical aspects of the religion, he largely viewed Islam, in a similar fashion to Ziya and Kemal, as a means of opposition. Yet, Afghani's response to Ernest Renan's criticism of Islam was much milder and apologetic than the one of Kemal's.<sup>76</sup> Afghani openly comes across as a liberal philosopher in his letter to Renan demeaning the role of religion in general as an obstacle to progress:

If it is true that the Muslim religion is an obstacle to the development of sciences, can one affirm that this obstacle will not disappear someday? How does the Muslim religion differ on this point from other religions? All religions are intolerant, each one in its way. The Christian religion, I mean the society that follows the inspirations and its teachings and is formed in its image, has emerged from the first period to which I have just alluded; thenceforth free and independent, it seems to advance rapidly on the road of progress and science, whereas Muslim society has not yet freed itself from the tutelage of religion. Realizing, however, that the Christian preceded the Muslim

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<sup>75</sup> See Nikki R. Keddie and Yann Richard, *Roots of Revolution, An Interpretation of History of Modern Iran* (Yale University Press 1981) at 43, quoting Malkam Khan, 'Persian Civilization' (1891) *Contemporary Review*, LIX, 238, 238-244.

<sup>76</sup> Kemal's response is much more defensive and passionate. See Mardin, above n 35, 324

religion in the world by many centuries, I cannot keep but hoping that Muhammadan society will succeed someday in breaking its bonds and marching resolutely in the path of civilization after the manner of Western Society, for which the Christian faith despite its rigors and intolerance, was not at all an invincible obstacle.<sup>77</sup>

Not surprisingly therefore, not all the Iranian intelligentsia followed Afghani's path of expediency to unite with the influential ulema. Intellectuals such as Akhund Zadeh and Kermani, for instance resorted to the pre-Islamic legacy of the Ancient Persian Empire. Mirza Aqa Khan Kermani (1853-1896), ironically a close acquaintance of Afghani, is regarded as the first scholar "to ground 'Iranian' thought in modern Western philosophical tenets."<sup>78</sup> Akhound Zadeh was also among the less pragmatic minds that lived a non-political life in the caucuses and openly criticised Islam as an obstacle to liberty.<sup>79</sup> Similar to Kermani,<sup>80</sup> Akhound Zadeh was of the belief that Islam is incompatible with human rights and dignity and that Iranians should free themselves of what he considered the misery that Arabs brought to them:

[C]omplete freedom has two elements: moral freedom and bodily freedom. The guardians of Islam have taken our moral freedom away, making us ... subject to their own will in moral issues.... The nations of the East, because of the advent of the Arabs' religion and their domination over Asia, have lost [their] complete freedom at once, and are deprived of the joy of equality and the blessing of human rights.<sup>81</sup>

One of Akhound Zadeh's flagship reform proposals was to move away from Arabic alphabets into Farsi. While one cannot doubt the significance of Akhound Zadeh's inflammatory writings, especially his anonymously circulated collections of fictitious epistles<sup>82</sup> or the revolutionary effects of the series of Persian letters written by Kermani,<sup>83</sup> these ideas could hardly be said to have penetrated Iranian modern legal thought which seems to be still in search for a synthesis between an Islamic-Iranian identity and modernism.

<sup>77</sup> Keddie et al above n 72, 187.

<sup>78</sup> See F Vahdat, *God and Juggernaut, Iran's Intellectual Encounter with Modernity* (Syracuse University Press, 2002) at 36.

<sup>79</sup> See Fereydoon Adamiyat, *Andisheye Fathali Akhundzadeh (The Thoughts of Fathali Akhund Zadeh)*, (Kharazmi, 1970).

<sup>80</sup> See Fereydoon Adamiyat, *Andishehaye Miraza Aqa Khan Kermani (The Thoughts of Mirza Agha Khan Kermani)* (Payam, 1992).

<sup>81</sup> See Cyrus Masroori 'European Thought in Nineteenth-Century Iran: David Hume and Others' (2000) 61(4) *Journal of the History of Ideas* 657, 657-674.

<sup>82</sup> *Kamal ad-dowleh va Jamal ad-Doleh* in Adamiyat above n 79.

<sup>83</sup> Keddie et al above n 75, 69.

It comes as no surprise that while these two figures are celebrated by contemporary champions of secularism in Iran, the likes of Malkam whose influence was far more present in the political sphere of the Iranian constitutional era, are harshly critiqued for ushering in the ulema into the Iranian political scene and hence paving the way for a theocratic-constitutional system in the post-1979 Iran.<sup>84</sup> From a point of view of political activism, however, this strategy has proved to be effective a number of times before 1979 ever since the successful ‘Tobacco movement’ of 1890-1891. As a significant precursor of the constitutional revolution of 1906, the Tobacco movement masterminded in part by Afghani succeeded in mobilizing the ulema’s support behind the merchant class in 1890-91 resulting in the annulment of the Shah’s concession to Talbot’s (a British citizen) monopoly of production, sales and marketing of tobacco in Iran.<sup>85</sup> It was upon the success of the Tobacco movement that the necessity of paying lip service of some sort (theoretical or rhetorical) to Islam and the reform-oriented ulema became an integral part of many Iranian intellectual’s writings and political activism.

#### V. ISLAMIZING THE ‘RIGHTS OF MAN’ IN IRAN

Similar to Mirza Malkam Khan, an old acquaintance of his father’s, Mirza Yousef Khan Mostashar al-Dowleh Tabrizi (‘Yousef Khan’) (1822- 1896) was an ardent supporter for reforms in the fashion of Ottoman Tanzimat<sup>86</sup>. Yousef Khan stands among the very first Muslim intellectuals (and perhaps the first Iranian) who adopted the rights language, in his book, *Yek Kalameh (The Book of One Word)*, written in 1870.<sup>87</sup> Mirza Malkam Khan largely followed Yousef Khan’s style in his treaties on the reconciliation of Islam and modernity.<sup>88</sup> Despite opposing views presented in the Persian literature,<sup>89</sup> Yousef Khan’s

<sup>84</sup> See Mashallah Ajoodani *Mashrooteye Irani (Iranian constitutionalism)* (Akhtaran, 2003).

<sup>85</sup> For a brief account of the Tobacco movement and the role of Afghani see Keddie et al above n 74 at 67. For the role of merchants in the Tobacco movements see Janet Afary *The Iranian Constitutional Revolution 1906-1911*, (Columbia University Press 1996) 29.

<sup>86</sup> Yousef Khan was *Chargé d’Affaires* of the Iranian Embassy in Saint Petersburg when he got acquainted with Ya’qub Khan. See Cyrus Masroori, above n, 65.

<sup>87</sup> Yousef Khan Mostashar al-Dowdeh *Resaleye Yek Kalameh The Book of One Word* Mohammad Sadeq Feiz (ed) (Terhan, 2003). Yousef Khan has another book on the merits of a railroad which he considered should be the constructed as a key to Iran’s development. See Adamiyat, above n 67, 182.

<sup>88</sup> Mirza Malkam Khan, *Serat al-Mostaqim (The Straight Path)* cited in Asil, above n, 68.

<sup>89</sup> Adamiyat, above n 66, 182. Adamiyat is among the historians who praises Yousef Khan for his progressive thoughts but ignores his attempt to reconcile modern philosophies of government with Islamic notions. While praising Yousef Khan’s understanding of Western constitutionalism Haeri forcefully dismisses Yousef Khan’s reconciliatory attempts as superficial and insignificant. See Abdolhadi Haeri *Tarikhe*

book seems to have had a significant influence on the constitutional revolution of 1906. Somewhat similar to the Mustafa Fazil's letter to Sultan Abdilaziz (1867), Yousef Khan's book became the manifesto of the constitutional revolutionaries. Yousef Khan in his book advocated for a codification of Sharia (Part I) while at the same time searching for an Islamist reading of the French Declaration of 'rights of man' and Citizen (Part II of his book).

Yousef Khan's doctrinal effort in constructing a rights language in Islamic terms was not due to his devotion to the Islamic faith and neither, unlike in the case of the Young Ottomans, was it a nationalist reaction to Westernization reforms since such fundamental reforms never took place in Iran. Rather, it was due to the same pragmatism that motivated Afghani to pay lip service to ulema, in the hope that they would join forces in any such reforms. This is clear in Yousef Khan's letter to his Islamophobic friend Akhound Zadeh, dated 17 November 1868 in which he utters words in excitement about how he just finished a book titled 'the spirit of Islam':

[I] have founded all the means of modernity and civilization in Quran and Hadith [*Prophet Muhammad's statements or practices*] ... so that nobody could claim that those are against Sharia, or that Islam is an obstacle to modernity and civilization.<sup>90</sup>

The title was apparently borrowed from Montesquieu's *The Spirit of the Law* and later changed to the *Book of the One Word*<sup>91</sup>. At the time of that particular writing, Yousef Khan was the *Chargé d'Affaires* of the Iranian Embassy in Paris. There is little doubt in Yousef Khan's affiliation with freemasonry lodges in France. It is evidenced that in November 1869, before publication of his book, Yousef Khan received a Rose Croix Medal from the Masonry Lodge of *Clemente Amitie*.<sup>92</sup>

Yousef Khan opens the book by recalling his spiritual dream to explain his motives for taking up such a project to the Muslim audience and

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*Jombeshha va Takapoochaye Feramangary dar Keshvarhaye Eslami (The History of Masonry Movements in the Islamic Countries)* (Mashad, 1989). For a highly favorable account of Yousef Khan's reconciliatory efforts see Javad Tabatabaei *Nazariye-e-Hokumat-e-Qanun-dar Iran (The theory of Rule of Law in Iran)* (Tehran, 2008).

<sup>90</sup> Ibid.

<sup>91</sup> Yousef Khan above n 86.

<sup>92</sup> The Lodge of *Clemente Amitie* was associated with the Grand Orient de France (GOdF) founded in 1728. See Esmail, Raeen, *Faramoushkhaneh and Framasonry dar Iran (The House of Oblivion and the Freemasonry in Iran)* (Amir Kabir, 1968).

thereby characterises his book as a religious mission.<sup>93</sup> In his dream a holy man's voice echoes in the Islamic world criticizing people of Islamic faith for lingering in the state of denial vis-à-vis the European progress.<sup>94</sup> The holy man blames the leaders of Islam for underdevelopment of the Islamic nations. Reminding Islamic leaders of the Judgment Day and their religious duties, he invites them to unite and start moving forward along the way of progress. As he woke, in a state of shock, by his own account, Yousef Khan consulted a friend, whom he believed to be well informed about Islam and its history. This friend, who may have been a mason master or colleague, explained to Yousef Khan the origin of Iran's problem: 'What you see is the telegraph, giant ships and the locomotive; but these are only effects and not causes.'<sup>95</sup> Yousef Khan's friend advised him that he had to shift his focus away from industrial and material developments to the underlying principles that bring them about. The secret behind Europe's progress, according to Yousef Khan's friend, is only 'one word' – it is the 'statute books' that contain all the rules and preconditions for wellbeing in the material world.<sup>96</sup>

In the first section of his book, Yousef Khan elaborates on the differences between the French codes and Sharia law and makes recommendations that are largely inspired by the Tanzimat. In the second section, that constitutes its largest portion, he focuses his comparative analysis on the French Declaration of the 'rights of man' and of the Citizen. In this part, Yousef Khan shifts his focus from the French codes to what he considers to be 'the spirit of the codes' laid out in the 1789 Declaration of the 'rights of man' and of the Citizen. He notes, 'it would not be much fruitful if we delve into the details of the codes, since [the codes like] all secular laws are subject to change and are to be adapted to the circumstances and time.'<sup>97</sup> Yousef Khan refers to Article 1 of the French Constitution<sup>98</sup> in which the principles of the Declaration are referred to as French public rights. He goes on to demonstrate that this spirit of the French laws is in complete harmony with principles of Islam. In doing so, however, he adopted an eclectic

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<sup>93</sup> *The Book of Tanzimat* by Malkam Khan, which was written before *the Book of One Word*, also begins by recalling a dream.

<sup>94</sup> Yousef Khan, above n 86, 38.

<sup>95</sup> *Ibid.*

<sup>96</sup> What seems odd to the contemporary reader is how Yousef Khan is impressed with predominantly English technology and yet he did not wonder that there were no codified rights of the French nature in the common law system of Great Britain at the time.

<sup>97</sup> Yousef Khan, above n 86.

<sup>98</sup> Yousef Khan finished his book before adoption of the Constitutional Laws of 1875 of the French Third Republic, February 24 and 25, and July 16, 1875.

approach towards the Declaration's principles. In his reconstruction of the seventeen Articles of the Declaration into a new set of nineteen principles,<sup>99</sup> Yousef Khan provided an almost identical translation of those principles that are less controversial (e.g. right to security or property rights) while he completely eliminated those principles that seem to be at odds with Islamic Shia jurisprudence (e.g. Article 1 on equal rights, Article 4 on liberty, and Article 10 on freedom of religion).

At the same time, Yousef Khan tempered the meaning of some of the Declaration principles or completely distorted their meaning, in order to make them plausible to the Iranian audience in particular the Shah and the ulema. For instance, Yousef Khan diverted attention from Article 1 (equal rights) to Article 6 (equality before the law), to provide a picture more consistent with Islamic law. In doing so, he avoided altogether the challenges of inequality of religions in Iran that had become central in the Young Ottomans' criticism of Tanzimat. Rather, he emphasized the fact that in Islam, all individuals, regardless of their religion (or at least Quranic Abrahamic religions) or gender, had *equal access* to Sharia courts. Moreover, he highlighted the areas of Islamic law, such as contract and property law, in which religious status is not generally deemed a basis for discrimination. Another challenge that Yousef Khan faced in his comparative exercise was regarding the enlightenment principles underlying Article 3 (popular sovereignty) and Article 6 (law as a reflection of general will) among others. Here are a few points on Yousef Khan's construction of a positivist top-down meritocracy and his promulgation of a narrow interpretation of civil and political rights:

First, as opposed to what Locke had been able to do, Yousef Khan, not having the luxury of living in the post-glorious-revolutionary context in England, had to avoid directly confronting the 'divine rights' of the monarch. Yet, he made a shrewd argument, somewhat in line with Rousseau<sup>100</sup>, that the law would be more acceptable and wilfully

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<sup>99</sup> Yousef Khan also takes the liberty to import a number of principles from sources other than the Declaration (some of which are from the French Penal Code). These principles include judicial tenure, the right to jury trial in criminal courts, the prohibition of torture, the freedom of businesses and industries, construction of public schools for the poor.

<sup>100</sup> See Jean-Jacques Rousseau, *On the Social Contract with Geneva Manuscript and Political Economy* (Judith R Masters trans, St Martin's Press) 48.

(The strongest is never strong enough to be the master forever unless he transforms his force into right and his obedience into duty. This leads to the right of the strongest, a right that is apparently taken ironically and in principle really established. But won't anyone ever explain this word to us? Force is a physical power. I do not see what morality can result from its effects. Yielding to force is an act of necessity, not of will. At

complied with if people participated in the law-making process in some meaningful way. The system that he eventually advocated for, the Iran of 1870, looks more like a platonic merit-based participation in political processes, in support of which he cited a number of Quranic verses and Prophet's practices.

Second, Yousef Khan, in a stark similarity with Kemal's idea of *usul-ii meshveret* (The Principles of Consultation)<sup>101</sup>, presented the Islamic concept of Shura (i.e. mutual consultation) to justify his idea of a representative parliament. One has to note, however, that Namik Kemal's use of this Quranic principle was alongside the institution of *biat* which Kemal had no contextual difficulty using under the Caliphate theory of the Sunni Ottomans. In the Sunni tradition of Islam, the Islamic community would give an oath of allegiance (*bey'at*) to the new caliph, on condition that he should not deviate from Shariah law.<sup>102</sup> There is no such concept in the Twelve Imami Shia understanding of Islam however, according to which all the Caliphs except for Imam Ali were illegitimate. Therefore, while the Quranic concept of Shura may have a utility for Ottomans in that it reminded the sultan of their religious accountability, Yousef Khan read too much into this concept that, at best, could imply nothing more than an idea of a consultative assembly to advise the monarch on public matters.

Third, Yousef Khan repackaged the doctrine of separation of powers promulgated in Article 16 of the Declaration in the Islamic tradition of the separation of the *Mujtahed* (Islamic jurist) and *Mufti* (Muslim scholar who interpret the sharia). Yet again, not only is this far from the separation of the executive and the judiciary in the Montesquieuean sense, but it is also another unfitting application of a Sunni Ottoman concept. In fact, an idea similar to the separation of judicial and executive activity was found in the Ottoman concept of *Shakh al-Rais*, which had no historical application in Iran. Even worse, the concept of *Mufti of the Umma*, as opposed to *qazi* (Islamic jurist or judge), was a reminder of the Great Imam of the Sunni Islam *Abu Hanifa* who was regarded in his time as the spiritual leader (*Mufti*) of

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most, an act of prudence. In what sense could it be a duty? ... Let us agree that might does not make right, and that one is only obligated to obey legitimate powers.')

<sup>101</sup> See Section II.

<sup>102</sup> Berdal Aral, 'The Idea of Human Rights as Perceived in the Ottoman Empire' (2004) 26(2) *Human Rights Quarterly* 452, 454–482, citing Niyazi Berkes, *The Development of Secularism in Turkey* (McGill University Press, 1964).



the Islamic world (*umma*).<sup>103</sup> It is rather odd that Yousef Khan attempted to relate to the Iranian ulema using the title and function of *Mufti* that was clearly absent in Shia Islam.

Fourth, Yousef Khan proposed an unfounded basis for the modern notions of freedom of the press and freedom of expression in the Islamic doctrine of *Amr-bil-Ma'roof* (enjoining good) and *Nahi-anil-munkar* (restraining from evil) that are rather related to social ethical standards than principles of liberty.

About two decades after the publication of Yousef Khan's book, Talebov – an Iranian merchant living in the Caucasus – published treatises as a freelance writer, reflecting on both the doctrine of natural rights and its contemporary critique. In a more engaging approach to the Western liberal thought, Abdolrahim Talebov (1832-1910) created a trilogy, *ketabe Ahmad* (the Book Of Ahmad),<sup>104</sup> modeled after Rousseau's *Emile*. In the course of conversations among different fictional characters, Talebov defined freedom as a 'natural right', which shall not be impeded or otherwise diminished. In *The Path of the Blessed*, Talebov made a reference to Ernest Renan, his contemporary French philosopher, stating that humanity is based on a 'natural' system of 'equality, fraternity and liberty.'<sup>105</sup> He put the absolutism of the 'rights of man' as follows:

The words *Huriyat* in Arabic, *Azadi* in Persian, or *Uzdenlek* in Turkish [liberty], constitute a 'natural' freedom; [that is] human beings, by nature, are born free and have autonomy over all their words and deeds. Except for their commander, that is their [own] 'will', there shall be no impediments in their deeds and words. God has not created any force external to man to impede him and no one has the power to manipulate our liberty, let alone give it or take it away from us.<sup>106</sup>

This was immediately followed by a counterview to the absolutist approach towards freedom, which demonstrated his consciousness of Bentham's critique of the 'rights of man', even using his child-parent example:

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<sup>103</sup> This is famously mentioned by the Young Turk revolutionary Ziya Gokalp. See Ziya Gokalp, Niyazi Berkes *Turkish Nationalism and Western Civilization* (George Allen and Unwin Ltd, 1959) 200.

<sup>104</sup> Abdolrahim Talebov, *Ketabe Ahmad (The Book of Ahmad)* (Jibi, 1967).

<sup>105</sup> Abdolrahim Talebov, *Masa'el al-Mohsenin (The Path of the Blessed)*, (Jibi, 1968) 140, 140-1.

<sup>106</sup> Abdolrahim Talebov, *Izahat Dar Khosouse Azadi (Reflections on Liberty)* quoted in Iraj Afshar *Azadi va Siyasat (Liberty and Politics)* (Tehran, 1978) 88.

Some scholars do not believe in unconditional freedom in the laws of creation in the first place. They [rather] consider obedience to be a basic element in the laws of existence from the world of particles to ...the law of birth subjecting children to the direction of a nanny, mother, teacher or a coach. After the stage of maturity, people's activities become subject to Sharia and the law of civility and thereafter with the inception of a nation it becomes subject to majority votes.<sup>107</sup>

In this vein, rather than trying to 'Islamize' liberal concepts of 'rights of man' and utilitarianism, Talebov highlighted that human rights and liberties are always subject to certain limitations. He noted:

[I]n the same way molecules have absolute freedom (with no restriction and qualification) in a sense, but their freedom is nonetheless limited to the laws of gravity, man's freedom is subject to Sharia and custom.<sup>108</sup>

In his division of liberty into the three categories of freedom of self, belief and expression,<sup>109</sup> Talebov noted:

[F]reedom of self implies that no one shall unlawfully imprison anyone or enter his property. Moreover, everyone is free as regards their conduct for which no one shall hold them liable unless such acts result in someone's harm or loss [of property].<sup>110</sup>

Similarly, Talebov also cited defamation as a legitimate example of a limitation on freedom of expression. The freedom of belief, in Talebov's view, could be restricted only if it led to anarchy or disturbed the peace among the people without clarifying what that might imply.<sup>111</sup> While Talebov defined 'law' in the tradition of 'natural law' references, he also echoed the positivist views of 'those recent scholars' who opined that rights could only be considered law 'if they are sanctioned by government force', referring to Bentham.<sup>112</sup>

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<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid; he further breaks it down to the notions of freedom of the press and freedom of association.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid 85. The following quote where Talebov cites and expounds the utilitarianism of Jeremy Bentham is most revealing: 'Bentham, an acclaimed philosopher, opines that humanity is by nature controlled by two prevailing powers: pleasure and pain. It is only under these two [qualities] that we could know what should be done, since good and evil or cause and deeds [effect] are undoubtedly determined by these two faculties....After laying out this introduction, the [primary] conclusion we reach is that wherever there is no law, there is no principle of utilities; and where there is no principle of utility, there is

Talebov's respect for Sharia, mentioned as a potential limitation on human rights and liberties, does not seem to originate from a sense of compulsion to please the ulema (as it is in the case of Afghani, Malkam and Yousef Khan), but from his own notion of Islam as a humanistic religion. He was not a proponent of Afghani's Pan-Islamism, which was fashionable at the time among Iranian intelligentsia. Rejecting both the European imperialism and the Iranian government's incompetence to defend its own sovereign rights, Talebov commented:<sup>113</sup>

Thereafter [the Quran's promise of] 'everything will return to its origin' will transform the law of the conquest to the law of Islam and humanity. The respectful readership may think of me as a Pan-Islamist or one of those who fantasize in vain about the union of the feeble Islamic nations. That is not the case I swear to Allah. This is just a fate determined by God that shall come true. Europeans can use no tricks to prevent this from happening since eventually one will meet the consequences of one's deeds, unless the nations who call themselves 'civilized' ...suddenly refrain from pursuing colonial ambitions and occupying the land of the weaker nations, reclaim humanity and understand the notion of rights in its true sense.<sup>114</sup>

Talebov's approach to Islam as a humanistic religion (rather than trying to force liberal ideas into Sharia law as understood by the ulema) seems to be an exception to the rule among his fellow intellectuals, who either had strong anti-Islamic inclinations (Kermani and Akhound Zadeh) or did resort to Islam and Sharia on the surface but only to cloth incompatible liberal ideas to lure the ulema into a coalition against the Shah (Afghani, Malkam, Yousef Khan). Talebov might thus be considered, in my opinion, to be the first genuine 'Islamic-intellectual' in Iran – a strand of thought, which came into the Iranian political scene much later in 1960s and became one of the main intellectual forces that brought about the Islamic Revolution of 1979.

## VI. CONCLUSION

From Locke's idea of 'natural rights', which was advocated in direct opposition to 'divine rights' of the sovereign, through to present times,

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no civilization; lack of civilization brings fear; and wherever there is fear there is no prosperity. Hence the lack of law equals the lack of prosperity: at 127.

<sup>113</sup> For a detailed discussion on Talebov's view on positivism and international law see Sadeq Bigdeli 'Legal Positivism in the Pre-constitutional Era of Late Nineteenth-Century Iran' (2011) 19(2) *Waikato Law Review* 174.

<sup>114</sup> Talebov, above n 104, 90.

'rights talk' has always been utilised as a 'language of claiming'<sup>115</sup> to foster a political cause. The nineteenth century critics of rights were never ignorant of the political utility of the rights language for the minorities, on behalf of which the rights were claimed. However, in light of the violent aftermath of the French Revolution, they criticised the individualistic implications of an abstract notion such as the 'rights of man' for the community as a whole. Moreover, the theoretical foundations of the natural law doctrine enshrined in both declarations of the twin revolutions in the US (1776) and France (1789) no longer seemed robust to the philosophers of the new century.<sup>116</sup>

Early Muslim constitutionalists, similar to Western political activists, appreciated the utility of the liberal 'rights talk', but they were only interested in using it to the extent that it fostered their projects. The fact that they operated in a context fundamentally different from the one in the post-reformation Europe, and their confrontation with the colonial ambitions of European powers (particularly in the case of the Ottoman Empire as the self-proclaimed caliphate of the Islamic world) seems to have had figured highly in their calculations. In such difficult situations, the Persians and the Ottoman intellectuals had similarities as well as important differences in their consciousness and approach.

As advocates of constitutional government, both Ottoman and Persian intellectuals - many of whom being excluded members of the government elite - planted the seeds of constitutionalism which came into fruition in both countries in the first decade of twentieth century. Moreover, both the Young Ottomans and a stand of Iranian intelligentsia (signified by Afghani, Malkam, Yousef Khan) turned to Islam as a social driver and a means of opposition. Yet there are conceptual differences in their approaches to Islam and identity.

Iranian intellectuals used Islamic language in their project as a matter of political expediency to lure the influential ulema into a coalition against the Shah rather than a genuine belief or an affirmation of their 'Islamic self' Islamic *identity* however had always been a unifying theme among the Young Ottomans from Kemal and Ziya to Sauvi.

The Young Ottomans, unlike their Iranian counterparts, had gone through a failed experience of a Westernization reform of the

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<sup>115</sup> For more on this approach on rights talk see Martha Minow 'Interpreting Rights: An Essay for Robert Cover' (1860) 96 *Yale Law Journal* 1986. For a collection of seminal works on the theories of rights see Jeremy Waldron, *Theories of Rights* (Oxford University Press, 1984).

<sup>116</sup> Waldron, above n 12, 14.

Tanzimat, in which the 'rights talk' was utilized by the government in ways that was seen by the Muslim Ottoman public to undermine the integrity of the Empire. In that environment, the Young Ottomans made use of a nationalist version the rights language in order to foster their constitutionalist political cause. Fully exploiting the populations' distaste of Tanzimat and its central theme of religious equality (in a positive and a negative sense), critical rights debate became a central theme in the Young Ottomans' opposition.

The minds of Iranian intellectuals, on the other hand, were more of a blank slate vis-à-vis Westernisation reforms as such reforms were never fully implemented in their country. Living mostly in the Caucasus, Istanbul or occasionally visiting Europe in diplomatic capacities, Iranian intellectuals were greatly frustrated with the political inertia of the Qajars. For most of them if not all, Tanzimat was a subject of envy rather than criticism. In that context, the abstraction of the rights language was simply clothed with Sharia concepts to pay lip service to the ulema as the most significant institution capable of mobilising the Iranian society. It was much later in the second half of the twentieth century and as a reaction to Westernisation reforms of the Pahlavis (1920 - 1979), when a strand of intellectual thought attempted to indigenise philosophies of government based on local (Shia) Islamic discourse.

# ABOLITIONIST OR RELATIVIST? : AUSTRALIA'S LEGISLATIVE AND INTERNATIONAL RESPONSES TO ITS INTERNATIONAL HUMAN RIGHTS DEATH PENALTY ABOLITION OBLIGATIONS

GREG CARNE\*

## ABSTRACT

The Commonwealth Parliament has enacted human rights amendments to the *Death Penalty Abolition Act 1973* (Cth), extending the existing prohibition against reintroduction of the death penalty to State laws. This legislation is most fully comprehended through examination of several background circumstances, including Australia's international abolitionist position.

A brief consideration is made of the contemporary human rights policy context from which the death penalty abolition extension has emerged, including the Commonwealth Government's response to the *National Human Rights Consultation Report*, and factors reflecting Australia's re-engagement with the United Nations human rights system, including Universal Periodic Review and the bid for a seat on the UN Security Council.

Earlier Commonwealth abolition of the death penalty is discussed, and a legal and constitutional analysis made of amendments in relation to states. The reform's importance is highlighted by the context of state based law and order debates in the age of terrorism, with politicians raising the possibility of death sentence re-introduction.

The reform is considered in an international context of Australians sentenced to death overseas and various inconsistencies in Australian international opposition to the death penalty, based on Australian obligations under Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR) and its *Second Optional Protocol*, and the

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disjuncture between legal obligation and practice, according to circumstances.

Finally, the link between domestic legislative implementation and broader international policy objectives is examined through examples of contemporary executive and parliamentary engagement. These institutions provide some recognition of the inconsistencies, but still allow an undermining of Australia's international abolitionist position. The confirmed death sentences and clemency applications for two of the Bali Nine may provide a reflective political moment for a more cogent appraisal of Australia's international abolitionist obligations.

## I. INTRODUCTION

In 2010, the Commonwealth Parliament enacted significant human rights legislation in the form of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth), which amended the *Death Penalty Abolition Act 1973* (Cth)<sup>1</sup> and also introduced Division 274 into the *Criminal Code* (Cth).<sup>2</sup>

The focus of this article is upon amendment of the *Death Penalty Abolition Act 1973* (Cth), which extended the existing prohibition against reintroduction of the death penalty in the Commonwealth and the Territories to the laws of the States. The significance of this amendment is most fully comprehended through consideration of several background circumstances, including the position of the legislation against Australia's international abolitionist position.

Accordingly, the article commences with a brief consideration of the contemporary human rights policy context from which the death penalty abolition extension has emerged, including the Commonwealth Government's response to the *National Human Rights Consultation Report*, and factors reflecting Australia's stated re-engagement with United Nations human rights institutions. The background of the earlier Commonwealth abolition of the death penalty is discussed, with the article proceeding to a legal analysis of the legislated extension of the death penalty abolition measures to the

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<sup>1</sup> See *Death Penalty Abolition Act 1973* (Cth) amended by Schedule 2: Amendments relating to the abolition of the death penalty of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009* which comprised a single page, with 6 brief clauses.

<sup>2</sup> Division 274 – Torture comprises sections 274.1 to 274.7 inclusively of the *Criminal Code* (Cth) and is contained in Schedule 1 – Amendments relating to the offence of torture, including the repeal of the *Crimes (Torture) Act 1988* (Cth).

states. Relevant constitutional issues on this point in relation to the states are then canvassed to explain the drafting and operation of the legislation. The importance of this reform directed towards state legislative capacity is highlighted by a discussion of the context of state based law and order debates in the age of terrorism, including State and Federal politicians raising the prospect of a re-introduction of the death penalty.

The reform is also considered in an international context of Australians sentenced to death overseas and inconsistencies in Australian international opposition to the death penalty, including interpretation and implementation of Australia's international human rights obligations. This involves the actual implementation of Australia's international human rights obligations under Article 6 of the *International Covenant on Civil and Political Rights (ICCPR)* and the *Second Optional Protocol to the ICCPR*<sup>3</sup> - in particular, the extent of Australian obligations, *reflected in policy, as applying externally to Australia*. However, the formal legislative development is not replicated in a consistent and cogent manner in Australian government policy promoting those death penalty abolition obligations internationally.

Finally, the link between domestic legislative implementation and broader international policy objectives is examined through examples of contemporary executive and parliamentary engagement and responses on this point, which, whilst providing some recognition of the inconsistencies, still allow Australia's international abolitionist position to be undermined. The circumstances of the two remaining Bali Nine facing the death penalty may provide a reflective political moment for a more comprehensive and cogent realisation of Australia's international abolitionist obligations.

The common aspect that emerges from each of the following sections is that the recent Australian abolitionist position regarding the death penalty fits within an expressed renewal of commitment to the United Nations human rights system and its instruments, but with an exclusion of an enhanced domestic judicial role in the exposition of such rights. Moreover, practical support for and realisation of that abolitionist position, through executive policy determination, is at times compromised in response to domestic political perceptions and

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<sup>3</sup> The full title is *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming At The Abolition of the Death Penalty* opened for signature 15 December 1989 1642 UNTS 414 (entered into force 11 July 1991)(*Second Optional Protocol*).



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international co-operative realities over matters such as terrorism. In turn, the inconsistencies and relativities apparent in Australia's abolitionist position arguably weaken Australia's moral and legal advocacy claims for Australians sentenced to the death penalty overseas.

## II. THE AUSTRALIAN NATIONAL AND INTERNATIONAL HUMAN RIGHTS POLICY CONTEXT OF THE EXTENDED DEATH PENALTY PROHIBITION

The Commonwealth reform to extend prohibition of the death penalty to the states is more accurately comprehended within the context of various announced changes to human rights policy at a national and an international level. The extension of the death penalty abolition reform to the states can be seen as responsive to and reflective of these influences, and ultimately as part of a wider executive commitment to re-engagement with United Nations human rights institutions and instruments.

The issue of extending the death penalty prohibition to the states can first be considered in the context of the legislative and policy response to the Brennan Committee report, the *National Human Rights Consultation Committee Report*.<sup>4</sup> The Brennan Committee report was released on 8 October 2009, therefore preceding the passage of the instant legislation, although the formal Australian government response to the Brennan Committee report followed the legislation's enactment. In adopting a decidedly minimalist response to the Brennan Committee report, the Australian government rejected the recommendation that Australia adopt a federal Human Rights Act, positioning that response within the *National Human Rights Consultation Report* recommendation that 'the Federal Government develop a national plan to implement a comprehensive framework'.<sup>5</sup> The launch of Australia's Human Rights Framework<sup>6</sup> provided the opportunity for announcing that only very limited and selected aspects of the *National Human Rights Consultation Report* would be adopted, and in a manner that overtly favoured parliamentary practices and parliamentary sovereignty over judicial involvement.

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<sup>4</sup> *National Human Rights Consultation Report* September 2009 Commonwealth of Australia

<sup>5</sup> *Ibid*, xxix, Recommendation 2.

<sup>6</sup> Robert McClelland, 'Address to the National Press Club of Australia - Launch of Australia's Human Rights Framework' (Speech delivered at National Press Club, Canberra, 21 April 2010)

<http://www.attorneygeneral.gov.au/Speeches/Pages/2010/21April2010AddressstotheNationalPressClubofAustraliaLaunchofAustralia'sHumanRightsFramework.aspx>.

Of particular significance in this limited and selected aspect was an acknowledgment of the obligations under seven core United Nations international human rights treaties to which Australia is a party.<sup>7</sup> Two measures from the *National Human Rights Consultation Report* were adopted, namely a Parliamentary Joint Committee on Human Rights, and the requirement of Ministers, when introducing a Bill into Parliament to present a statement of human rights compatibility, would be performed against these treaties.<sup>8</sup> Three other key commitments in the Human Rights Framework<sup>9</sup> also studiously avoided any further judicial involvement in expounding human rights. This clear emphasis upon parliamentary sovereignty and a Parliamentary based assessment of Australia's international human rights obligations, for instance, foreclosed the type of direct judicial interpretive development that would flow from a statutory charter of rights, including, on the present topic, the right to life.<sup>10</sup> In excluding a judicial interpretive role through a statutory charter of rights, including a relevant interpretive role for present purposes over a right to life, the

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<sup>7</sup> Namely, the *International Covenant on Civil and Political Rights* opened for signature 19 December 1966 999 UNTS 171 (entered into force 23 March 1976) (ICCPR); the *International Covenant on Economic, Social and Cultural Rights* opened for signature 19 December 1966 993 UNTS 3 (entered into force 3 January 1976), the *Convention for the Elimination of All Forms of Racial Discrimination* opened for signature 7 March 1966 660 UNTS 195 (entered into force 4 January 1969), the *Convention for the Elimination of Discrimination Against Women* opened for signature 1 March 1980 1249 UNTS 13 (entered into force 3 September 1981), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* opened for signature 10 December 1984 1465 UNTS 85 (entered into force 26 June 1987), the *Convention on the Rights of the Child* opened for signature 20 November 1969 1577 UNTS 3 (entered into force 2 September 1990) and the *Convention on the Rights of Persons with Disabilities* opened for signature 30 March 2007 2515 UNTS 3 (entered into force 3 May 2008).

<sup>8</sup> Legislation was introduced to establish a Parliamentary Joint Committee on Human Rights and to require Statements of Compatibility assessing whether a bill introduced into the Commonwealth Parliament is compatible with human rights – see respectively Part 2 and Part 3 of the *Human Rights (Parliamentary Scrutiny) Bill 2010* (Cth). The bill finally passed the Parliament on 25 November 2011, was assented to on 9 December 2011 and came into operation on 4 January 2012: see *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

<sup>9</sup> Namely an investment of \$12 million in a comprehensive suite of education initiatives, combining federal anti-discrimination laws into a single Act and creating an annual NGO Human Rights Forum to enable comprehensive engagement with non government organisations on human rights matters: 'Address To The National Press Club of Australia – Launch of Australia's Human Rights Framework,' above n 6.

<sup>10</sup> See *National Human Rights Consultation Report*, above n 4, xxxv, Recommendation 24 'The Committee recommends that the following non derogable civil and political rights be included in any federal Human Rights Act, without limitation: The right to life. Every person has the right to life. No one shall be arbitrarily deprived of life. The death penalty may not be imposed for any offence'. In any event, the *National Human Rights Consultation Report* envisaged that a Federal Human Rights Act would only apply to Commonwealth public authorities: *Ibid*, xxxviii, Recommendation 30.

National Human Rights Framework considers that parliamentary and executive action is the designated method of Australian human rights implementation. It is important to see the extension of death penalty abolition legislation to the states as squarely within that parliamentary/executive model, but also enabling the government to present itself as responding positively to international human rights obligations.

Equally, the death penalty abolition extension should also be seen as enacted within the context of the Rudd and Gillard government's desired renewal of Australia's relationship with the United Nations and its human rights institutions. In formal terms, this combines purposes such as re-engagement with United Nations human rights institutions<sup>11</sup> and adoption of other formal human rights mechanisms,<sup>12</sup> intended to differentiate the present government's international human rights based policies from those of its predecessor, the Howard government. Extending the abolition of the death penalty to the states can logically be presented by the government as a

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<sup>11</sup> Robert McClelland, 'Australia and International Human Rights: Coming in from the Cold' (Speech delivered at Human Rights and Equal Opportunity Commission, Sydney, 23 May 2008) <http://www.attorneygeneral.gov.au/Speeches/Pages/2008/Secondquarter/23May2008HumanRightsandEqualOpportunityCommission.aspx>>. Robert McClelland, 'Human Rights under a Rudd Labor Government - What will be different?' (Speech delivered to Banks/Barton FEC Regional Forum, Sydney, 17 November 2008) <http://www.attorneygeneral.gov.au/Speeches/Pages/2008/Fourthquarter/17November2008HumanRightsUnderaRuddLaborGovernmentWhatwillbedifferent.aspx>>. Robert McClelland, Attorney-General (Cth) 'Invitation to United Nations Human Rights Experts' (A-G's Media release 7 August 2008) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2008/Thirdquarter/7August2008InvitationtoUnitedNationshumanrightsexperts.aspx>>. Kevin Rudd, 'Australia's Engagement in Improving Global Human Rights' (Speech delivered to Australian Government NGO Forum on Human Rights, Parliament House, Canberra 22 June 2011) < [http://www.foreignminister.gov.au/speeches/2011/kr\\_sp\\_110622.html](http://www.foreignminister.gov.au/speeches/2011/kr_sp_110622.html) >. The relevant institutional re-engagement included becoming a party to a number of key international instruments opposed by the Howard government, and an open invitation issued to Special Rapporteurs and Working Groups under the auspices of the Human Rights Council to visit Australia. Subsequent re-engagement is also seen in Australia's participation in and responses to Universal Periodic Review, before the UN Human Rights Council.

<sup>12</sup> These activities include ratifying the *Convention on the Rights of Persons with Disabilities* and acceding to the Optional Protocol to the *Convention on the Rights of Persons with Disabilities*; acceding to the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination Against Women* and signing the Optional Protocol to the *Convention Against Torture*.

comprehensive fulfillment of Australia's obligations, within a federal system, under Article 6 of the ICCPR and the *Second Optional Protocol*.<sup>13</sup>

Of particular recent significance in engagement with United Nations human rights institutions was Australia's Universal Periodic Review before the Human Rights Council in the first half of 2011. The Australian government's engagement with the Human Rights Council was highlighted by particular commitments and undertakings raised during the review process, in the opening statement<sup>14</sup> and in the closing remarks.<sup>15</sup> These measures were raised in addition to the content of Australia's report<sup>16</sup> for Universal Periodic Review which includes commentary upon Australian government action in relation to death penalty issues.<sup>17</sup> The inclusion of this material in the Australian report under the heading of 'Right to life, liberty and security of the

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<sup>13</sup> See Robert McClelland, Attorney-General (Cth) 'Passage of Legislation to Prohibit Torture and the Death Penalty' (A-G's media release 11 March 2010) <<http://www.attorneygeneral.gov.au/MediaReleases/Pages/2010/Firstquarter/11March2010PassageofLegislationtoProhibitTortureandtheDeathPenalty.aspx>>. 'This amendment will safeguard Australia's ongoing compliance with the Second Optional Protocol to the International Covenant on Civil and Political Rights, which requires all necessary measures be taken to ensure that no one is subject to the death penalty'.

<sup>14</sup> These new commitments were the establishment of a full time Race Discrimination Commissioner in the Australian Human Rights Commission; the tabling in Parliament of concluding observations made by UN treaty bodies to Australia, as well as recommendations made to Australia in the UPR; establishing a systematic process for the regular review of Australia's reservations to international human rights treaties; and providing a contribution of \$2.35 million to the UN Office of High Commissioner for Human Rights in 2011 to help promote and protect human rights, particularly in the Asia Pacific region: Kate Lundy 'Opening and closing remarks at the United Nations Human Rights Council for Universal Periodic Review 28 January 2011' (Speeches delivered to UN Human Rights Council UPR Review Panel, Geneva, 28 January 2011) <<http://www.attorneygeneral.gov.au/Speeches/Pages/2011/First%20Quarter/28January2011OpeningandclosingremarksattheUnitedNationsHumanRightsCouncilfortheUniversalPeriodicReview.aspx>>.

<sup>15</sup> These further commitments were that the government 'intends to consult extensively with the Australian Human Rights Commission and non government organisations, reflecting on the UPR process and considering how recommendations can best be addressed'; 'to establish a publicly accessible, online database of recommendations from the UN human rights system, including recommendations made by UN human rights treaty bodies to Australia as well as recommendations made to Australia in the UPR'; and 'the Australian Government will use the recommendations made during UPR and accepted by Australia to inform the development of Australia's new National Human Rights Action Plan': 'Opening and closing remarks at the United Nations Council for Universal Periodic Review', above n 14.

<sup>16</sup> Human Rights Council, Working Group on Universal Periodic Review Tenth session Geneva 24 January - 4 February 2011 *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 – Australia (Australia UPR Report)*

<sup>17</sup> Ibid paragraph 101 (discussion of present legislation ensuring 'the death penalty cannot be reintroduced anywhere in Australia') and paragraph 102 ('new policy to govern law enforcement co-operation with countries that apply the death penalty').

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person'<sup>18</sup> amongst measures outlining developments covering other civil and political rights, indicates its importance as one of a series of highlights in Australia's first Universal Periodic Review report to the Human Rights Council.

In relation to United Nations institutions, the most significant present factor is Australia's seeking of a non permanent elected seat on the United Nations Security Council. Within this bid, prominence has been given to the human rights related dimensions<sup>19</sup> that Australian elected membership of the Security Council would entail, along with the constructive role that Australian membership would provide.<sup>20</sup>

Importantly, the subject matter of the death penalty as a recent Australian human rights issue has not been confined by the government as a single dimension issue of legislative abolition being extended to the states. Instead, it is properly contemplated as an executive sponsored human rights issue involving several other features broadly reflective of Australia's abolitionist position. First, in 2007 Australia successfully co-sponsored a General Assembly resolution<sup>21</sup> calling for an immediate moratorium on executions, which

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<sup>18</sup> Ibid. under heading III Promotion and protection of human rights.

<sup>19</sup> See 'Australia's Engagement in Improving Global Human Rights', above n 11: 'A seat on the United Nations Security Council – for which we are a candidate for 2013-14 – will provide Australia with even greater leverage to influence the global debate on human rights – not just in terms of the sanctions but much more broadly to promote the core values and principles to which we are so strongly committed as a nation'; Kevin Rudd 'Australia's foreign policy priorities and our candidature for the UN Security Council' (Speech delivered at National Press Club, Canberra, on 1 June 2011) <[http://www.foreignminister.gov.au/speeches/2011/kr\\_sp\\_110601.html](http://www.foreignminister.gov.au/speeches/2011/kr_sp_110601.html)>. Stephen Smith 'A Modern Australia For a New Era' (Speech delivered to Australian Strategic Policy Institute National Security Dinner, Sydney, 9 April 2008) <[http://www.foreignminister.gov.au/speeches/2008/080309\\_nsd.html](http://www.foreignminister.gov.au/speeches/2008/080309_nsd.html)> at 1 December 2011.

<sup>20</sup> 'A Modern Australia for a New Era', above n 19; 'Australia's foreign policy priorities and our candidature for the UN Security Council' above n 19; 'Australia's Engagement in Improving Global Human Rights' above n 11.

<sup>21</sup> General Assembly Resolution 62/149 of 18 December 2007 called upon states still maintaining the death penalty (a) To respect international standards that provide safeguards guaranteeing protection of the rights of those facing the death penalty, in particular the minimum standards, as set out in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984; (b) To provide the Secretary General with information relating to the use of capital punishment and the observance of the safeguards guaranteeing protection of the rights of those facing the death penalty; (c) To progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed (d) To establish a moratorium on executions with a view to abolishing the death penalty.

attracted the support of 104 out of 192 member states.<sup>22</sup> That resolution was reaffirmed in 2008 in General Assembly resolution 63/168.<sup>23</sup> Second, Australia in 2010 'made representations to all countries – without exception- which carry out the death penalty or which continue to have the death penalty on their statute books'.<sup>24</sup> A feature of Australia's representations against the death penalty has been the inclusion of the topic in annual Australia-Vietnam bilateral human rights dialogues.<sup>25</sup>

Third, in participating in the 8<sup>th</sup> Session of the Human Rights Council Universal Periodic Review Working Group, Australia called on various states to abolish the death penalty as it applied within their jurisdictions.<sup>26</sup> Fourth, Australia continued its long standing practice of full support in seeking executive clemency for Australian nationals convicted abroad of offences carrying the death penalty, when all formal appeal rights had been exhausted.<sup>27</sup> The potential undermining

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<sup>22</sup> See Law Council of Australia Media Release 19 December 2007 'Law Council Supports UN Vote to Halt Executions' < <http://www.lawcouncil.asn.au/media/news-article.cfm?article=B55FFDD6-1E4F-17FA-D23F-4CD50A36AF4E>> . Minister for Foreign Affairs 12 November 2008 'Joint Press Conference with Dr Hassan Wirajuda – Foreign Minister of Indonesia' (Canberra, 12 November 2008) <[http://www.foreignminister.gov.au/transcripts/2008/081112\\_jpc.html](http://www.foreignminister.gov.au/transcripts/2008/081112_jpc.html)>; Minister for Foreign Affairs 'Questions Without Notice – Indonesia: Travel Advice' (Canberra, 10 November 2008) <[http://www.foreignminister.gov.au/transcripts/2008/081110\\_qwn.html](http://www.foreignminister.gov.au/transcripts/2008/081110_qwn.html)> 1 December 2011.

<sup>23</sup>General Assembly Resolution 63/168 Moratorium on the use of the death penalty (18 December 2008).

<sup>24</sup> 'Australia's Engagement in Improving Global Human Rights', above n 11; Stephen Smith, Minister for Foreign Affairs and Robert McClelland Attorney-General (Cth) 'Australia welcomes Amnesty International report on the death penalty' (Joint Media release, 1 April 2010) <<http://www.foreignminister.gov.au/releases/2010/fa-s100401.html>> at 1 December 2011.

<sup>25</sup> See Stephen Smith, Minister for Foreign Affairs and Trade 'Australia-Vietnam Human Rights Dialogue' (Media Release 26 August 2008) <[http://www.foreignminister.gov.au/releases/2008/fa-s136\\_08.html](http://www.foreignminister.gov.au/releases/2008/fa-s136_08.html)> at 1 December 2011; Alexander Downer, Minister for Foreign Affairs 'Australia-Vietnam Human Rights Dialogue' (Media Release 19 December 2005) <[http://www.foreignminister.gov.au/releases/2005/fa159a\\_05.html](http://www.foreignminister.gov.au/releases/2005/fa159a_05.html)> at 1 December 2011.

<sup>26</sup> See Stephen Smith, Minister for Foreign Affairs 'Australia's Engagement at the 8<sup>th</sup> Session of the Human Rights Council Universal Periodic Review Working Group' (Media Release 14 May 2010) < <http://www.foreignminister.gov.au/releases/2010/fa-s100514.html>>. The states were Belarus, Grenada, Guyana, Kenya, Laos and Lesotho.

<sup>27</sup> See Minister for Foreign Affairs 'Press conference: Dr Marty Natalegawa, Minister of Foreign Affairs, Republic of Indonesia and The Honourable Kevin Rudd MP, Minister of Foreign Affairs' ( Jakarta, 8 July 2011) [http://www.foreignminister.gov.au/transcripts/2011/kr\\_tr\\_110708a\\_press\\_conference.html](http://www.foreignminister.gov.au/transcripts/2011/kr_tr_110708a_press_conference.html) Prime Minister 'Transcript of joint press conference, Brisbane' (Brisbane, 18 June

of Australia's abolitionist position by inconsistencies in this practice of Australian nationals warranting an application for clemency are canvassed later in the article. Finally, new guidelines<sup>28</sup> were released to govern AFP assistance provided to international law enforcement agencies in death penalty cases,<sup>29</sup> prompted by the conduct of the AFP leading to the arrest of the Bali Nine by Indonesian authorities.

In summary, this range of Commonwealth executive activity largely demonstrates a consistent and multi-layered opposition to the death penalty, consonant with a renewed expression of commitment to international human rights institutions and documents and their realisation through executive and legislative means. The present legislation extending the abolition of the death penalty to the states is a practical domestic expression of that approach, properly seen within the broader range of initiatives and activities outlined above.

### III. EARLIER COMMONWEALTH ABOLITION OF THE DEATH PENALTY FOR THE COMMONWEALTH AND THE TERRITORIES

In 1973, the Commonwealth retrospectively, contemporaneously and prospectively<sup>30</sup> abolished the death penalty in relation to Commonwealth and Territory offences and as far as the then powers of the Parliament permitted, in relation to offences under Imperial Acts.<sup>31</sup>

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2011) < <http://www.pm.gov.au/press-office/transcript-joint-press-conference-brisbane-0>>.

Minister for Foreign Affairs and Trade 'Joint media conference with Indonesia Foreign Minister Wirajuda' (Jakarta, 11 August 2008) < [http://www.foreignminister.gov.au/transcripts/2008/080811\\_pc.html](http://www.foreignminister.gov.au/transcripts/2008/080811_pc.html)>.

<sup>28</sup> AFP Practical Guide on International Police to Police Assistance in Potential Death Penalty Situations < <http://www.afp.gov.au/about-the-afp/~media/afp/ips-foi-documents/ips/publication-list/OG00014%20-%20International%20police%20to%20police%20assistance%20in%20death%20penalty.ashx>>.

<sup>29</sup> See Brendan O'Connor, Minister for Home Affairs and Robert McClelland Attorney General (Cth) 18 December 2009 'International Law Enforcement Cooperation' (Joint Media Release 18 December 2009) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2009/Fourthquarter/18December2009InternationalLawEnforcementCooperation.aspx>. AFP Media Release 'New AFP Guidelines released' (Media Release 18 December 2009) <<http://www.afp.gov.au/media-centre/news/afp/2009/december/new-afp-guidelines-released.aspx>>. See the subsequent discussion in this article under the heading 'Executive reforms for co-operation and assistance arising from the AFP handling of the Bali Nine - movement towards Australia's international abolitionist obligations?'

<sup>30</sup> *Death Penalty Abolition Act 1973* (Cth) s 3(4) 'This Act applies in relation to offences committed before, on or after the date of commencement of this Act...'

<sup>31</sup> *Death Penalty Abolition Act 1973* (Cth) s 3 and s 4.

In place of the penalty of death for these identified offences, it substituted a penalty of life imprisonment.<sup>32</sup>

Australia ratified the *Second Optional Protocol* in October 1990. Parties to the *Second Optional Protocol*<sup>33</sup> undertake under Article 1 that:

1. No one within the jurisdiction of a State party to the present Optional Protocol shall be executed
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Importantly, for the issue of state legislative capacity to impose the death penalty for state offences, Article 9 of the *Second Optional Protocol* states that 'The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions'. The *Second Optional Protocol* builds upon existing States parties obligations under Article 6 of the *ICCPR*<sup>34</sup> and is informed by General Comment 6 of the Human Rights Committee on Article 6.<sup>35</sup>

Clearly, the drafting of the 1973 legislation, in its exclusion of the states for constitutional reasons, was overtaken by the new international legal obligations which accrued from 1990 under the *Second Optional Protocol*. Australia's ratification of the *Second Optional Protocol* enabled the constitutional support for legislation abolishing the death penalty to be shifted from the s 51(xxxix) incidental power allowing legislative implementation of matters incidental to other Commonwealth heads of

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<sup>32</sup> *Death Penalty Abolition Act 1973* (Cth) s 5 'Where by any law in relation to which this Act applies (including a provision that would, but for this Act, have effect by virtue of such a law) it is provided that a person is liable to the punishment of death, the reference to punishment of death shall be read, construed and applied as if the penalty of imprisonment for life were substituted for that punishment.'

<sup>33</sup> For a discussion of the *Second Optional Protocol*, see William Schabas, *The Abolition of the Death Penalty in International Law* 3<sup>rd</sup> Edition (2002), 174-187.

<sup>34</sup> In particular, Article 6(2) states that 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant... This penalty can only be carried out pursuant to a final judgment rendered by a competent court'. Article 6(6) states that 'Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State party to the present Covenant'.

<sup>35</sup> Paragraph 6 of General Comment 6 on Article 6 of the *ICCPR* observes that states are obliged to 'restrict the application of the death penalty to the 'most serious crimes'. The article also refers generally to abolition in terms which strongly suggest (paras. 2(2) and (6)) that abolition is desirable'.



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constitutional power,<sup>36</sup> as well as the s 122 *Commonwealth Constitution* Territories power, to the now larger scope of the treaty implementation aspect of the s 51(xxix) *Commonwealth Constitution* External Affairs power.

#### IV. EXTENDING THE COMMONWEALTH PROHIBITION OF THE DEATH PENALTY TO THE STATES: THE LEGISLATIVE CHANGES

The *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2009* (Cth)<sup>37</sup> has made a number of straightforward changes to extend the Commonwealth and Territory abolition of the death penalty to laws of the States and does so retrospectively, contemporaneously and prospectively.

A new s 6 is enacted, which states that ‘The punishment of death must not be imposed as the penalty for any offence referred to in subsection 3(2) or (3).’ Relevantly, the existing ss 3(2) states that

This Act applies in relation to, and in relation to offences under, the laws of the Commonwealth and of the Territories, and, to the extent to which the powers of the Parliament permit, in relation to, and in relation to offences under, Imperial Acts’.

New ss 3(3) and 3(4) are added by the amending legislation: ss 3(3) states that ‘Section 6 also applies, in relation to offences under, the laws of the States’; whilst ss 3(4) states that ‘This Act applies in relation to offences referred to in subsections (2) and (3) committed before, on or after the commencement of this Act’.

#### V. COMMONWEALTH CONSTITUTION ISSUES IN EXTENDING THE DEATH PENALTY PROHIBITION TO THE STATES

The legislation’s implementation of the *Second Optional Protocol* also falls squarely within the limits established for domestic treaty implementation under the s 51(xxix) External Affairs power by the High Court of Australia. First there must be an identifiable treaty obligation – that is, the enacting law must prescribe a regime that the treaty has defined with sufficient specificity to direct the general course

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<sup>36</sup> Being those heads of Commonwealth constitutional power which enable the enactment of criminal offences as within the scope, or incidental to the scope, of the relevant head of power.

<sup>37</sup> See Schedule 2 – Amendments relating to the abolition of the death penalty of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2009* (Cth).

of action to be taken by the signatory states - in contrast to aspirational, recommendatory and hortatory statements in treaties.<sup>38</sup> Second, a proportionality test is applied in that the enacting measures are reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under the Convention.<sup>39</sup> The proportionality test applies as the treaty implementation aspect of the s 51 (xxix) external affairs power is considered to be purposive in nature.<sup>40</sup>

Here, the identifiable treaty obligation is Article 1 of the *Second Optional Protocol* - the obligations that no one within the jurisdiction of a State party to the Optional Protocol be executed and that each State party to the *Second Optional Protocol* shall take all necessary measures to abolish the death penalty within its jurisdiction.<sup>41</sup> The inclusion of new subsections 3(3) and 3(4) in the *Death Penalty Abolition Act 1973* (Cth) to include offences under the laws of the states, and with retrospective, contemporaneous and prospective application of the death penalty prohibition, directly implements both the substantive obligation under Article 1(2) of the *Second Optional Protocol* and the jurisdictional obligation under Article 9 of the *Second Optional Protocol*.<sup>42</sup> The economy and direct language of these sections deriving from the *Second Optional Protocol* indicates that the legislative changes are reasonably capable of being considered as giving effect to Australia's obligations under the *Second Optional Protocol* and Article 6 of the *ICCPR*.

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<sup>38</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1; *Victoria v Commonwealth* (Industrial Relations Case) (1996) 187 CLR 416, 486 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. The requirement of an identifiable treaty obligation was also more recently confirmed by three judges who discussed the s.51 (xxix) External Affairs power issue in *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 95, 126-128 per Hayne and Kiefel JJ (esp 127) and (2009) 238 CLR 1, 157-168 per Heydon J (esp 162).

<sup>39</sup> *Victoria v Commonwealth* (Industrial Relations Case) (1996) 187 CLR 416, 486-488 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ and *R v Tang* (2008) 237 CLR 1, 21 per Gleeson CJ; Gummow J (at 27), Hayne J (at 54), Heydon J, Crennan J and Kiefel J (at 64) agreed with Gleeson CJ.

<sup>40</sup> *Cunliffe v Commonwealth* (1994) 182 CLR 272, 322 per Brennan J; *Richardson v Forestry Commission* (1988) 164 CLR 261, 326 per Dawson J; *Victoria v Commonwealth* (Industrial Relations Case) (1996) 187 CLR 416, 487 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

<sup>41</sup> Article 1, paragraphs (1) and (2) to the *Second Optional Protocol*.

<sup>42</sup> Namely that "The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions'.

Significantly, this straightforward implementation task<sup>43</sup> avoided the more complicated option of seeking a request and consent of power from the states under s 51(xxxviii) of the *Commonwealth Constitution*.<sup>44</sup> In that sense, the minimalist constitutional approach was both practical and preferred.

Importantly, the legislative extension of the prohibition of the death penalty as applying to state laws constitutionally relies upon the creation of an inconsistency between Commonwealth and State laws under section 109 of the *Commonwealth Constitution*.<sup>45</sup> It operates on the assumption of a State seeking to impose a penalty of death in relation to an offence under the law of a State, which would then be inconsistent with the new Commonwealth law.<sup>46</sup>

The legislative approach by the Commonwealth clearly relies upon the jurisprudence of the ICCPR First Optional Protocol communication to the UN Human Rights Committee, *Toonen v Australia*,<sup>47</sup> the subsequent enactment of the *Human Rights (Sexual Conduct) Act 1994* (Cth)<sup>48</sup> and

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<sup>43</sup> In enacting Schedule 2 of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2010* (Cth) comprising a single page, as implementing Article 1(2) of the Second Optional Protocol that 'Each State party shall take all necessary measures to abolish the death penalty within its jurisdiction'.

<sup>44</sup> This alternative (albeit superfluous) basis for Commonwealth enactment of death penalty abolition legislation was the preferred approach of the Howard Government – see discussion of the *Death Penalty Abolition Amendment (Request) Bill 2008* in NSW Council for Civil Liberties *Background Paper Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* (Background Paper 2005/4 2 January 2008 3<sup>rd</sup> Edition), 22-23 and Appendix 2.

<sup>45</sup> s 109 of the *Commonwealth Constitution* states 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid'.

<sup>46</sup> For brief commentary anticipating this point see Michael Kirby 'The High Court and the death penalty: Looking back, looking forward, looking around' (2003) 77 *Australian Law Journal* 811, 818 and Sam Garkawe, 'The Reintroduction of the Death Penalty in Australia? - Political and Legal Considerations' (2000) 24 *Criminal Law Journal* 101, 107-108.

<sup>47</sup> United Nations Human Rights Committee Communication No 488/1992. The UN Human Rights Committee found that sections 122(a) and (c) and section 123 of the *Criminal Code Act 1924* (Tas), which criminalized sexual contact between consenting adult homosexual males in private, violated Article 17, paragraph 1 of the ICCPR. In that finding of a violation, the author of the communication was entitled to a remedy from the state party under article 2(3) of the ICCPR, which, in the opinion of the Committee, was the repeal of sections 122 (a) and (c) and section 123 of the *Criminal Code Act 1924* (Tas).

<sup>48</sup> With the Tasmanian government declining to introduce repeal legislation, the Commonwealth Parliament enacted the *Human Rights (Sexual Conduct) Act 1994*, (Cth), being an 'Act to implement Australia's international obligations under Article 17 of the International Covenant on Civil and Political Rights', with section 4 of the Act the operative provision. Section 4 of the Act states:

the High Court of Australia decision in *Croome and Another v State of Tasmania*.<sup>49</sup> The amendments to the *Death Penalty Abolition Act 1973* (Cth) anticipate (and seek to make inconsistent) any state law imposing the death penalty for nominated offences, contrary to the Commonwealth prohibition.

Accordingly, the judgments in *Croome*<sup>50</sup> mean that in a range of presently relevant circumstances,<sup>51</sup> that any state law purporting to impose the death sentence in relation to state offences, is amenable to a High Court challenge on the basis of a section 109 inconsistency of the state law with the amended *Death Penalty Abolition Act 1973* (Cth). In other words, within that range of circumstances, a relevant constitutional *matter*<sup>52</sup> would arise for adjudication under the *Commonwealth Constitution*.

#### VI. THE DESIRABILITY OF EXTENDING THE COMMONWEALTH PROHIBITION OF THE DEATH PENALTY TO THE STATES: DOMESTIC POLITICS, STATE BASED LAW AND ORDER DEBATES AND THE AGE OF TERRORISM

The reforms as discussed extending the Commonwealth prohibition of the death penalty to the states are highly desirable on several grounds. These are firstly, a consistency of ultimate penalties for similar or identical offences between state, territory and Commonwealth

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'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 International Convention on Civil and Political Rights; (2) For the purpose of this section, an adult is a person who is 18 years old or more.'

<sup>49</sup> (1997) 191 CLR 119. In *Croome v Tasmania*, Toonen's partner sought to obtain a declaration that the *Criminal Code Act 1924* (Tas) provisions were inconsistent with the *Human Rights (Sexual Conduct) Act 1994* (Cth). As no criminal charges had been pursued against Croome and Toonen under the relevant sections of the *Criminal Code Act 1924* (Tas), the litigation focused on whether a constitutional 'matter' existed in the instant circumstances. Accordingly, an apparent inconsistency existed between a Commonwealth law and a State law, but there was no factual application of the State law to the plaintiff upon which the High Court could adjudicate. The High Court, in two separate joint judgments, found unanimously that a relevant constitutional *matter* did exist and that the Tasmanian *Criminal Code* provisions were inconsistent with the Commonwealth legislation.

<sup>50</sup> (1997) 191 CLR 119.

<sup>51</sup> As s 6 of the *Death Penalty Abolition Act 1973* (Cth) states 'The punishment of death must not be imposed as the penalty for any offence referred to in subsection 3(2) or (3)', such imposition arguably includes a legislative imposition as a penalty for *an offence with which persons may be charged, a sentencing imposition upon conviction* for an offence carrying the death penalty, as well as *the actual carrying out of such a sentencing imposition*.

Accordingly, the range of circumstances arising from potential s.109 inconsistency creating a justiciable controversy is considerable.

<sup>52</sup> See s 76(i) of the *Commonwealth Constitution*.

jurisdictions and their offences. Secondly, the legislative reform provides a more substantial constitutional foundation, reliant as it is upon the treaty implementation aspect of the s 51(xxix) External affairs power, for the death penalty prohibition legislation. This reflects both Australia's ratification of the *Second Optional Protocol* in 1990, but also the evolution of interpretation of the treaty implementation aspect of the s 51(xxix) External affairs power in the post 1973,<sup>53</sup> commencing with the cases of *Koowarta v Bjelke-Petersen*<sup>54</sup> in 1982 and *Commonwealth v Tasmania*<sup>55</sup> in 1983. Thirdly, the obligations under the *Second Optional Protocol* to take all necessary measures to abolish the death penalty within a state's jurisdiction<sup>56</sup> and that obligations of the *Second Optional Protocol* 'extend to all parts of federal States without limitations or exceptions'<sup>57</sup> similarly make the reforms highly desirable, following twenty years of legislative inactivity, to ensure conformity with Australia's international obligation.

The legislative extension of the Commonwealth prohibition of the death penalty to the states is also highly desirable for a further significant reason. The reform reflects the reality that the majority application, activity, investigation and prosecution of criminal offences in Australia involve state laws. It is at state level that law and order debates demand increasingly draconian legislative responses and penalties have emerged, and particularly so after the terrorist events of September 11 2001.<sup>58</sup> Terrorist crimes have been a modern animator of populist debate about reintroduction of the death penalty. These debates indicate that the Commonwealth legislation is both timely and deals with an unlikely, but not impossible, state legislative move towards re-introduction of the death penalty.<sup>59</sup>

The logical conclusion of increasing calls for severe laws and harsher sentencing is a debate – likely to be conducted in populist terms – about the reintroduction of the death penalty for certain categories of offence, including terrorism offences, which shock the public conscience. In orchestrating such a debate as an ultimate law and order

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<sup>53</sup> The year of the *Death Penalty Abolition Act 1973* (Cth).

<sup>54</sup> (1982) 153 CLR 168.

<sup>55</sup> (1983) 158 CLR 1.

<sup>56</sup> Article 1, paragraph 2 of the *Second Optional Protocol*.

<sup>57</sup> Article 9 of the *Second Optional Protocol*.

<sup>58</sup> This is the case even though Part 5.3 Division 100 of the *Criminal Code* (Cth), which comprises terrorism offences, relies in part upon a State referral of power to the Commonwealth under s 51(xxxvii) of the *Commonwealth Constitution*: see s 100.2 and s 100.3 of the *Criminal Code* (Cth).

<sup>59</sup> In 1985, New South Wales was the last state in Australia to abolish the death penalty for all offences, having abolished the death penalty for murder in 1955.

response, political calculations might note the fact that some surveys suggest considerable public support for reintroduction of the death penalty.<sup>60</sup>

The state of Western Australia<sup>61</sup> provides an apposite and recurrent example as to the desirability of the federal abolitionist legislation – both from the perspectives of the abhorrence of the death penalty itself, and also because debate about suggested reintroduction can be used as an instrument to advance political objectives.<sup>62</sup>

In 2000, during the lead up to the Western Australian state election, a petition with two and a half thousand signatures was tabled in the Western Australian Parliament, calling for a referendum on re-introduction of the death penalty.<sup>63</sup> The then Western Australian Premier, Richard Court, a supporter of capital punishment,<sup>64</sup> cultivated public debate whilst ambivalently stating that there would not be a referendum before the state election.<sup>65</sup> Opponents claimed that the

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<sup>60</sup> 'A 2005 Bulletin poll showed most Australians supported capital punishment. The Australian National University's 2007 Electoral Survey found that 44 per cent of people thought the death penalty should be reintroduced ... Australia may not have the death penalty, but a sizeable part of its population supports its return.': Cited in George Williams 'Opinion: 'No death penalty, no shades of grey' *Sydney Morning Herald* 2 March 2010, 11. The *Bills Digest* for the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009* cites conflicting support: '...A poll taken in 1999 indicated that 54 per cent of Australians believed that Australia should have the death penalty at that time...In a more recent poll, taken in August 2009, a clear majority of Australians (64 per cent) said that imprisonment should be the penalty for murder compared to just 23 per cent who said the penalty should be death'.

<sup>61</sup> Western Australia was the second last state to abolish the death penalty in 1984 and the last state, in 1984, to remove the death penalty for murder: See NSW Council for Civil Liberties 'Death Penalty in Australia' (2009) [http://www.nswccl.org.au/issues/death\\_penalty/australia.php](http://www.nswccl.org.au/issues/death_penalty/australia.php)>. Western Australia was the last state in which a convicted person – Brenda Hodge – was sentenced to death in Australia, in August 1984: see Brenda Hodge, *Walk On The Remarkable True Story of the last person sentenced to death in Australia* (2005).

<sup>62</sup> As Western Australia was the only state to raise concerns about Attorney-General McClelland's then proposal to extend the *Death Penalty Abolition Act 1973* (Cth) to the states, previous advocacy of the reintroduction of the death penalty in Western Australia is highly relevant for present purposes. Western Australia also raised concerns about United Nations inspections of detention and custodial facilities following Australia's accession to the Second Optional Protocol to the *Convention Against Torture*.

<sup>63</sup> See 'Death penalty debate in WA' *ABC PM Archive* 16 March 2000 and 'WA premier revisits capital punishment issue' *ABC The World Today Archive* 16 March 2000.

<sup>64</sup> See 'WA premier revisits capital punishment issue' *ibid*, for reference to Richard Court first raising the issue in 1994 during a state by election.

<sup>65</sup> See 'WA government rules out death penalty poll' *Sydney Morning Herald* 16 March 2000. The article highlights contradictory statements about the intentions and willingness of the WA state government to hold a referendum on the issue coinciding with the state election, citing community and public opinion reasons.

death penalty was raised as a political diversion and distraction from other pressing political issues then facing the Western Australian government.<sup>66</sup>

Subsequently in 2007, the then shadow Western Australian police minister, Rob Johnson,<sup>67</sup> called for reintroduction of the death penalty, in such instances as mass murders, serial killers and terrorism.<sup>68</sup> Support for this initiative was derived from responses to a survey conducted in the shadow minister's Western Australian electorate, with 72 per cent of the 300 respondents agreeing that serious crimes such as murder should be punished by death.<sup>69</sup>

These state based death penalty debates were promoted in 2003 with the public contributions of Prime Minister Howard, in the aftermath of the Bali bombing death penalty applied to the convicted terrorist Amrosi, and in the context of the ongoing enactment of Commonwealth terrorism legislation.<sup>70</sup> Prime Minister Howard's opinions, aired in a radio interview, were ambivalent in relation to the death penalty, whilst identifying it as a state political issue:

See there is a division in our community on the death penalty, many Australians who are as decent and as moderate as I hope both you and I are actually have a different view on the death penalty and perhaps your view and my view is different, I don't know, but I know lots of Australians who believe that a death penalty is appropriate and they are not barbaric, they're not insensitive, they're not vindictive, they're not vengeful, they're people who believe that if you take another's life deliberately then justice requires that your life be taken...

Firstly the criminal law of this country is overwhelmingly administered by state governments and I don't, even if I'm in favour of the death penalty, I couldn't apply the death penalty for example in

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<sup>66</sup> See comments by then opposition leaders Geoff Gallop in 'WA premier revisits capital punishment issue' above n 63 and Kim Beazley in 'WA government rules out death penalty poll', above n 65.

<sup>67</sup> Johnson is presently Western Australian Police Minister and Emergency Services Minister and Leader of the House in the Legislative Assembly of the Western Australian Parliament.

<sup>68</sup> See 'Liberal calls for death penalty' *The Sunday Times* 3 August 2007. See also 'Barnett shifts agenda to a better society' *The Australian* 27 February 2010. For earlier comments by Mr Johnson supporting the death penalty see 'Execute killers, says Lib' *The Sunday Times* 16 October 2005.

<sup>69</sup> *Ibid.*

<sup>70</sup> Since 2001, over 40 pieces of legislation were passed by the Howard government relating to terrorism: see *Chronology of Legislative and Other Legal Developments since September 11 2001* (Parliamentary Library)

<<http://www.apf.gov.au/library/intguide/law/terrorism.htm#terrchron>>.

the state of Victoria. You can raise, and this matter can be pursued at a state political level, you say why haven't you got the right? Well that's up to the Victorian Government...if people want to raise it again it would be open for example to the Victorian Opposition, if you have a different view on this matter to promote it as an electoral issue.<sup>71</sup>

One interpretation is that these ambivalent comments are a nuanced cultivation of different political constituencies for maximum electoral effect – mixed messages each playing to different community views, suggesting a possible re-introduction but leaving responsibility for debate and legislative implementation to the states. This vindicates the subsequent enactment of the legislation which prevents state reintroduction of the death penalty, therefore forestalling such debate conducted for opportunistic political reasons.

The matter emerged once more in 2010 through similarly ambivalent comments by the Leader of the Opposition, Tony Abbott. Mr Abbott, describing himself as having always been against the death penalty, stated that if he became Prime Minister there would be no plans for its reintroduction, but that if the issue came before Parliament he would ensure it was a conscience vote.<sup>72</sup> Mr Abbott then surmised about the inadequacy of imprisonment as a punishment for mass terrorist deaths, stating that death might be appropriate.<sup>73</sup>

The legislation extending abolition of the death penalty to the states is therefore desirable from the practical governance perspective that it removes both the scope for partisan and reactive political debate to prosecutions and convictions for notorious criminal incidents, and for state and federal politicians alike to opportunistically exploit public sentiment and outrage for base motives and to distract public opinion from other inconvenient and unfavourable political issues. In the case of federal politicians, it removes the ability to engage in suggestive, or 'dog-whistle', politicking about the death penalty, in the knowledge

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<sup>71</sup> Transcript of the Prime Minister The Hon John Howard Interview with Neil Mitchell, Radio 3AW, Melbourne August 8 2003 attached to article by Margo Kingston 'Howard to the states: capital punishment your call' *Sydney Morning Herald* August 8 2003 <<http://www.smh.com.au/articles/2003/08/08/1060145858623.html>>. See also Cynthia Banham and Robert Wainwright 'PM ignites death penalty furore' *Sydney Morning Herald* 9 August 2003.

<sup>72</sup> See Paul Toohey 'Tony Abbott says death penalty fitting for terrorists' *Daily Telegraph* 20 February 2010.

<sup>73</sup> Ibid. Mr Abbott stated 'Well, you know, what would you do with someone who cold-bloodedly brought about the deaths of hundreds or thousands of innocent people? I mean, what you've got to ask yourself, what punishment would fit that crime? That's when you do start to think that maybe the only appropriate punishment is death': 'Tony Abbott says death penalty fitting for terrorists'.



that a state or states would have primary political responsibility in re-introduction of the death penalty, without the extension to the states of the *Death Penalty Abolition Act 1973* (Cth).

VII. THE INTERNATIONAL CONTEXT OF THE LEGISLATIVE CHANGES:  
DIFFERENTIATING AUSTRALIANS SENTENCED TO THE DEATH OVERSEAS  
FROM OTHER EXTERNAL IMPOSITIONS OF THE DEATH SENTENCE

The comments referred to by Prime Minister Howard above<sup>74</sup> were preceded by the then Prime Minister's acknowledgment that the death penalty on the Indonesian convicted Bali bomber terrorist Amrosi was a matter for Indonesian law and that the Australian government would not be making any objections to the death sentence being carried out.<sup>75</sup>

There has been a further lack of a comprehensive and consistent abolitionist approach regarding Australia's international obligations, from the various senior leaders of both major political parties, in other circumstances overseas involving notorious individuals, where Australia has a particular interest from its military and diplomatic actions post September 11, 2001.<sup>76</sup> The Foreign Minister, Alexander Downer observed in 2006:

The execution of Saddam Hussein is a significant moment in Iraq's history. He has been brought to justice, following a process of fair trial and appeal, something he denied to countless thousands of victims of his regime...No matter what one might think about the death penalty, and the Government of Iraq is aware of the Australian Government's position on capital punishment, we must also respect the right of

<sup>74</sup> See the comments of Prime Minister Howard in the text, n71, under the heading 'The desirability of extending the Commonwealth prohibition of the death penalty to the States: domestic politics, state based law and order debates and the age of terrorism'.

<sup>75</sup> See transcript of Prime Minister John Howard interview with Neil Mitchell, August 8 2003, above n 71: 'I intend to deal with the facts and the facts are that the man is an Indonesian citizen, he was tried in accordance with Indonesian law, Indonesian law obliges the imposition of the death penalty, it has been imposed and in those circumstances, I regard it as appropriate and I do not intend, in the name of the Australian people, to ask the Indonesian Government to refrain from the imposition of that penalty'. See also 'Howard Gives Support to Indonesian Death Penalty for Amrosi' (transcript of press conference given by the Prime Minister John Howard, August 7, 2003) < <http://australianpolitics.com/news/2003/08/03-08-07.shtml>>. 'Australians expect Bali bomber executions, says PM' *Brisbane Times* 13 October 2007.

<sup>76</sup> Such as Osama Bin Laden and Saddam Hussein. Politicians include Prime Minister John Howard and Opposition leaders Simon Crean and Mark Latham. See Lex Lasry 'Australia and the Death Penalty Are we really against it?' (2006) 80 *Law Institute Journal* 58, 60-61; and Daniel Hoare 'Australian Exceptionalism: The Bali Nine and the Future of the Death Penalty' *The Monthly* July 2007, 20, 23.

sovereign states to pass judgment relating to crimes committed against their people, within their jurisdictions.<sup>77</sup>

Similar approaches to the position of Prime Minister Howard have been articulated by senior members of the Labor Party, forming the present government which introduced the amending legislation extending the death penalty prohibition to the states. In the lead up to the 2007 Federal election, the then Leader of the Opposition, Kevin Rudd, distanced himself from comments made by Labor Foreign Affairs spokesman Robert McClelland, who had indicated an intention in government to campaign against the death penalty in South East Asia, including the execution of the Bali bombers.<sup>78</sup> This was in spite of Mr Rudd's earlier avowal of an absolute opposition to the death penalty.<sup>79</sup>

Likewise, as the Foreign Minister, Mr Rudd focused on the effectiveness and professionalism of United States Special Forces in bringing to justice by killing (rather than arresting, and delivering in custody for charging and prosecuting, either in the United States or before an international tribunal, for crimes against humanity or similar grave offences) Osama Bin Laden in Pakistan in May 2011.<sup>80</sup>

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<sup>77</sup> Alexander Downer, Minister for Foreign Affairs, Execution of Saddam Hussein' (Media Release 30 December 2006) <[http://www.foreignminister.gov.au/releases/2006/fa145\\_06.html](http://www.foreignminister.gov.au/releases/2006/fa145_06.html)>. In contrast, see the comments of Australian Philip Alston as UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in 'Tragic Mistakes Made In The Trial and Execution of Saddam Hussein Must Not Be Repeated' (UN Press Release 3 January 2007) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3983&LangID=E>>.

<sup>78</sup> 'PM slams Rudd over death penalty' *The Age* October 9, 2007, in which Mr Rudd is quoted as stating 'no government that he led would ever make a diplomatic intervention to save the life of a terrorist facing capital punishment' and cited the insensitivity of the McClelland comments as the fifth anniversary of the Bali bombings approached; Law Council of Australia Media Release, 'Law Council laments Leadership Vacuum on the Death Penalty.' (Media Release 9 October 2007) <<http://www.lawcouncil.asn.au/media/news-article.cfm?article=B55FFD0B-1E4F-17FA-D25D-2C78C2EF4981>>.

<sup>79</sup> 'I believe the death penalty is repugnant at every level and we have a responsibility not just to speak out against it when it applies to Australians, but to argue uncompromisingly that the time has come for the world to put an end to this medieval practice': Robert Macklin *Kevin Rudd The Biography* (2008), 206-207.

<sup>80</sup> See Minister for Foreign Affairs 'Transcript of remarks after meeting with US Secretary of State Hillary Clinton' (Washington, 2 May 2011) <[http://www.foreignminister.gov.au/transcripts/2011/kr\\_tr\\_110502\\_washington\\_dc.html](http://www.foreignminister.gov.au/transcripts/2011/kr_tr_110502_washington_dc.html)>. See also Minister for Foreign Affairs Transcript 'Interview with Jason Morrison, Radio 2UE' (Sydney, 3 May 2011) <[http://www.foreignminister.gov.au/transcripts/2011/kr\\_tr\\_110503\\_2ue.html](http://www.foreignminister.gov.au/transcripts/2011/kr_tr_110503_2ue.html)>. Minister for Foreign Affairs Transcript 'Interview with Nick McCallum and Justin Smith,

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In 2008, the Foreign Minister, Mr Stephen Smith, unabashedly outlined the differentiated characteristics as providing the firm limits of promoting Australia's abolitionist position:

Australia does not have a death penalty and we argue in international forums to countries that do that they should move away from the death penalty. Where we find Australian citizens, as we do in Indonesia, who have been convicted of crimes subject to the death penalty then when all of the legal and judicial processes have exhausted themselves we make pleas for clemency on behalf of Australian citizens to the relevant nation state....When it comes to non-Australian citizens, we make a judgment on a case by case basis as to whether Australia will make representations on their behalf. For example since I became Foreign Minister there was an incident in Iran where Iran was proposing to execute a minor, a child and Australia joined with other nation states in making representations to Iran to desist from that. When it comes to terrorists who have been convicted and are subject to the death penalty, Australia does not as a matter of policy make representations on their behalf. We make representations on behalf of Australian citizens in the manner that I have outlined.<sup>81</sup>

Four critical bipartisan factors primarily establish the boundaries of Australia's abolitionist position. These factors are non-Australian nationality, its linkage to the notoriety of the offence for which the death penalty has been imposed, the adverse impact of the offender's actions on Australian nationals or Australian security and strategic interests, as well as anticipated adverse domestic political reaction if the death penalty was opposed.

However, it is obvious that there are significant consequences for tacitly approving the death penalty for foreign nationals who have killed Australian citizens in terrorist outrages, in sharp contrast to seeking clemency in individual cases for Australians convicted abroad for various offences, particularly drug offences, carrying the death penalty. The operative factors mentioned above which set the boundaries of Australia's abolitionist position clearly promote relativity and convenience. The claim for preservation of the lives of convicted Australians in other situations is then undermined by the allegation of a double standard (with potential racially based

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Radio 3AW (Sydney, 3 May 2011) <  
[http://www.foreignminister.gov.au/transcripts/2011/kr\\_tr\\_110503\\_3aw.html](http://www.foreignminister.gov.au/transcripts/2011/kr_tr_110503_3aw.html)>.

<sup>81</sup> 'Joint media conference with Indonesian Foreign Minister Wirajuda', above n 27.

overtones), selective application of human rights principles,<sup>82</sup> and a heightened sensitivity of Asian death penalty states, to claims of attempted Australian interference with their laws. Australia's international diplomacy in opposing the death penalty is also undermined by having such an inconsistent approach – that is by differentiating the acceptability of the death penalty on the basis of nationality and externality to Australia, rather than by internationally opposing the death penalty as a matter of universal principle.

The two most prominent contemporary examples of Australians sentenced to death for crimes committed abroad raising these concerns are Van Nguyen<sup>83</sup> and amongst the Bali Nine,<sup>84</sup> the individual cases of Scott Rush, Andrew Chan and Myuran Sukumaran, all of whom were sentenced to death. On 10 May 2011, Scott Rush's death sentence was reduced on appeal to the Indonesian Supreme Court to life imprisonment.<sup>85</sup>

Both Andrew Chan<sup>86</sup> and Myuran Sukumaran<sup>87</sup> have exhausted all rights of appeal, their death sentences confirmed on judicial review by

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<sup>82</sup> The obligation of States parties to the *Second Optional Protocol* for international advocacy against the death penalty is seen to arise from the statement in the *Second Optional Protocol* preamble, 'Desirous to undertake an international commitment to abolish the death penalty'.

<sup>83</sup> Van Nguyen was hanged in Singapore on December 2 2005 after imposition of a mandatory death penalty for importation of 396 grams of heroin intended ultimately for entry to Australia. In relation to the Van Nguyen matter, see Lasry above n 76, 58; David Indemaur 'Changing Attitudes to the Death Penalty: An Australian Perspective' (2006) 17 *Current Issues in Criminal Justice* 444 and Mirko Bagaric 'Lessons to be Learned from the Execution of Van Nguyen' (2005) 1 *International Journal of Punishment and Sentencing* 111.

<sup>84</sup> These convictions relate to participation in the attempted smuggling into Australia from Bali of 8.3 kilograms of heroin. Five of the Bali Nine were sentenced, either originally or on appeal, to life imprisonment. A sixth member of the Bali Nine had her life imprisonment sentence reduced to 20 years imprisonment on appeal: see 'Keelty's belated Bali lifeline' *The Australian* 7 May 2010, 13 and 'Postcard: Bali Nine' ABC Radio National *Late Night Live* broadcast 12 May 2010 at <<http://www.abc.net.au/rn/latenightlive/stories/2010/2897744.htm>>. See also Ronli Sifris 'Balancing Abolitionism and Cooperation on the World's Scale: The Case of the Bali Nine' (2007) 35 *Federal Law Review* 81, 83.

<sup>85</sup> See Kevin Rudd, Minister for Foreign Affairs 'Statement of Indulgence – Mr Scott Rush' (Media Release 10 May 2011) <[http://www.foreignminister.gov.au/releases/2011/kr\\_mr\\_110510.html](http://www.foreignminister.gov.au/releases/2011/kr_mr_110510.html)>. Peter Alford, 'Scott Rush spared death for a life in Bali jail' *The Australian* 12 May 2011.

<sup>86</sup> See 'Bali Nine ringleader Andrew Chan loses final appeal' *The Australian* 17 June 2011 and 'Bali Nine's Andrew Chan loses final appeal' *The Age* 17 June 2011.

<sup>87</sup> See 'Bali Nine ringleader Myuran Sukumaran 'calm' after death appeal loss' *The Australian* 7 July 2011 and 'Bali Nine's Sukumaran loses final death appeal' *The Age* 7 July 2011.

the Indonesian Supreme Court, with the only remaining avenue being a grant of clemency by the Indonesian President. Both the Australian Minister for Foreign Affairs and the Prime Minister have indicated that full representations for clemency will be made by them on behalf of the Australian government with the objective of not having the death sentences carried out.<sup>88</sup>

These cases demonstrate several political consequences from Australia's selective and inconsistent death penalty opposition in contrast to its clear *Second Optional Protocol* international obligations. The influence which Australia can exert for Australian citizens abroad in urgent circumstances,<sup>89</sup> and also in achieving solidarity amongst other abolitionist states,<sup>90</sup> is potentially diminished by this selective and nuanced approach. It can also be speculated that lack of moral clarity in such inconsistency creates hesitation in advancing effective Australian objections in individual death penalty cases, frequently because economic interests with important Asian states such as Singapore,<sup>91</sup> or co-operative counter-terrorism memoranda with Asian States,<sup>92</sup> are believed to be potentially affected.

#### VIII. ADHERING TO AUSTRALIA'S INTERNATIONAL LEGAL OBLIGATIONS AS AN ABOLITIONIST STATE

In the instance of the investigation and prosecution of the Bali terrorist Amrosi, documents obtained by the NSW Council of Civil Liberties indicate that under the mutual assistance legislation,<sup>93</sup> the

<sup>88</sup> See 'Press conference: Dr Marty Natalegawa, Minister of Foreign Affairs, Republic of Indonesia and The Honourable Kevin Rudd MP, Minister of Foreign Affairs', above n 27; 'Transcript of joint press conference, Brisbane', above n 27.

<sup>89</sup> Lasry, above n 76, 60; Hoare, above n 76, 22, 25.

<sup>90</sup> Hoare above n 76, 22-23.

<sup>91</sup> See Indemaur, above n 83, 446; Bagaric, above n 83, 112.

<sup>92</sup> Australia has entered into bilateral memoranda of understanding on terrorism issues with a number of states in the Asia-Pacific. These states are Indonesia, Malaysia, Thailand, The Philippines, Fiji, Cambodia, India, East Timor, Papua New Guinea, Pakistan, Brunei and Afghanistan, as well as a counter-terrorism declaration with the Association of Southeast Asian Nations. See Greg Carne 'Neither Principled nor Pragmatic? International Law, International Terrorism and the Howard Government' (2008) 27 *Australian Year Book of International Law* 11, 33-35.

<sup>93</sup> *Mutual Assistance in Criminal Matters Act 1987* (Cth). S.8(1A) of the Act allows the Minister to authorise assistance in death penalty prosecutions in 'special circumstances': 'A request by a foreign country for assistance under this Act must be refused if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless the Attorney General is of the opinion, having regard to the *special circumstances of the case*, that the assistance requested should be granted' (emphasis added).

circumstances in which assistance could be rendered to authorities in jurisdictions with the death penalty was significantly expanded.<sup>94</sup> The basis of this expansion was a controversial, narrow Attorney General's department legal opinion of the extent of Australia's human rights death penalty obligations under the *Second Optional Protocol*:

The obligations under the ICCPR (and therefore also the OP) apply to 'individuals within [Australia's] territory and subject to its jurisdiction. The Department has previously advised that, in its view, the ICCPR and OP do not apply to individuals outside of Australia's territory or not subject to Australia's jurisdiction. In the Bali attacks, the issue of Australia's obligations under the ICCPR and OP do not arise.'<sup>95</sup>

A contrary view, expressed in the briefing paper, was that the Howard government's legal opinion:

...is flawed. It cannot be reconciled with the UN Human Rights Committee's observation that, under the ICCPR and Second Optional Protocol, Australia is obliged to ensure that it exposes no one in any circumstances to the real risk of execution.<sup>96</sup>

This latter view has strong merit, considering relevant Human Rights Committee jurisprudence and commentary.<sup>97</sup> In *Judge v Canada*,<sup>98</sup> the Human Rights Committee, in reviewing and revising earlier jurisprudence about obligations under the *ICCPR* in relation to

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It is noteworthy that in the case of the Bali Nine, no request was made under the *Mutual Assistance in Criminal Matters Act 1987* (Cth) – see *Rush and Others v Commissioner of Police* (2006) 150 FCR 165, 175 (per Finn J).

<sup>94</sup> This occurred in 1999, with Justice Minister Vanstone's liberalisation of the interpretation of 'special circumstances' in s.8 (1A) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth): see NSW Council for Civil Liberties briefing paper (4 February 2008) 'Australia and the Death Penalty A guide to confidential documents obtained under FOI', 4 at < <http://www.nswccl.org.au/docs/pdf/dpfoi%20guide.pdf>>. It has been suggested that 'informal requests' are made by foreign states to Australia, so as to avoid triggering the protections of s 8(1A) of the *Mutual Assistance in Criminal Matters Act 1987*: see NSW Council for Civil Liberties briefing paper (4 February 2008), 9.

<sup>95</sup> NSW Council for Civil Liberties briefing paper (4 February 2008), *ibid.*, 9-10, citing an Attorney-General's department 'Talking Point' (18 March 2003) titled 'Has the Prime Minister in his recent comments reversed Australia's long standing opposition to the death penalty?', which contained the government's legal advice.

<sup>96</sup> *Ibid.*

<sup>97</sup> See United Nations Human Rights Committee First Optional Protocol Communications ARJ *v Australia* (Communication 692/1996, 6 February 1996); *GT v Australia* (Communication 706/1996, 10 May 1996) and *Judge v Canada* (Communication 829/1998, 7 August 1998); Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (2<sup>nd</sup> Edition, 2005), 151-153 and Sifris, above n 84, 85.

<sup>98</sup> Communication No 829/1998, *ibid.*

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extradition to states with a death penalty by states parties who have abolished the death penalty, observed that:

Paragraph 1 of Article 6, which states that ‘Every human being has the inherent right to life...’ is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect *in all circumstances*...the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet verified the Second Optional Protocol to the Covenant Aiming at Abolition of the Death Penalty, violated the author’s right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out.<sup>99</sup>

The Human Rights Committee’s earlier views in *G T v Australia*,<sup>100</sup> identified that Article 6 of the ICCPR and the *Second Optional Protocol* are to be read conjointly in the case of abolitionist states:

The Committee observes that article 6, paragraphs 1 and 2 read together, allows the imposition of the death penalty for the most serious crimes, but that the Second Optional Protocol, to which Australia is a party, provides that no one within the jurisdiction of a State party shall be executed and that the State party shall take all necessary measures to abolish the death penalty in its jurisdiction. The provisions of the Second Optional Protocol are to be considered as additional provisions to the Covenant.<sup>101</sup>

In both *G T v Australia* and in the earlier communication, *ARJ v Australia*,<sup>102</sup> the instant issues regarding extradition were ultimately resolved on the factual assessment that return of a foreign national to the national’s state would not create a real risk of execution.<sup>103</sup> Overall, the combined obligation arising under Article 6 of the ICCPR and the *Second Optional Protocol* to the ICCPR for *abolitionist states*, such as Australia, is stated by Nowak:

States parties to the 2<sup>nd</sup> OP are not only under an obligation to abolish capital punishment in their own jurisdiction, but they also have a broader obligation not to contribute to the implementation of capital punishment by other States. Since the OP must be read together with the right to life in Art 6, paragraphs 2, 4, 5 and 6 of Art 6 are no longer applicable to States parties to the 2<sup>nd</sup> OP. Consequently, the right to life applies in these

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<sup>99</sup> *Ibid*, para 10.4, 10.6 (emphasis added).

<sup>100</sup> *GT v Australia* Communication 706/1996, para 8.3.

<sup>101</sup> *Ibid*.

<sup>102</sup> Communication No 692/1996, above n 97.

<sup>103</sup> *GT v Australia* Communication No 706/1996 para 8.4; *ARJ v Australia* Communication No 692/1996 para 6.12.

countries without any limitation regarding capital punishment, any extradition to a country which implies the real risk for the person concerned to be subjected to the death penalty would amount to a violation of Art 6 (1), in conjunction with Art 1 of the 2<sup>nd</sup> OP by the extraditing state.<sup>104</sup>

Similarly, it is recalled<sup>105</sup> that in *Judge v Canada*, the UN Human Rights Committee had found that those state parties to the ICCPR which had abolished the death penalty are:

...obliged to protect life in all circumstances. This clearly extends beyond non refoulement (non return) obligations in extradition or deportation cases and includes all actions by a State and its agents. This includes, for example, the actions of the Australian Federal Police when cooperating or sharing information with foreign police agencies in retentionist countries.<sup>106</sup>

The obligations of abolitionist states therefore significantly derive from a direct focus upon Article 6, paragraph 1 of the ICCPR<sup>107</sup> and the inapplicability to abolitionist states of paragraphs 2, 4, 5 and 6 of Article 6 of the ICCPR once abolition has been enacted by the state party. This approach makes for a coherent reading of Article 1, paragraph 2<sup>108</sup> of the *Second Optional Protocol* as its confining reference 'within its jurisdiction' is expended once abolition is achieved. The pre-eminence of the Article 6 ICCPR obligation and the broad responsibilities for abolitionist states under it is also suggested by three other factors.

First, the preamble to the *Second Optional Protocol* contains two relevant statements supportive of broad abolitionist responsibilities - 'Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable' and 'Desirous to undertake an international commitment to abolish the death penalty'. Second, Article 6 of the *Second Optional Protocol* states that 'The provisions of the present Protocol shall apply as *additional provisions* to the Covenant'.<sup>109</sup> Third,

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<sup>104</sup> Nowak, above n 97, 153. See also Sifris, above n 84, 85.

<sup>105</sup> See *Background Paper Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* NSW Council for Civil Liberties Background Paper 2005/4 2 January 2008 (3<sup>rd</sup> Edition), 12.

<sup>106</sup> *Ibid.*

<sup>107</sup> Namely, that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.

<sup>108</sup> Namely, that 'Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction'.

<sup>109</sup> Emphasis added.



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consistent with the precedence of Article 6 of the *ICCPR*, the language of the UN Human Rights Committee General Comment 6 on the Article 6 Right to Life takes a purposive and proactive approach to the right to life, including, but not limited to, death penalty issues. General Comment 6 on the Right to life states:

It is a right which should not be interpreted narrowly...the Committee has noted that the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.<sup>110</sup>

It is these points which rebut the artificially narrow interpretation of international death penalty obligations arising for abolitionist states under Article 6 of the *ICCPR* and the *Second Optional Protocol* advanced by one commentator,<sup>111</sup> who gives pre-eminence to the domestic jurisdictional limits upon the Article 1 obligation under the *Second Optional Protocol*.<sup>112</sup>

Indeed, the further situation which extended special circumstances warranting Australian assistance to Indonesia in offences carrying the death penalty in the Bali bombing incident involving the deaths of 88 Australians, without a request of an undertaking from Indonesia that no executions occur, indicates pursuit of particular *national* self interest, arguably, at the expense of compromising of Australia's *international* abolitionist obligations under the *Second Optional Protocol*. Australia's abolitionist position, (expressed for example, in the subsequent legislation extending the prohibition to the states), plays well within domestic politics and within international human rights forums. It however neglects a practical, external implementation of plausible obligations consistent with those identified for states parties under Article 6 of the *ICCPR* and the *Second Optional Protocol*, from the jurisprudence of the UN Human Rights Committee. Accordingly, the Australian position has been exceptional and selective in its interpretation of its abolitionist international legal responsibilities,

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<sup>110</sup> United Nations Human Rights Committee General Comment 6 on the right to life, paragraphs 1 and 5.

<sup>111</sup> Lorraine Finlay, 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia' (2011) 33 *Sydney Law Review* 95.

<sup>112</sup> *Ibid*, 108-109,110. In doing so, these views are similar to the narrow 2003 Attorney General's department legal opinion cited above. Finlay further argues that it is doubtful the obligations raised by the Human Rights Committee in *Judge v Canada* extend 'beyond the specific factual scenario confronted in that case, namely the removal of an individual facing the death penalty by deportation or extradition'.

suggesting that the interpretation of those international responsibilities has been shaped by populist domestic political considerations, animated by the nationality of offenders and the egregious nature of the crimes committed against Australian nationals.

IX. OTHER INTERNATIONAL ADJUDICATIVE AVENUES FOR AUSTRALIA TO PURSUE AN ABOLITIONIST POSITION

It should at this moment be confirmed that the death penalty is not prohibited in international law, even though there is a trend towards its abolition.<sup>113</sup> A further (theoretical)<sup>114</sup> measure that would be available to Australia to pursue its abolitionist position would be to invoke the Article 41 *ICCPR* inter-state complaints mechanism, Australia having declared on 23 January 1993 that it 'recognises the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the aforesaid Convention'.<sup>115</sup> The Article 41 procedure may however only be invoked by a state making such a declaration recognising the competence of the Human Rights Committee as against another State which has also made such an Article 41 declaration.<sup>116</sup> A total of 46 states,<sup>117</sup> including Australia, have made Article 41 declarations. Of these 46 states, a total of 31 states have also adopted the *Second Optional Protocol*.<sup>118</sup>

Two points of observation arise here in relation to the scope of application of the Article 41 declaration. Firstly, in relation to the *Second Optional Protocol*, the provisions of the *Second Optional Protocol*

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<sup>113</sup> Article 6 of the *ICCPR* is made a non-derogable right under Article 4 of the *ICCPR*. Articles 6(2) to 6(5) of the *ICCPR* impose restrictions on the imposition of the death sentence. See also Human Rights Committee General Comment 6 on Article 6, the right to life, paragraph 6: 'While it follows from Article 6(2) to (6) that States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the 'most serious crimes...in any event [they] are obliged to restrict the application of the death penalty to 'the most serious crimes'. See also Finlay, above n 111, 111.

<sup>114</sup> In that the *ICCPR* Article 41 Inter-State Complaints mechanism has never invoked by any state.

<sup>115</sup> Declaration recognizing the competence of the Human Rights Committee under article 41 – Australia 28 January 1993.

<sup>116</sup> The inter-state complaints mechanism under the *ICCPR* is set out in Articles 41 to 43 of the *ICCPR* and initially involves the Human Rights Committee, and subsequently 'If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission': Article 42, *ICCPR*.

<sup>117</sup> As at December 2011.

<sup>118</sup> As at December 2011.

apply as additional provisions to the ICCPR.<sup>119</sup> Therefore states having made an Article 41 declaration are amenable as against a state also having made an Article 41 declaration, for obligations under Article 6 of the *ICCPR*, but also for additional obligations if there has been a further adoption of the *Second Optional Protocol*. Secondly, none of the states in which Australians overseas in recent decades have faced the death penalty – Indonesia, Malaysia, Singapore and Vietnam – have made Article 41 declarations. Indeed, only Indonesia<sup>120</sup> and Vietnam<sup>121</sup> of these states are parties to the *ICCPR*. For practical purposes therefore, this avenue is foreclosed as a likely method of pursuing Australia's abolitionist position. In relation to Indonesia's obligations under Article 6 of the *ICCPR* in the case of the remaining two of the Bali Nine, Andrew Chan and Myuran Sukumaran,<sup>122</sup> whose death sentences have been confirmed, there is nothing *prima facie* to suggest that compliance by Indonesia with its international law obligations under Articles 6(2) and 6(4) of the *ICCPR* has not been met.

A further avenue of international review in death penalty cases in recent years is worthy of brief comment. This has been in the form of litigation<sup>123</sup> involving the United States before the International Court of Justice, where an indication of provisional measures has been sought to prevent the carrying out of a death sentence upon a national of a state making that request, with the ICJ's jurisdiction established on the basis of both states being parties to the *Vienna Convention on Consular Relations*<sup>124</sup> and the *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*.<sup>125</sup> In the three relevant cases, the state where the death penalty has ultimately been imposed has allegedly not adhered to rights of

<sup>119</sup> Article 6 of the *Second Optional Protocol*.

<sup>120</sup> Indonesia acceded to the *ICCPR* on 26 February 2006. See <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en)>.

<sup>121</sup> Vietnam acceded to the *ICCPR* on 24 September 1982. See <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en)>.

<sup>122</sup> See the preceding discussion under the heading 'The international context of the legislative changes: differentiating Australians sentenced to death overseas from other external impositions of the death sentence'.

<sup>123</sup> See *Avena and other Mexican Nationals (Mexico v United States of America)* ICJ 31 March 2004 and subsequently, *Request for Interpretation of the Judgment of 31 March 2004 in the case concerning Avena and other Mexican Nationals (Mexico v United States of America)* ICJ 19 January 2009; *Le Grand (Germany v United States)* ICJ 27 June 2001; *Case Concerning the Vienna Convention on Consular Relations (Paraguay v United States of America)* ICJ 9 April 1998 and 11 November 1998.

<sup>124</sup> Opened for signature 24 April 1963, 596 *UNTS* 261 (entered into force 19 March 1967).

<sup>125</sup> Opened for signature 24 April 1963 596 *UNTS* 487 (entered into force 19 March 1967).

consular access accruing to the suspect at the point of arrest and investigation, as required under Article 36 of the *Convention*. However, the four states mentioned previously where Australians have in recent decades been convicted of offences carrying the death penalty, whilst being parties to the *Convention*, are not parties to the *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*, so this aspect of providing a jurisdictional basis for the seeking of provisional measures from the ICJ for a like case involving an Australian national sentenced to death but from the point of arrest denied consular access would not be available.

#### X. AUSTRALIA'S INTERNATIONAL ABOLITIONIST OBLIGATIONS IN THE FEDERAL COURT OF AUSTRALIA

The legislative ambivalence of Australia's abolitionist commitment was further highlighted in the Federal Court decision by Finn J on an application by four members of the Bali Nine.<sup>126</sup> The applicants submitted, *inter alia*, that actions taken by the Australian Federal Police under the powers and functions of s 8 and s 9 of the *Australian Federal Police Act 1979* (Cth), exposing them to the risk of the death penalty in Indonesia, should be read down by the application of other legislative and government obligations and procedures relating to the death penalty.<sup>127</sup> As Finn J observed:

The international treaties and instrument that have been ratified by Australia and on which the applicants rely<sup>128</sup> have not as such been incorporated into Australian law by express enactment. The Abolition Act pre-dated Australia's signing up to the Protocol to the ICCPR. Neither the Abolition Act nor the Protocol addresses action taken by Australian public officers or agencies vis-à-vis foreign law enforcement agencies in connection with offences in their jurisdiction which can there attract the death penalty. Neither expressly or impliedly prohibits taking such action eg the provision of information...Neither expressly betrays an intent in relation to such action. The Abolition Act cannot thus properly be used to read down s.8 of the AFP Act. The Protocol only came into effect for Australian purposes years after the

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<sup>126</sup> *Rush and Others v Commissioner of Police* (2005) 130 FCR 165.

<sup>127</sup> *Ibid.* For commentary on this case, see Paul Harpur 'The Evolving Nature Of the Right To Life: The Impact Of Positive Human Rights Obligations' (2007) 9 *University of Notre Dame Australia Law Review* 95, 98-99 and Case Note - *Rush v Commissioner of Police* (2006) 30(5) *Criminal Law Journal* 314.

<sup>128</sup> The applicants relied on 'Australia's ratification both of the *International Covenant on Civil and Political Rights* on 13 November 1980 (the ICCPR) and, more importantly for present purposes, of the *Second Optional Protocol to the International Covenant on Civil and Political Rights* 2 October 1990, it coming into force on 11 July 1991': (2006) 130 FCR 165, 178.

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enactment of s.8. It provides no contextual aid to the section's interpretation. In any event it imposes no obligation on a contracting party *vis a vis* a non contracting party in respect of the former's dealings with the latter in relation to offences in the latter jurisdiction which can attract the death penalty...It may be possible to discern in Australian legislation, treaties, official guides etc a declared antipathy to the death penalty. That antipathy, though, has not been pursued unqualifiedly in our legislation and guides in relation to dealings with foreign countries in respect of matters which could attract the imposition of the death penalty.<sup>129</sup>

This judgment was handed down prior to the amendments extending the prohibition of enactment of the death penalty to the states, which coincidentally responds to the chronology issue raised by Finn J in between the Abolition Act and the *Second Optional Protocol*. However, the Australian government's National Human Rights Framework, in its rejection both of a federal Human Rights Act domestically implementing *ICCPR* articles<sup>130</sup> and a judicial interpretive clause<sup>131</sup> that, as far as consistent with Parliament's purpose, legislation be interpreted in a manner consistent with listed *ICCPR* derived international human rights, means that the interpretive approach of Finn J in *Rush* would remain valid if the matter was to arise again. That is, absent an express incorporation of the relevant *ICCPR* derived rights in the legislation, there is no new legislative authority authorising that the powers and functions of the *Australian Federal Police Act 1979* (Cth) be judicially interpreted in a manner consistent with *ICCPR* rights in cases involving possible eventual imposition of the death penalty. Again, the executive decision to exclude an interpretive clause in a human rights charter means that the strength of Australia's international abolitionist position is ultimately weakened.

#### XI. EXECUTIVE REFORMS FOR CO-OPERATION AND ASSISTANCE ARISING FROM THE AFP HANDLING OF THE BALI NINE CASE – MOVEMENT TOWARDS AUSTRALIA'S INTERNATIONAL ABOLITIONIST OBLIGATIONS?

In the absence of legislative reform to s 8 (1A) and s (1B) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth), under which no application was made to the Attorney General in *Rush and Others v Commissioner of Police*,<sup>132</sup> the significant reform therefore is the

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<sup>129</sup> (2005) 130 FCR 165, 183-184.

<sup>130</sup> See *National Human Rights Consultation Report*, above n 4, xxxiv –xxxv, Recommendation 18 and Recommendation 24.

<sup>131</sup> *Ibid*, xxxvii, Recommendation 28.

<sup>132</sup> *Rush and Others v Commissioner of Police* (2006) 150 FCR 165, 175: 'It is an agreed fact for the purposes of this application that no request has been made by the Indonesian

subsequent set of AFP guidelines<sup>133</sup> governing police assistance to and cooperation with overseas law enforcement agencies in countries that may apply the death penalty.<sup>134</sup>

The guidelines require senior AFP management to consider a list of prescribed factors before providing assistance in possible death penalty cases.<sup>135</sup> The guidelines require Ministerial approval of assistance in any case in which a person has been arrested, detained, charged with or convicted of an offence which carries the death penalty.<sup>136</sup> Significantly, Ministerial approval has been added as a requirement to the earlier situations of arrest and detention, preceding those of prosecution and conviction.<sup>137</sup> The guidelines are a clear response to criticisms of the AFP handling of the tip off information provided by the parents of Scott Rush to the AFP,<sup>138</sup> and the AFP's failure to stop Rush leaving Australia.<sup>139</sup> Interestingly, by requiring ministerial approval of assistance in possible death penalty cases from an earlier situation, there may be a significant increase in procedural workload issues for the AFP in documenting a case against the criteria and then

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Government to the Australian Government or by the Australian Government to the Indonesian Government in relation to any investigation, arrest or prosecution of the persons now known as the Bali Nine under the provisions of the *Mutual Assistance in Criminal Matters Act 1987* (Cth).’ See (2006) 150 FCR 165, 177-178 for the relevant extracts of ss 8(1)(A) and 8(1)(B) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth). These provisions remain unchanged as at 1 December 2011.

<sup>133</sup> AFP Practical Guide on International Police to Police Assistance in Potential Death Penalty Situations above n 28.

<sup>134</sup> ‘International Law Enforcement Co-Operation’, above n 29.

<sup>135</sup> The relevant factors to be taken into account are the purpose of providing the information, the likelihood of the foreign country authorities in using the information only for that purpose, the reliability of the information, whether the information is of an exculpatory nature, the nationality, age and personal circumstances of the person involved, the seriousness of the suspected criminal activity, the potential risks to the person, and other persons in not providing the information, the degree of risk to the person in providing the information, including the likelihood of death penalty being imposed, and Australia’s interest in promoting and securing cooperation from overseas agencies in combating crime: ‘New AFP Guidelines released’, above n 29.

<sup>136</sup> ‘International Law Enforcement Cooperation’ above n 29; ‘New AFP Guidelines released’ above n 29.

<sup>137</sup> Contrast s 8 (1A) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) which mandates refusal of assistance according to the criteria of ‘relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country’ (italics added). See also Finlay, above n 111, 107, who relies on the earlier September 2006 guidelines covering police to police assistance, which provided ‘that prior to a person being charged with an offence that attracts the death penalty [p]olice-to-police assistance can be provided, without reference to the Attorney General or the Minister for Home Affairs, until charges are laid for the offence’ (emphasis added).

<sup>138</sup> Alford, above n 83.

<sup>139</sup> *Ibid.* ‘Keelty’s belated Bali lifeline’ *The Australian* 7 May 2010.

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seeking Ministerial approval. The practical implications and problems of increasing compliance obligations in police to police co-operation have been canvassed elsewhere – these include the sheer volume of information exchanged, adverse impacts upon co-operation aimed at preventing and prosecuting the most serious offences, significantly restricting counter-terrorism co-operation with both Indonesia and the United States and overseas police authorities not being authorised to provide an assurance that the death penalty will not be imposed before information can be exchanged.<sup>140</sup> The 2009 guidelines obviously address these issues impacting upon police to police co-operation by the application of the criteria as a senior AFP managerial function, in turn subject to Ministerial decision at the point where a custodial situation emerges. A political judgment has been made therefore, that despite the problems canvassed, tightened guidelines are practical and workable.

However, the 2009 guidelines remain sufficiently adaptable and porous as to continue to undermine Australia's international abolitionist position regarding the death penalty and the exemplary message in international circles of the extension of the *Death Penalty Abolition Act 1973* (Cth) to the states. It can be argued that the guidelines necessarily have to be sufficiently ambivalent to achieve the stated government claim that they 'represent a balanced and responsible approach that provides greater clarity and accountability, while maintaining our commitment to combating transnational crime'.<sup>141</sup> The 2009 guidelines again highlight the centrality and importance of executive policy determination and executive discretion in determining the scope and character of Australia's abolitionist credentials. In particular, the listed factors guiding Ministerial approval of co-operation and assistance from an earlier point of investigatory custody in possible death penalty cases leave wide open the application of the differentiated characteristics in Australia's abolitionist position, which were highlighted earlier in this article.<sup>142</sup>

This less than optimal support for Australia's international abolitionist position was highlighted in correspondence from the Law Council of

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<sup>140</sup> Finlay, above n 111, 115-116.

<sup>141</sup> 'International Law Enforcement Cooperation' above n 29.

<sup>142</sup> See the discussion under the above heading 'The international context of the legislative changes: differentiating Australians sentenced to death overseas from other external impositions of the death penalty'.

Australia to the Attorney General and the Minister for Home Affairs,<sup>143</sup> stating that

...unfortunately it must also be acknowledged that Australia's leadership and credibility in this area has been undermined in recent years by an inconsistent and equivocal approach to the provision of agency to agency assistance in death penalty cases. In its current form, the new Guide perpetuates rather than remedies this anomaly.<sup>144</sup>

Several major criticisms of the guidelines were raised by the Law Council – the lack of a receipt of an undertaking not to impose the death penalty as a precondition to sharing information, the presence of a balancing requirement regarding information provision instead of a tougher principle that information and assistance should only be provided in death penalty cases in exceptional circumstances, the inclusion of criteria such as nationality and circumstances of the suspect as being incompatible with in principle and absolute opposition to the death penalty and so inviting potential criticisms of inconsistency and racism undermining Australia's legitimacy as an advocate for abolition, and the expedient criterion of Australia's interest in promoting and securing cooperation from overseas agencies in combating crime in deciding whether to provide information and assistance.<sup>145</sup>

The criticisms of the Law Council are valid in that they highlight in principle and leave open for practical interpretation, factors of expedience and opportunity as relevant in the exercise of various Ministerial discretions in assistance and co-operation in situations attracting the death penalty. The most likely situations where these factors will play out are Australian nationals abroad being investigated, charged, tried and convicted for offences carrying the death penalty within that jurisdiction. It is significant also that rather than amending relevant legislation – both the *Mutual Assistance in Criminal Matters Act 1987* (Cth) and the *Australian Federal Police Act 1979* (Cth) – to incorporate these principles, guidelines have been relied upon – of itself, a statement of qualified commitment to consistency in Australia's international abolitionist position. Again, this approach highlights the centrality of executive policy, determination and executive discretion in shaping a part of the substantive character of

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<sup>143</sup> Law Council Of Australia Letter to Attorney General and to Minister for Home Affairs 'AFP Practical Guide on International Police to Police Assistance In Potential Death Penalty Situations' 29 January 2010.

<sup>144</sup> *Ibid.*, 2.

<sup>145</sup> *Ibid.*



Australia's abolitionist position. In addition, the rejection of a federal Human Rights Act as part of Australia's Human Rights Framework again removes the influence of a judicial interpretive provision requiring that federal legislation – under which the guidelines are ultimately issued – be interpreted in a way that is compatible with the right to life that would be included in a Human Rights Act and as consistent with parliament's purpose in enacting the legislation.

XII. PARLIAMENTARY DEBATE ACKNOWLEDGING THE INTERACTION OF NATIONAL AND INTERNATIONAL ISSUES REGARDING AUSTRALIA'S ABOLITIONIST OBLIGATIONS

The 2010 parliamentary debates preceding passage of the Act (and after the release of the AFP guidelines in December 2009) clearly acknowledged some issues about advocacy against death penalty application and advocacy of death penalty abolition. In doing so, the link between domestic legislative implementation and broader international policy objective was highlighted. These matters may be indicative of some movement towards greater consistency in the interpretation of obligations under the *Second Optional Protocol* and Article 6 of the *ICCPR* in the domestic and international spheres – in other words, a more consistent and coherent appraisal of Australia's abolitionist policy in the international arena, or at least a heightened appreciation of weaknesses in Australia's abolitionist position.

One emphasis from the debates was the fulfillment of Australia's international obligations, including that of taking 'all necessary measures to abolish the death penalty within its jurisdiction'<sup>146</sup> obviously including state jurisdictions, with the *Death Penalty Abolition Act 1973* (Cth) previously applying only to the laws of the Commonwealth and the Territories. This is a point canvassed in the second reading debates:

The ICCPR only permits the death penalty for the 'most serious crimes'. The Second Optional Protocol goes further and requires Australia to take all necessary measures to abolish the death penalty within its jurisdiction and to ensure that no one within its jurisdiction is subject to the death penalty.<sup>147</sup>

<sup>146</sup> *Second Optional Protocol* to the ICCPR Article 1(2).

<sup>147</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives 19 November 2009, 4 (Mr McClelland) and Commonwealth, *Parliamentary Debates* Senate 24 February 2010, 82 (Senator Wong). See also Commonwealth, *Parliamentary Debates* Senate 24 February 2010, 1084 (Senator Wong) and Commonwealth *Parliamentary Debates* House of Representatives 22 February 2010, 1358 (Mr McClelland): '...the bill contains important

A variation in debate upon this fulfillment of Australia's international obligations is in the demonstrated opportunity, through implementing the *Second Optional Protocol*, of re-engagement with the United Nations human rights system,<sup>148</sup> as an example of developments more generally canvassed elsewhere.<sup>149</sup>

A second aspect that emerges in the debates is the exemplary role that the legislation represents for Australia as advocating the world wide abolition of the death penalty,<sup>150</sup> including issues about death penalty sentences for Australians convicted abroad and the diplomatic representations made on their behalf. In seeking an international leadership role in advocating death penalty abolition, the debates affirm a compelling aspect that Australia's domestic legislative arrangements are *consistent* with the substance of its international human rights stance and its advocacy of death penalty abolition, as well as its diplomatic representations on behalf of Australians convicted abroad.<sup>151</sup> Anything less than exemplary implementation of the *Second Optional Protocol* in Australian domestic legislation and in its

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measures which demonstrate the government's ongoing commitment to better recognising Australia's international human rights obligations'.

<sup>148</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives 19 November 2009, 4 (Mr McClelland) ...the spirit of engagement with international human rights mechanisms' and Commonwealth, *Parliamentary Debates* House of Representatives 11 February 2010, 1195, (Ms Parke) 'Australia has taken significant steps under this Labor government to re-engage with the international community'.

<sup>149</sup> McClelland, 'Coming in from the Cold' above n 11; 'Invitation to United Nations Human Rights Experts'; McClelland Human Rights under a Rudd Labor Government above n 11.

<sup>150</sup> The Attorney General noted 'Such a comprehensive rejection of capital punishment will also demonstrate Australia's commitment to the worldwide abolitionist movement and complement Australia's international lobbying efforts against the death penalty': Commonwealth, *Parliamentary Debates*, House of Representatives 19 November 2009, 5. (Mr McClelland).

<sup>151</sup> As the Attorney General observed, 'These domestic amendments complement the measures Australia is taking internationally to promote universal abolition of the death penalty. Through our overseas missions, the government is currently making bilateral representations against the death penalty to all countries that may carry out executions or maintain capital punishment as part of their law': Commonwealth, *Parliamentary Debates*, House of Representatives 22 February 2010, 30 and Commonwealth, *Parliamentary Debates*, House of Representatives 22 February 2010, 52 (Mr McClelland) For other contributions on the issue of consistency as strengthening the Australian abolitionist argument generally and in particular circumstances, see Commonwealth, *Parliamentary Debates* House of Representatives 11 February 2010, 1192-1193 (Mr Hayes) and Commonwealth, *Parliamentary Debates* House of Representatives 22 February 2010, 42 (Mr Dreyfus).

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diplomatic practice weakens the practical and moral conviction of the Australian abolitionist position<sup>152</sup> and the chances of success of both.

A third aspect emerging in the debates is the perceived function of the Act responding to the potential re-imposition of the death penalty in international responses to terrorism, including strengthening the democratic nature and values of Australian society being protected,<sup>153</sup> as well as redressing in some way past death penalty related counter-terrorism excesses – both overseas and domestic – which affronted human rights values.<sup>154</sup>

### XIII. CONCLUSION

The extension of the prohibition on re-introduction of the death penalty to state laws through the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) is a welcome and timely addition to the domestic implementation of Australia's international human rights obligations. It implements, through a prospective s 109 *Commonwealth Constitution* inconsistency of the Commonwealth law against the state law, a barrier against a State reintroduction of the death penalty. That is an important assurance in the context of recurrent state based and federally referenced law and order debates calling for increasingly severe sentences for offenders, particularly in the ongoing response to international terrorism and possible application of state criminal laws. State jurisdictions were previously not included for constitutional reasons in the 1973 legislation prior to Australia's accession to the *Second Optional Protocol* in 1990. That legislative extension to the States implements, after a very long interval, Australia's federal international convention obligations under Article 6 of the *ICCPR* and the *Second Optional Protocol*. It does so in a manner consistent with the contemporary legislative, rather than judicial orientation, of Australia's Human Rights Framework.

The legislative changes also contribute, as one of a varied range of initiatives, to Australia's international credentials as an abolitionist state. Some greater conformity with Australia's international

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<sup>152</sup> Cynthia Banham 'Federal law aims to stop death penalty' *Sydney Morning Herald* 14 March 2009 and 'Australia wants to end death penalty' *Sydney Morning Herald* 9 November 2008.

<sup>153</sup> Commonwealth, *Parliamentary Debates* House of Representatives 22 February 2010, 48 (Ms Rea).

<sup>154</sup> Commonwealth, *Parliamentary Debates* House of Representatives 22 February 2010, 40 (Dr Kelly) and Commonwealth, *Parliamentary Debates* House of Representatives 22 February 2010, 44 (Mr Murphy).

abolitionist obligations has occurred in the time of the Rudd and Gillard governments in the present extension of the abolition provision to the states, inclusion of earlier arrest and investigation criteria in the 2009 AFP Guidelines on international police to police assistance in potential death penalty situations, and in indications from the Foreign Minister and the Prime Minister that representations seeking clemency in relation to the two convicted Bali Nine Australians facing the death penalty will be strongly pursued. There is also greater evidence of the awareness by some parliamentarians from the debates of inconsistencies in Australian death penalty practice and policy as undermining Australia's abolitionist position, in the twin advocacies of persuading retentionist states to abolish the death penalty and in seeking clemency for Australians convicted abroad for death penalty offences.

However, this reform, and the executive responses to the post death sentence circumstances of the Bali bombers and the Bali Nine, raises continuing issues concerning Australia's substantive commitment to the international abolitionist principle. The strong executive policy determination and responses regarding death penalty issues by both the Howard government and by the Rudd/Gillard governments (the latter responding within the further complicating framework of a renewed commitment to UN human rights institutions and instruments) have been shaped and compromised on occasions by international co-operative realities and domestic political perceptions. Whilst some consciousness exists of such inconsistencies and contradictions, the detrimental effect upon Australia's external credibility is not presently perceived to be of sufficient domestic political importance to warrant more concerted efforts to realise closer conformity of all aspects of Australian policy and practice with its international legal obligations.

One possible further avenue for development is an Australian initiative in leading and developing an international coalition in Asia against the death penalty.<sup>155</sup> Such an initiative could draw its membership from those regional states which have ratified or acceded to the *Second Optional Protocol*<sup>156</sup> and those which have abolished the death penalty

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<sup>155</sup> See Donald Rothwell 'Australia and the Death Penalty Forum' *Centre for International and Public Law Newsletter* September 2007, 4-5.

<sup>156</sup> These states being Australia (2 October 1990), Nepal (4 March 1998), New Zealand (22 February 1990), The Philippines (20 November 2007) and Timor Leste (18 September 2003).

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without such ratification.<sup>157</sup> From an Australian perspective, it would have the advantage of broadening and localising support and advocacy for the abolitionist position within Asian states, whilst strengthening efforts and credibility in the region where Australian offenders abroad are most likely to face death sentences for serious offences.

The credibility gap and its impact upon measures seeking to avert executions may be brought into sharper relief by the forthcoming success or failure of Australian government representations for clemency to the President of Indonesia in the Indonesian Supreme Court affirmed death sentences by firing squad for two of the convicted Bali Nine, Andrew Chan and Myuran Sukumuran. In practical terms, either consequence will offer a political reflective moment to focus in a more comprehensive and cogent manner in realising Australia's international abolitionist obligations under Article 6 of the *ICCPR* and the *Second Optional Protocol*, of which the extended legislative prohibition to the States under the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 1973* (Cth) is merely a part.

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<sup>157</sup> Cambodia and Bhutan: see Amnesty International document 'Abolitionist And Retentionist Countries' < <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>>. Under the heading '1. Abolitionist for all crimes'.

# NURTURING MULTIPLE INTELLIGENCES THROUGH CLINICAL LEGAL EDUCATION

ROSS HYAMS\*

## ABSTRACT

Legal pedagogy needs to take into account many of the theories of intelligence and creativity which have been proposed by educators in the last few decades, such as Gardner's theory of multiple intelligences, Wechsler and Thorndike's concepts of emotional intelligence and Schank's theories of narrative intelligence. Teachers of clinical legal education, because of its different pedagogical emphasis to traditional classroom learning, have begun to show increasing interest in nurturing and valuing displays of intelligence and creativity which are outside of the traditionally accepted methods of demonstrating intelligence in legal education.

This paper explores the concept of multiple intelligences within legal education. It proceeds from the premise that clinical legal education has the ability to apply its teaching methodologies in nurturing creativity, problem-solving and other skills which are not necessarily valued in mainstream legal education. It suggests ways in which legal educators can recognise, embrace and nurture multiple intelligences in law students. Finally, it makes suggestions for methods of law teaching which can better utilise and develop students' various forms of intelligence.

## I. INTRODUCTION

Current legal pedagogy fails to take into account many of the theories of intelligence and creativity which have been proposed by educators in the last few decades. For the most part, legal education ignores Gardner's theory of multiple intelligences,<sup>1</sup> concepts of emotional intelligence pioneered by Wechsler and Thorndike<sup>2</sup> and narrative intelligence first proposed in the 1970s and 1980s by Schank and his

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<sup>1</sup> Howard Gardner, *Frames of Mind: The Theory of Multiple Intelligences* (Basic Books, 1983).

<sup>2</sup> Paul Cain, 'A First Step Toward Introducing an Emotional Intelligence into the Law School Curriculum: The Emotional Intelligence and Clinic Student Class' (2003 - 2004) 14 *Legal Education Review* 1, 2.

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research group at the Yale.<sup>3</sup> In recent years, however, teachers of clinical legal education, because of its different pedagogical emphasis to traditional classroom learning, have begun to show increasing interest in nurturing and valuing displays of intelligence and creativity which are outside of the traditionally accepted methods of demonstrating intelligence in legal education, such as logic and analytical abilities.

Clinical pedagogy can be differentiated from mainstream legal learning in recognising, valuing and fostering multiple intelligences in its clinical students. Encouragement of students to recognise their own use of multiple intelligences and develop insight into the way they approach the resolution of legal disputes can lead to a lifelong change in the way students approach their lawyering. Clinical legal education has a unique opportunity to develop insightful, creative and inventive graduates through promoting and nurturing multiple intelligences in students.

This paper will explore the concept of multiple and emotional intelligences within legal education. It proceeds from the premise that clinical legal education has the ability to apply its teaching methodologies in nurturing creativity, problem-solving and other skills which are not necessarily valued in mainstream legal education. However, it is these skills that often distinguish excellent lawyers from the mediocre. It suggests ways in which legal educators can recognise, embrace and nurture multiple intelligences in law students. Finally, it will make suggestions for methods of law teaching which can better utilise and develop students' various forms of intelligence.

## II. WHAT ARE MULTIPLE INTELLIGENCES?

Until 1983, intelligence testing was dominated by the standard IQ test. In that year, Howard Gardner published his seminal work - *Frames Of Mind: The Theory of Multiple Intelligences*.<sup>4</sup> Gardner has expanded his theories since the publication of this work to include further intelligences<sup>5</sup> and continues to refine his theories.<sup>6</sup> Gardner posits that rather than one single intelligence which can be measured by IQ

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<sup>3</sup> Michael Mateas and Phoebe Sengers, 'Narrative Intelligence' (Fall Symposium, American Association for Artificial Intelligence, 1999).

<sup>4</sup> Gardner, above n 1.

<sup>5</sup> Howard Gardner, *Intelligence Reframed: Multiple Intelligences for the 21st Century* (Basic Books, 1999).

<sup>6</sup> Howard Gardner, *Multiple Intelligences: New Horizons in Theory and Practice* (Basic Books, 1993).

testing, it is possible to identify up to 10 separate forms of intelligence in individuals. He identifies the traditional intelligence which is tested by IQ measurement as being "logical -- mathematical intelligence". This is the intelligence that a majority of people will be most familiar with and relate to problem analysis and mathematical operations. The other intelligences that Gardner proposes are as follows:<sup>7</sup>

- linguistic (ability with both the written and spoken word);
- bodily kinesthetic (ability with hands and using body as a form of communication);
- spatial (ability to accurately perceive the world and utilise those perceptions constructively);
- musical (ability to appreciate and utilise music constructively);
- naturalist (ability to work with natural environment);
- interpersonal (ability to be sensitive to motivations and feelings of others);
- intrapersonal (ability to form self-knowledge and self insight );
- spiritual (ability to perceive and appreciate issues of spirituality);<sup>8</sup> and
- existential (ability to contemplate issues of existence and infinity).<sup>9</sup>

Of course, the immediate difficulty with Gardner's theory is it can neither be proved nor disproved. Gardner himself has not attempted to defend his theory on the basis of how these intelligences can be tested - indeed, part of the reason for developing the theory of multiple intelligences was to undermine notions of intelligence testing.<sup>10</sup> Thus, by its very nature, the theory of multiple intelligences cannot be empirically demonstrated to be sound. However, it provides a different and useful paradigm for investigating not only the way that students learn, but how they individually perceive that they learn. Students may never have had come into contact with the concept of multiple intelligences, but most will be able to identify the areas where they feel learning comes easy to them and those that do not. Gardner's theory can assist educators to help students develop insight into their own learning capabilities and preferences. It also potentially provides insights into demonstrations of various strengths and weaknesses amongst a student cohort at a group level. It exhorts educators to recognise that not all students learn the same thing in the same way

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<sup>7</sup> Gardner, above n 1.

<sup>8</sup> Gardner, above n 5.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.



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and opens up a vast array of opportunities in the way that knowledge can be presented to students and skills can be developed by them.

### III. WHAT IS EMOTIONAL INTELLIGENCE?

The ability to recognise and empathise with others feelings and also to show insight into one's own internal feelings and emotions are the skills which make up the concept of emotional intelligence.<sup>11</sup> Emotional intelligence is certainly not a new concept and can be dated back to the work of Weschler and Thorndike, beginning in the 1930s.<sup>12</sup> However, the concept has received wider public attention since the publication of Goleman's 1997 book *Emotional Intelligence*.<sup>13</sup> Montgomery points out that emotional intelligence, unlike IQ, can be both taught and learned.<sup>14</sup> Accordingly, if we that accept that emotional intelligence is not just an innate quality, legal educators must find creative ways to nurture and encourage this essential skill.

There is no doubt that the ability to develop useful insights into a client's state of mind and motivations is enhanced by a well honed empathetic awareness of other people.<sup>15</sup> A lawyer who is unable to develop a rapport with clients is at a severe disadvantage. Relationship building with clients can be seen as an essential prerequisite in professional behaviour.<sup>16</sup> Law school graduates who have not developed the ability to empathise with others or to recognise their own emotional reactions in their interactions with clients and other professionals will find themselves struggling to survive in a profession which requires strong communication and relationship skills. Considering that so much of lawyering involves dealing with the breakdown of relationships (whether it be in the commercial sphere, family law, or indeed, sometimes even in criminal law) and also relies heavily on establishing strong professional lawyer/client relationships, law schools are failing in their responsibilities to teach students in a relational manner. Parker notes that this failure can lead to a condition which he refers to as 'alexithymia', in which students demonstrate a

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<sup>11</sup> Michael King et al, *Non-adversarial Justice* (Federation Press, 2009) 243.

<sup>12</sup> Cain, above n 2, 2.

<sup>13</sup> Daniel Goleman, *Emotional Intelligence* (Bantam Books, 1997).

<sup>14</sup> John E Montgomery, 'Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students' (2008) 39 *University of Toledo Law Review* 323, 326.

<sup>15</sup> *Ibid* 327.

<sup>16</sup> *Ibid* 336.

reduced capacity for empathy and difficulties in both identifying and describing feelings to others.<sup>17</sup>

Cain demonstrates that it is possible to create exercises which focus upon and teach concepts of emotional intelligence in a classroom environment.<sup>18</sup> In the University of Denver College clinical internship program, he employed a teaching methodology which consisted of ten weeks of hour classes in which the primary goal was to introduce clinical student to the concept of emotional intelligence. In addition to classes focusing on a discussion of the relevant literature, simulated client interviews were conducted and videotaped in order to identify and discuss the emotional content.<sup>19</sup> He also involved experts in both management and psychology to assist in the teaching -- thus emphasising the multidisciplinary nature of emotional intelligence and of the lawyering role. Cain notes that some students express the opinion that emotional intelligence is something that you either have or don't have and thus cannot necessarily be taught in a classroom.<sup>20</sup> Others find the experience 'too touchy-feely'.<sup>21</sup> However, Cain found students mostly engaged and interested in the topic.<sup>22</sup> Cain believes attempting to teach methods of emotional intelligence is a worthwhile exercise and supports this claim by the use of Cooper and Sawaf's 'EQ Map Questionnaire'<sup>23</sup> which maps students' emotional awareness of themselves and others. However, as Cain points out<sup>24</sup> it remains to be seen whether there is a useful way of evaluating what the students did or didn't learn in the long term. It would be useful to administer this test at first year orientation and then again after the students have completed the EQ classes in order to discover whether such classroom exercises, as developed by Cain, may have some lasting impact on student learning.

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<sup>17</sup> JDA Parker et al, 'Alexithymia and Academic Success: Examining the Transition from High School to University' (2005) 38 *Personality and Individual Differences* 1257, 1257-1258.

<sup>18</sup> Cain, above n 2.

<sup>19</sup> Ibid 9.

<sup>20</sup> Ibid 12.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid 13.

<sup>23</sup> Robert K Cooper and Ayman Sawaf, *Executive EQ: Emotional Intelligence in Leadership and Organisations* (Berkeley Publishing Group, 1998).

<sup>24</sup> Cain, above n 2, 14.

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#### IV. WHAT IS NARRATIVE INTELLIGENCE?

Originally conceived by Blair and Meyer as the human ability to organise experience into narrative form,<sup>25</sup> Burton more specifically describes narrative intelligence, in the context of legal education, as an ability to solve the ebb and flow of a legal problem.<sup>26</sup> Such an ability transcends the logical -- mathematical intelligence described by Gardner<sup>27</sup> and requires the skill of being able to problem solve with a set of fluid facts and circumstances. Examinations in legal education tend to provide students with a static set of facts -- this is very unlike real practice experience where the facts of a legal problem are rarely concrete and tend to evolve over time as the matter moves forward towards an ultimate resolution.<sup>28</sup> Frank points out that lawyers use narratives every day of their working lives but few are mindful of the basic principles inherent in understanding and working with these narratives.<sup>29</sup>

The skill of working with clients' 'stories' may certainly evolve over time and experience but it is not an ability which is necessary inherent in law graduates. Fundamentally, legal educators need to understand the difference between static facts and the ongoing flow of the narrative and be able to nurture an understanding of this in their students. Students can and should be taught the ability to understand a sequence of facts in their social and legal context -- as Mertz points out, teaching students to only be pragmatic and analytical in their understanding of factual situations leaves out essential aspects of the narrative dealing with plot, character and content.<sup>30</sup> It really only provide students with half the story, stunting their ability to develop skills in understanding motivation, temperament and reasons for human behaviour. Lawyers must be able to understand and work with an ever-changing array of facts and also must be flexible in their problem-solving abilities when those facts change as the matter progresses. Current legal education does little to encourage and teach this flexibility. By teaching legal principles based on appeal court cases, legal educators are merely providing their students with a snapshot of

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<sup>25</sup> Mateas and Sengers, above n 3.

<sup>26</sup> Angela Olivia Burton, 'Cultivating Ethical, Socially Responsible Lawyer Judgement: Introducing The Multiple Lawyering Intelligences Into The Clinical Setting' (2004) 11 *Clinical Law Review* 15, 24.

<sup>27</sup> Gardner, above n 4.

<sup>28</sup> King et al, above n 11, 245.

<sup>29</sup> Sally Frank, 'Eve was Right to Eat the "Apple": The Importance of Narrative in the Art of Lawyering' (1996) 8 *Yale Journal of Law and Feminism* 79, 81.

<sup>30</sup> Elizabeth Mertz, 'Teaching Lawyers the Language of the Law: Legal and Anthropological Translations' (2000) 34 *John Marshall Law Review* 91, 102.

a factual situation, leaving out the entire process by which the conflict which led to those legal principles being enunciated played out in the lawyer's office and inferior courts. Mertz notes that this de-contextualisation is further exacerbated by the way that law exams often provide fact situations with emotional or narrative 'red herrings' which the students are meant to filter out as irrelevant to an analytical approach to problem-solving<sup>31</sup>. This confirms the erroneous message that social, emotional or narrative contexts are immaterial to the appropriate investigative approach to legal problem solving.<sup>32</sup> The ability to work with narratives is an essential aspect of a lawyer's skill set and yet is largely ignored in legal education.

#### V. HOW DO WE NURTURE THESE VARIOUS INTELLIGENCES?

In 2006 James conducted empirical research amongst graduates of the school of law at the University of Newcastle relating to causes of stress and dissatisfaction amongst lawyers. One of the aims of the study was to identify correlations between the emotional intelligence of respondents and their workplace satisfaction.<sup>33</sup> It was found that appropriate training in emotional intelligence may help law graduates cope with the stressful situations of practice, improve their communication skills and assist them in deciding which type of legal practices is appropriate for them.<sup>34</sup> The research also indicated relatively strong support for clinical legal education as preparation for legal practice.<sup>35</sup> Over 40 years ago, Watson suggested that law teachers used problem-based exercises in their teaching in order to attempt to replicate some of emotional issues found in legal practice.<sup>36</sup> This was an attempt to nurture insight amongst students about the way lawyer/client communication takes place - both verbal and non-verbal. Watson was attempting to develop interpersonal skills in the classroom<sup>37</sup> which was pioneering work in the 1960s.

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<sup>31</sup> Ibid 104.

<sup>32</sup> Ibid.

<sup>33</sup> Colin James, 'Lawyer Dissatisfaction, Emotional Intelligence and Clinical Legal Education' (2008) 18 *Legal Education Review* 123.

<sup>34</sup> Ibid 135.

<sup>35</sup> Ibid 136.

<sup>36</sup> Andrew S Watson, 'The Quest for Professional Competence: Psychological Aspects of Legal Education' (1968) 37 *University of Cincinnati Law Review* 91, 150.

<sup>37</sup> Marjorie A Silver, 'Emotional Intelligence and Legal Education' (1999) 5 *Psychology, Public Policy, and Law* 1173, 1196.

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In order to engage all the intelligences that Gardner posits, Dauphinais<sup>38</sup> suggest various opportunities for students to demonstrate their comprehension of legal doctrine by diverse means – for example, students could be offered a number of ways of completing legal assignments, such as oral presentations for those with more developed linguistic intelligence<sup>39</sup> and activities requiring drawing skills (such as creating flowcharts) for students who excel in areas of spatial or visual intelligence.<sup>40</sup> These suggestions are certainly more creative and engaging than the traditional examination commencing ‘A and B had a joint interest in the land known as Whiteacre’. Such written problem based exams have come to dominate assessment in University legal education, but they are limited to requiring students to develop only logical – mathematical intelligence.

Silver takes up some of Watson's ideas and adds suggestions which move away from the restrictions of the lecture theatre and classroom. She proposes a lawyering course which would integrate legal doctrine with problem-based learning, legal skills and values.<sup>41</sup> She offers the suggestions of an integration of classroom studies with experiential learning taking place in the third year of studies. She describes a system of ‘rotations’ in which students would spend substantial time in either an in-house clinic or an externship.<sup>42</sup> In this way, the lessons learnt in the classroom relating to client interactions and the nurturing of emotional, narrative and multiple intelligences would be supported by real-life practice in a supervised clinical environment. As she explains:

The thrust of the entire proposed curriculum then will be to integrate the theory, the doctrine, and the practice of law with the goal of having the students’ experiences in law school and in their placements reinforce one another.<sup>43</sup>

Clinical legal education can be the mode of implementation of Silver’s integration model, as discussed in the next section.

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<sup>38</sup> Kristen A Dauphinais, ‘Valuing and Nurturing Multiple Intelligences in Legal Education: A Paradigm Shift’ (2005) 11 (1) *Washington & Lee Race and Ethnic Ancestry Law Journal* 1.

<sup>39</sup> *Ibid* 33.

<sup>40</sup> *Ibid*.

<sup>41</sup> Silver, above n 37, 1198.

<sup>42</sup> *Ibid* 1199.

<sup>43</sup> *Ibid*.

## VI. A CLINICAL APPROACH TO INTEGRATION OF MULTIPLE AND EMOTIONAL INTELLIGENCE INTO MAINSTREAM CURRICULUM

It is part of the nature of most legal clinics that a fairly broad and holistic view is taken of their approach to client care.<sup>44</sup> This client centred focus is the result of the way that legal clinics developed, with a vision of justice which has traditionally been focused on individual rights and on law reform in an attempt to protect individuals in their (often reluctant) interactions with the legal system. Given the nature of legal clinics, which usually cater for people in lower socio-economic conditions, clients often attend their appointments with a strong emotional overlay. They are often angry, nervous, confused or upset -- or a mixture of these emotions. Such clients are exceptionally challenging for students who have never been exposed to situations requiring empathy and understanding of human behaviour and motivations. Even the most well-intentioned students find themselves without the necessary tools to deal with clients demonstrating strong emotions. It is quite possible that a number of students entered law school with some ability to display emotional intelligence, but that the case dialogue method of legal education, which focuses so strongly on analytical thinking, has discouraged its development.<sup>45</sup>

The idea of integrating clinical methodology with mainstream teaching is certainly not a new one. Clinical methodology was first described by Gary Bellow in 1973.<sup>46</sup> In that seminal work, he proposed that there are three fundamental aspects of clinical methodology:

- Role performance by students;
- Pedagogical focus on student experiences; and
- Motivational tensions arising from the interaction between performance and pedagogy.<sup>47</sup>

In 1985, Feldman<sup>48</sup> investigated these concepts further and argued that clinical education can be integrated with the traditional curriculum in order to move clinical education from the margin to the mainstream of legal education. He provided a comprehensive plan for accomplishing this task. Such integration has a number of goals which includes

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<sup>44</sup> King et al, above n 11, 248.

<sup>45</sup> Parker, above n 17, 1258.

<sup>46</sup> Bellow G, 'On Teaching the Teachers: Some Preliminary Reflections on Clinical Legal Education as Methodology' (1973) *Council on Legal Education for Professional Responsibility, Clinical Education for the Law Student*, 374.

<sup>47</sup> *Ibid* 379-394.

<sup>48</sup> Marc Feldman, 'On the Margins of Legal Education' (1985) 13 *New York University Review of Law and Social Change* 607.

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exposing law students to law in operation, exploring the impact of roles, providing skills instruction, increasing students' ability to cope with professional pressures and allowing students to make more informed career choices. In emphasising both client focus and the development of an enhanced ability to self-reflect, there is ample evidence from clinical legal education literature that various forms of clinical methodology can be introduced into classroom teaching with relatively little demand on resources.<sup>49</sup>

In large law schools, it may not be possible to offer all students an opportunity to participate in clinical legal education. Accordingly, one approach would be to integrate skills focused exercises into all law school units through a range of simulated exercises, such as those described by Silver<sup>50</sup>, Cain<sup>51</sup> and Watson<sup>52</sup> above, aimed to develop insight into the various forms of intelligence. Montgomery makes a variety of suggestions as to how emotional intelligence can be incorporated into classroom activities in order to develop professionalism in law students.<sup>53</sup> For example, he teaches a family law course, in which a self-reporting instrument is used in a negotiation exercise in order to emphasise the need for students to understand their own and their client's emotions.<sup>54</sup> He is also creating a separate course on professionalism in which emotional intelligence competencies will form an integral part.<sup>55</sup> Gerarda Brown<sup>56</sup> suggests various classroom activities designed to promote creativity and enhance the multiple intelligences required for problem-solving, including De Bono's 'Six Hats' Technique<sup>57</sup> (in which students symbolically wear different coloured hats which focus on different aspects of a problem – for example, wearing a red hat requires the student to focus on the emotional aspect of a problem) and the 'Atlas of

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<sup>49</sup> See, for example, Ross Hyams, 'The Teaching of Skills: Rebuilding, Not Just Tinkering Around the Edges' (1995) 13(1) *Journal of Professional Legal Education* 63; Lyndal Taylor, 'Skills Skills - Kind Inclusion and Learning in Law School' (2001) 3 *UTS Law Review* 85; MA Noone and JA Dickson, 'Teaching Towards A New Professionalism: Challenging Law Student To Become Ethical Lawyers' (2001) 4 *Legal Ethics* 127; Jeff Giddings, 'New Directions in ADR and Clinical Legal Education: Why No Clinic is an Island: The Merits and Challenges of Integrating Clinical Insights Across the Law Curriculum' (2010) 34 *Washington University Journal of Law and Policy* 261.

<sup>50</sup> Silver, above n 37.

<sup>51</sup> Cain, above n 2.

<sup>52</sup> Watson, above n 36.

<sup>53</sup> Montgomery, above n 14, 323.

<sup>54</sup> *Ibid* 350.

<sup>55</sup> *Ibid* 351.

<sup>56</sup> Jennifer Gerarda Brown, 'Symposium: Creativity and Problem-Solving' (2003-2004) 87 *Marquette Law Review* 697.

<sup>57</sup> *Ibid* 702.

Approaches'<sup>58</sup> method, in which students are required to problem solve by adopting the perspectives of various other disciplines – asking themselves 'How would a psychologist/doctor/journalist view this?'<sup>59</sup>

Simulated exercises can be complemented by a range of work integrated learning activities including site visits, workplace learning placements, *pro bono* internships and exchanges into other law school clinical programs. In order for these experiences to be more than simple observation or action without reflection, students could be required to complete a reflective journal which documents their experiences and encourages them to reflect, during these activities not simply upon their learning of legal or practical content, but their reactions and insights to the lawyering and professional roles they are expected to play in the workforce. The writing of reflective journals is a widely used tool of clinical pedagogy and has strong support in higher education pedagogical literature.<sup>60</sup>

This approach has the advantage of energizing often dry areas of law with relevant skills which draw upon narrative and emotional intelligence, so that both substantive content and practical implementation develop together and are seen by students to be necessary to each other. In taking a 'vertical curriculum' approach, which requires students to take certain units sequentially, such skills and self-reflection sophistication could also be incrementally developed with each year, as students' understanding and awareness gradually deepens.

If a law school wishes to truly nurture student insight into the multiple and emotional intelligences, a coordinated approach of simulation with real life work placement has to be well developed. It cannot be a process of simply sending students out to various placements and hoping that some lessons may be learnt from students' observation of the workplace. A system and philosophy of work integrated learning needs to be developed with a sound pedagogical basis. There are various terms which are used and many ways to define 'work

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<sup>58</sup> Ibid 703.

<sup>59</sup> Ibid.

<sup>60</sup> See DA Schön, *The Reflective Practitioner: How Professionals Think in Action* (Basic Books, 1983); JJ Loughran, *Developing Reflective Practice: Learning About Teaching and Learning Through Modelling* (Falmer Press, 1996); R Rogers, 'Reflection in Higher Education: A Concept Analysis' (2001) 26(1) *Innovative Higher Education* 37; Ross Hyams, 'Assessing Insight: Grading Reflective Journals in Clinical Legal Education' (2010) 17 *James Cook University Law Review* 25.



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integrated learning' - The 2009 'WIL Report'<sup>61</sup> identified the following most used terms being used in the Australian context: 'practicum', 'professional practice', 'internship', 'workplace learning', 'industry-based learning', 'project-based learning', 'cooperative education' and 'fieldwork education'.<sup>62</sup> Despite the fact that there are a range of terms being used, there appears to be some common factors inherent in all of these concepts:

- It is generally an activity agreed between a university and a "host" or "sponsor" employer, where students gain recognised course-related experience with the employer;
- It is undertaken for academic credit; and
- The host employer can be involved in assessing the work undertaken by students (but does not have to be).<sup>63</sup>

Work integrated learning has a relatively recent history. Collaboration between Universities and industry partners developed throughout the 1980s and has taken various forms over the last three decades, including fieldwork, cognitive apprenticeship models (similar to work experience and the primary model used in law), 'sandwich' courses, joint industry-university courses and clinical placements (most widely used by medical, veterinary science and nursing faculties).<sup>64</sup> Nowadays, cooperative programs in which the work experience component is integrated into the overall curriculum is the most common form of work integrated learning program.<sup>65</sup>

Whatever form it takes, the essential aspect of a well developed and pedagogically sound work integrated learning program is that it is perceived by both faculty and students as a primary learning tool, and not as an 'add on' or a 'time out'. Martin<sup>66</sup> points out that there is a definite connection between staff's notions of work integrated learning placements and the students' insight into their own development of skills and their satisfaction with their placement experience:

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<sup>61</sup> Carol-joy Patrick et al, 'TheWIL [Work Integrated Learning] Report: A National Scoping Study' (Final Report to the Australian Learning and Teaching Council (ALTC), January 2009).

<sup>62</sup> Ibid 9.

<sup>63</sup> See, for example, the Monash University Employment and Career Development webpage: <http://www.careers.monash.edu/>.

<sup>64</sup> Elaine Martin, 'The Effectiveness of Different Models of Work-based University Education' (Curriculum and Academic Development Unit, The Royal Melbourne Institute of Technology, January 1997), Chapter 2 - 'Models of Work-based University Education'.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

[W]here there is close guidance of experiences and continued joint support by both workplace and university supervisors, students claim to have developed more specific generic skills and to have had more satisfying experiences.<sup>67</sup>

Thus, a successful work integrated learning program must have the full support of all stakeholders. If students perceive that it is not being treated seriously by the faculty or the workplace, then this will undermine its credibility as an essential aspect of their legal education.

## VII. AN INTEGRATED APPROACH

A truly integrated model of legal education would promote multiple and emotional intelligences by incorporating simulated class exercises, work integrated learning placements and clinical legal education. It would recognize the fact that, because there are various intelligences, there are a number of ways that law students can develop their understanding of legal doctrine. Accordingly, such a model would provide a variety of ways in which students could be assessed in which they could play to their strengths, rather than forcing all students into a narrow 'logical - mathematical' approach. Such a model of legal education would also recognize that, in real legal practice, lawyers are not presented with a set of cold and clinical facts which they must simply use analytical skills to solve. An integrated model would nurture students' emotional intelligence and recognize that these skills must be developed to their utmost potential in order for law graduates to operate in an environment which requires an array of personal skills, including that of self-reflection and insight. It would develop students' skills in working with narratives, developing their flexibility in dealing with the ebb and flow of clients' 'stories', changing facts, clients' shifting emotions and objectives which must be revised in order to achieve the best possible outcome. It would be multidisciplinary, drawing upon knowledge from the social sciences as to our understanding of how students learn and how knowledge can be best presented for different types of learners. It would be structured as a 'vertical curriculum' - that is, exercises and activities which develop multiple and emotional intelligences together with self-reflection would be incorporated with increased complexity and sophistication as students progress through their studies. Finally, a genuinely integrated model of legal education would also utilize clinical pedagogy which has accumulated over a period of almost forty years, to assist students to graduate from law school with a

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<sup>67</sup> Ibid (Executive Summary).

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complete 'tool kit' which will enable them to practice effectively – incorporating legal knowledge and doctrine, practical skills and insight.

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# US POWER AND TRANSNATIONAL GOVERNANCE

SCOTT MANN\*

## I. INTRODUCTION

A number of commentators have followed Levi-Faur and Jordana, in identifying recent years as a 'golden era of regulation', with the 'proliferation of regulatory activities, actions, networks or constellations' leading to 'an explosion of rules and to the profound re-ordering of our world.'<sup>1</sup> Beyond the territories of particular nation states 'an increasing share of this intense governance activity takes place between and across nations'.<sup>2</sup> And much of this developing 'culture' of transnational governance relies upon 'voluntary' rules, 'to which formal legal sanctions are not attached.'<sup>3</sup>

The implication is that of a significant expansion of the rule of law or of quasi-legal self-regulatory practices, built upon democratic participation and consensus in transnational affairs, replacing an earlier rule of force or no rule at all.

This paper argues that this is a misleading picture of transnational governance in the contemporary world, insofar as much that it identifies as 'voluntary', 'democratically decided' and/or 'self-regulatory' principles and practises are really built upon the use of force, threat and coercion, including both the economic and military force of the United States ('US'). At the same time, it is as true to see recent decades as a time of deregulation, as much as of regulation, including the winding back of regulations which really were built upon a foundation of democratic and ethical legitimacy to leave the field free for the exercise of the raw economic power of big transnational corporations.

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<sup>1</sup> Marie-Laure Djelic and Kerstin Sahlin-Andersson, 'Introduction: A World of Governance: The Rise of Transnational Regulation', Marie-Laure Djelic and Kerstin Sahlin-Andersson (eds), *Transnational Governance: Institutional Dynamics of Regulation* (Cambridge University Press, 2006) 1.

<sup>2</sup> Ibid 2.

<sup>3</sup> Ibid 23-24.

Part of the problem of the Levi-Faur and Jordana analysis, I believe, lies in focusing upon specific microstructures of transnational governance, and losing sight of the bigger picture of the exercise of political and economic power on a global scale. This paper aims to provide a counter-balance to such smaller scale analysis by focusing upon the underlying power relations upon which all such specific governance developments actually rest. In particular, the focus is upon the centrality of the US economic and military power in shaping governance in the contemporary globalised world, and the challenge to US power and US dominated regulation by the rise of China as major world power.

## II. POWER HOLDERS

As John Rees points out, since the early nineteenth century there have been three major institutional centres of exercise of such social power.<sup>4</sup> First of all, a system of competing nation states, with their own systems of executive authority, commanding a monopoly of force within their geographical boundaries and using this to enforce a particular system of law. Such states have also been directly involved, to a lesser or greater extent, in direct control of production and distribution of material goods and of information.

Secondly, a system of different interlocking and interdependent world markets within which private business organisations - particularly large public corporations - and nation states compete for commercial domination. Such corporations produce and/or trade in and distribute raw materials, manufactured goods, financial and other services, including health services, along with information and ideas.

Thirdly, within each competing nation state, a more or less organised labour force of workers and/or peasants. Insofar as these are the actual producers of social wealth, they have huge potential economic power - to disrupt production and capital accumulation in strikes and go slows and to take over such production through occupation of land, factories and other productive facilities. Insofar as they are the majority of the population so do they have huge political power - to form and vote into power their own political parties - in liberal democratic states; to seize power through force of arms in other political situations.

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<sup>4</sup> John Rees, *Imperialism and Resistance* (Routledge, 2006) 3.

Control of political and economic structures by the capitalist class obstructs the realisation or effective application of such working class power. Workers are prevented from taking effective action in their own interests through legal threats of punitive responses to economic and political actions and economic threats of unemployment and destitution. Control of education and communication by private business organisations or by state apparatuses dominated by such private businesses, generally functions to undermine working class solidarity.

### III. POLITICS OF CAPITALISM

Particular nation states and capitalist corporations have increased in strength over the last 200 years, with the growth of a number of centralised bureaucratic state organisations, with highly developed infrastructures and huge military capacities, and a number of massive corporate structures, seeking markets, raw materials and labour on a world scale. Such state apparatuses have generally worked closely together with nationally based corporations, competing for commercial dominance around the globe.

Insofar as individual capitalist corporations compete amongst themselves, they are subject to intrinsic pressure to expand their operations, reducing their costs through increased scale of production and technological innovation. But this means that there is a need for more resources, more investment opportunities, more consumers in order to avoid the system running into crisis. The fact that investment depends, to a significant extent, upon bank credit, creates further pressure for such ongoing expansion, to allow for sufficient profit for debt service as well as accumulation in the service of competition.

Insofar as the goal of capitalist investment and production is profit, and profit involves the production and sale of goods of greater value than the cost of producing such goods, it is clear that the working population – and replacement demand for technology and raw material, cannot provide sufficient effective demand for the profitable sale of total output. And insofar as state authorities assist big business in keeping wages low – at home and abroad – to increase profitability, so is there increased threat of crises of under-consumption. Increase in the extension of credit to workers can temporarily address this problem, but only at the expense of increased likelihood of ever greater default and inflation of good and asset prices.<sup>5</sup>

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<sup>5</sup> David Harvey, *The Enigma of Capital and the Crises of Capitalism* (Profile Books, 2010) 107.

There are physical limits upon the power of private consumption of capitalists themselves – subsistence plus luxury goods and services – to absorb the surplus. And these problems are exacerbated by the increasing concentration of capitalist wealth and power in fewer and fewer hands. So the system crucially depends upon accumulation itself; upon reinvestment of surplus to expand the scale of production, to absorb the expanding surplus produced by such accumulation, and maintain profitability.<sup>6</sup>

But there are also limits to such compounding growth. There are tendencies for interruption to the availability of initial money capital – when banks run into problems of default (and stop lending) and investors lose confidence, to the availability of – sufficiently cheap and pliable – labour supply, of necessary raw materials and of monetarily effective demand for the increasing pool of goods on the market. The more capital is accumulated and profit generated, the more problems in finding sufficiently profitable investment opportunities.<sup>7</sup> As Keynes pointed out, entrepreneurs who fear that they cannot sell goods in the future cut back upon their investment, thereby fulfilling their own prophecy.

The ups and downs of the business cycle reflect such problems; with the rush to invest in an expanding (low interest) market, with new more productive technology and/or lower wage costs, initially producing a boom through increased employment, borrowing, wages, purchases of investment goods. But with supply of such resources reduced and prices increased (higher wages, higher interest rates, higher raw material costs), with the new technology generally available and no longer a source of surplus profit, and consumption failing to absorb the increased output, typically smaller, higher cost businesses start to fail, with loan defaults, workers laid off and accelerated decline in consumption, leading to further reduced investment and so on.

There are powerful pressures upon individual corporations to escape the rigors of competition through the creation of monopoly or oligopoly power, keeping the prices for their goods as high as possible through restricting supply. Downturns of the business cycle accelerate this process with surviving larger scale, lower cost operations absorbing the devalued labour, productive resources and market share of their fallen competitors.

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<sup>6</sup> Ibid 110.

<sup>7</sup> Ibid 111.

Increasing monopolisation can lead to economic stagnation and inflation, with wasted resources, and increasing problems of lack of effective demand. The monopoly sector initially benefits at the expense of higher costs and lower profits for the non-monopoly sector. But increasing monopolisation means that individual monopolies themselves pay monopoly prices for necessary inputs or absorb such suppliers themselves, with reduced output, increased cost, wastage and stagnation for the whole national economy.

Strong governments can protect national monopolies with tariff barriers and capital controls and/or pressure them to serve social interests in various ways (through high taxes for example). Alternatively, governments can act to reduce any such protections, and/or break up big concentrations of monopoly power within their territories in the service of increased competition, innovation and reduced costs for national producers. But this can merely hand over their economies to bigger transnational monopolies and oligopolies, over which they have little or no control.

Two hundred years of increasing concentration and centralisation of capital have produced a situation where world markets have come to be dominated by around 300 vast transnational corporations, sometimes competing, sometimes co-operating in price-fixing oligarchies, dividing world markets amongst themselves. In many industries 50% or more of output comes from ten or less big corporations. In the US, just five conglomerates own most of the newspapers, magazines, book publishers, television and radio stations. The majority of what is called world trade now consists of planned exchanges within such corporations, undermining government powers to tax corporate profits.

National governments have historically worked closely with bigger business operations because nation states are crucially dependent upon bigger businesses to provide employment and tax revenues within their territories, and the financial power of such businesses allows them to control the selection of key government personnel. In addition to providing or ensuring necessary infrastructure, an appropriately skilled, healthy and docile work force, a stable money supply and ongoing access to credit to ensure uninterrupted investment, more powerful state apparatuses have also become increasingly involved in assisting big home based capital to gain access to raw materials, investment opportunities and markets overseas.



On the one hand this has involved industry policy with subsidies and tax breaks for favoured industries. On the other, this has led to the use of state military power by bigger, wealthier states to protect their home markets and create formal overseas empires or protected spheres of control, with others denied access to relevant investment opportunities, markets, (cheap) labour and raw materials. And this, in turn, has led to imperial conflicts and wars, as nations newly developing sufficient economic and military power to challenge established empires and trade and investment barriers, have set out to build or extend their own empires through force of arms.

#### IV. COLONIALISM AND IMPERIALISM

Industrial capitalism was originally created through the accumulation of wealth pillaged by militarily advanced Europeans from the rest of the world, and the creation of an expanding population dispossessed of direct access to the means of production – driven off the land – and forced to sell their labour as a commodity in the market. Via the banking system, such pillaged wealth financed the employment of such ex-agrarian populations in the developing factory system.

Such ‘primitive accumulation’ by dispossession continues today, with peasants and tribal peoples expelled from their traditional homelands, through failure to compete with cheap agricultural imports, or through violent appropriation of their land to make way for cash cropping, industry, mining or urban development. In contemporary Australia farmers are being disposed by the coal seam gas mining industry.

The consolidation of industrial capitalism in Europe and North America went along with accelerated plundering of the wealth of India, China and other ‘already developed non-capitalist social formations’<sup>8</sup> This provided great amounts of new money to sustain further expansion, but ultimately exacerbated the problem of finding new investment opportunities to absorb this pillaged wealth. So that imperialism ‘has to shift from robbing values and stripping assets from the rest of the world to using the rest of the world as a site for opening up new forms of capitalist production.’<sup>9</sup> This led to new forms of conflict, with the developed capitalist powers competing for such investment opportunities. As Rees says:

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<sup>8</sup> Ibid 109.

<sup>9</sup> Ibid 113.

[T]he nineteenth century colonial system of the European powers faced its global crisis when the first industrialised total war began in 1914. The redrawing of power relations between the major powers lasted from the First World War to the end of the Second World War.<sup>10</sup>

The crisis of the 1930s showed how increased availability of credit could give the appearance of overcoming the problems of under-consumption and surplus absorption, while hugely increasing the power of the bankers and financiers operating the credit system, and ultimately creating a massive meltdown of world capitalism. With declining profits from expansion of the real economy, investors turned to – increasingly debt-financed – acquisition of existing assets, stocks and shares and other financial instruments, property and art objects. Demand driven inflation of asset prices provided the collateral for further borrowing in the positive feedback of a bubble– before the inevitable collapse in values.

When the collapse came, in 1929, with plunging share values, bankruptcies and bank failures, the original – orthodox – response was for governments to reduce their taxing and spending and step back to allow free market forces to operate – generating new growth through reduced costs of labour and productive resources. But, governments found that there were no inbuilt market mechanisms to ensure any such renewed growth. Instead, further falls in consumption motivated further reduced investment and so on, with ever dwindling government tax revenues

The upturn came only through recognition of the need for substantial fiscal, as well as monetary state intervention to reverse the decline, with extensive regulation of financial markets, and ultimately through complete state takeover of key components of leading national economies. Originally, in the US this meant government deficit spending to mobilise idle resources in infrastructure expansion. But increasingly, such deficit spending moved towards militarisation, seen as necessary to protect against overseas imperial expansion by Japan and Germany and as providing the power to recoup such investment through overseas intimidation and conquest.

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<sup>10</sup> Rees, above n 4, 7.

## V. THE POST WAR WORLD

The settlement that concluded the Second World War depended upon the economic power of the victors. Russia and the US emerged as dominant powers, with the US very much the stronger. Whereas in Europe the war had severely damaged civilian economies, in the US the economy had hugely expanded on the basis of deficit funded military investment, putting the US into a position to benefit from world-wide free trade. The Russian economy, by contrast, had suffered from the war, and the leadership sought tight political control of Eastern Europe to allow for a planned redistribution of resources, rather than free market relations.<sup>11</sup>

At the United Nations Monetary and Financial Conference at Bretton Woods, New Hampshire, in 1944, attended by delegates from 44 allied and associated nations, the US ruling class set out to establish the rules of the post-war game for the rest of the – non Communist – world, in such a way as try to maintain stable US domination without further resort to warfare, while maintaining high levels of military spending to stimulate the rest of the US economy and keep the Soviet Union at bay. This primarily meant freedom for US companies to trade and invest in the rest of the world. Currency exchange rates fixed in relation to gold meant that the dollar became the international means of payment, insofar as the US held 80% of world gold reserves. So ‘every dollar held abroad [as reserve] meant that a similar amount of imports need not be met by exports – the rest of the world would finance the US trade gap.’<sup>12</sup>

The US ensured that it effectively controlled the IMF and World Bank (through voting power according to capital subscription), and the General Agreement on Trade and Tariffs (‘GATT’), and used these to wind back the restriction of US (goods and capital) exports by other nations trade and monetary laws. Marshall Aid was made available for the reconstruction of Europe only on condition of devaluation of European currencies, takeover of their markets by the US and restriction upon socialist and communist political parties.

As Keynes pointed out in the 1930s, in conditions of intrinsic uncertainty, there is a tendency for people – and banks – to hold onto money rather than re-invest or lend it. But this means unsold goods, cut backs in employment and wages, collapsing effective demand,

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<sup>11</sup> Ibid 39.

<sup>12</sup> Ibid 41.

further reduced investment and so on. Hence the need for governments to maintain a climate of optimism, not just - or not necessarily - through reduced interest and tax rates but through increased direct - deficit funded - government spending to stimulate the national economy in times of downturn. This, in turn, required trade and capital controls to prevent stimulus money flowing overseas rather than regenerating the home economy.

Keynes was very much aware of the importance of under-consumption at the level of the world economy. He proposed that the IMF should preside over a new system of international trade, specifically designed to encourage maximum national self-sufficiency and avoid significant trade imbalances - penalising nations running up big trade surpluses. This was seen as a way to prevent a feedback of increasing deflation of world markets, with debtors cutting back their imports, leading to loss of jobs and consumption amongst exporters and so on. So too did it allow nation states the capacity to plan their own economies around full-employment.

As the major trade surplus nation then and in the foreseeable future, the US rejected this idea in favour of a system of financial support for those states with balance of payments difficulties, conditional upon their taking steps to improve their competitive position and ensure the means to repay such loans within a set period. Fixed - but flexible - exchange rates would prevent trade imbalances through currency devaluations. To a significant extent, the current global economic and ecological crisis can be attributed to US failure to support Keynes' plan. The US also ensured that the World Bank originally loaned money to developing countries for infrastructure projects that were seen to be viable in terms of interest and principle repayments through encouraging and facilitating increased exports.

Greater democracy in the United Nations General Assembly (with one-country -one vote) - with representation of the Soviet Bloc and increasing involvement of ex-colonial developing countries and Russian veto power in the Security Council saw ongoing struggles over UN policies and reforms, generally leading to stalemate and inaction on serious issues.

In the period from 1945 to 1970 state apparatuses were active in leading economic development, not just in the planned economies of the eastern bloc, but also in the 'welfare-state/nationalisation

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economies of the West and in the developmental models of the Third World'<sup>13</sup>.

In the US, such intervention continued to centre upon state purchases of military hardware from big private corporations, with 12.2% of GNP spent directly on warfare and preparation for warfare in 1947 and 11.1% in 1971. Hunt refers to research suggesting that the multiplier effect of further aggregate demand created by these military expenditures was actually 30.5% of total aggregate demand in 1947 and 27.8% in 1971.<sup>14</sup>

As Hunt points out, militarism stimulates aggregate demand without redistributing income from the rich to the poor; government financed research constantly renders military hardware obsolete, allowing and demanding further investment; the capital goods industry as the most volatile and unstable segment of capitalist economy is kept operating at full capacity; it gives big corporations a stable core of demand not subject to the vagaries of the market; it increases the influence and power of the nation state in question, to blackmail and ultimately take over other nations; and patriotism and militarism are very effective means of keeping workers docile and under control.<sup>15</sup>

At one time 400 US military bases worldwide ringed the communist world. And a number of military alliances and treaties were aimed at both the external threat of Soviet power and the threat of workers revolution within such allied nations. Arms could be exported to such allies. The arms race put huge pressure on the weaker Soviet economy to maintain military parity, thereby preventing the eastern bloc from offering consumption goods to workers sufficient to pose a real threat to western capitalism.

Elsewhere in the developed world, particularly Europe, the welfare state consensus included nationalisation of key productive, infrastructural and financial operations, capital controls and deficit spending upon productive investment, health and welfare to avoid downturns and maintain full employment. Progressive income taxation and ceilings upon executive remuneration, high taxation of profits, capital gains and inheritance, along with strong trade unions and productivity based wage-increases kept working class

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<sup>13</sup> Rees, above n 4, 38.

<sup>14</sup> EK Hunt, *History of Economic Thought: A Critical Perspective* (ME Sharpe, 2<sup>nd</sup> ed, 2002) 419.

<sup>15</sup> *Ibid* 421.

consumption in line with increased output and contributed to social stability and productivity through reduced inequality.

In the developing world, many nations pursued import substitution policies aimed at protecting local industry and agriculture, with restrictions and tariffs on imports and state subsidies on basic necessities for poor workers and peasants.

## VI. FROM BOOM TO CRISIS

On this foundation, capitalism enjoyed the greatest boom in its history, with a threefold increase in world manufactured output from 1945 to 1970. As Skidelsky points out, the growth of global real GDP during the Bretton Wood years [1950- 1973] was 4.8% 'as compared to the 3.2% growth rate after 1980.'<sup>16</sup> By the IMF standard of recession as less than 3% growth, 'there were no global recessions in the Bretton Woods age.'<sup>17</sup> There were downturns in 1958 and 1966, but fixed currency values led to few financial crises.

These decades were characterised by record low unemployment, with an average of 1.6% in the UK, 1.2% in France, 3.1% in Germany (the latter absorbing 12 million east European immigrants after the war) and 4.8% in the US, compared to 7.4% in the UK, 7.5% in Germany and 6.1% in the USA after 1980.<sup>18</sup>

It is frequently said that the post-war boom period was a time of high inflation compared to the later neoliberal period. But in fact, as Skidelsky shows, 'there was no significant difference in the inflation rates of the two periods - the 1950-73 average being 3.9%, the 1980-2008 average 3.2%'.<sup>19</sup> And while inequality within nations was stable during the Bretton Woods age, it rose very sharply in the subsequent Washington Consensus years after 1982 - everywhere except South America.<sup>20</sup>

But it is important to highlight the special conditions prevailing during this brief boom period, in addition to ongoing Keynesian interventions of deficit funded finance and the expansion of state financed employment. In the first instance, unprecedented amounts of US aid played a central role in reconstructing the massively damaged

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<sup>16</sup> Robert Skidelsky, *Keynes; The Return of the Master* (Penguin, 2010) 116.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* 118.

<sup>19</sup> *Ibid.* 121.

<sup>20</sup> *Ibid.* 122-123.

European and Japanese economies, while also driving the growth of the US economy. In the second, ongoing productivity growth through the spread of new technology allowed for profitability to be maintained while increasing workers wages and consumption to maintain demand for both consumer and producer goods.

There was a term to all of these things, with European reconstruction completed, with the technology generally available, with full employment empowering workers to fight for better wages and conditions, and corporations seeking to protect themselves through oligopoly pricing and restricted production, growth inevitably slowed. And further government spending generated increasing inflation and debt.

Nor was growth uniform throughout the post-war boom. In particular, after 1967, growth of the US economy fell behind that of other developed world nations, particularly West Germany and Japan, with the former's industrial output growing fivefold and the latter' thirteenfold between 1949 and 1970.<sup>21</sup> Protection and oligopoly power in the US car industry, in particular, obstructed the deployment of new labour-saving technologies, while on the other hand restricted wages and executive salaries, with government directed industrial development, contributed to the growth of the Japanese economy.<sup>22</sup>

Because so much of US investment went into military technology, this created an opening for exports of consumer goods to the US from Germany and Japan – including cars and electronics. As Rees says, 'the deficit spending by the US during the Vietnam war sucked in German and Japanese imports to the further competitive disadvantage of the US economy.'<sup>23</sup>

The rise of nationalism and communism in the developing world increasingly threatened US access to cheap overseas resources, markets and investment opportunities, in particular the loss of China from western influence in 1949. The later Algerian revolution (1954-1962) encouraged Arab nationalism and threatened US oil supplies. The loss of Cuba to communism in 1959 encouraged revolutions throughout Latin America. In Europe, Labour and Communist movements pushed for increasing workers power and expanded social welfare provision. At a time when increasing monopolisation was undermining economic

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<sup>21</sup> Rees, above n 4, 43.

<sup>22</sup> Paul Mattick, *Business as Usual* (Reaktion Books, 2011) 53.

<sup>23</sup> *Ibid* 49.

growth in the US, contributing to inflation, stagnation and wastage of resources, so was the US becoming increasingly bogged down in the costly, losing, war in Vietnam.

In the US increased output of dollars and outflow of gold stimulated by the high cost of the Vietnam war, by a weakening US trade balance and substantial anti-poverty spending generated a deepening crisis after 1968, with the fixed exchange rate of the dollar against gold undermined.<sup>24</sup> Falling oil revenues due to the decline in the value of the dollar were a major motivation for the oil producers to increase the price of their oil, and the OPEC price rises of 1974-5 exacerbated tendencies towards monopoly driven inflation and stagnation.

## VII. US RESPONSES

With US creditor nations trying to exchange their dollars for gold and US reserves running low, President Nixon declared in 1971 that the US would only pay its debts in dollars and US Treasury bonds. In terms of the old system this was a default on promised gold payments and a requirement that low cost loans to the US become the basis for international reserves.<sup>25</sup> Central banks around the world now held US government IOU's rather than gold. As Pettifor points out, the US could now increase or lower the value of its foreign debts by revaluing or devaluing the currencies it printed (printing and circulating more or less). And it could run up huge trade deficits without needing to balance its trade budget, as the US insisted other trade deficit should do.<sup>26</sup>

The US forced a worldwide shift to floating exchange rates, with an increasing outflow of US investment to low wage, low cost areas overseas. Concerted efforts to undermine, defeat and subvert developing world reform and revolution were increasingly successful in the later 1970s, following the US engineered Pinochet coup in Chile in 1973. On the US home front, Reagan's neo-liberal revolution (from 1980) aimed to shift power further away from the working class through cuts in employment, wages, welfare and worker's rights. Workers wages and powers, public services and environmental protections were successfully wound back, contributing to increased US exports at the expense of Germany and Japan.

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<sup>24</sup> Harvey, above n 5, 32.

<sup>25</sup> Ann Pettifor, *The Coming First World Debt Crisis* (Palgrave, 2006) 41.

<sup>26</sup> *Ibid.*



The neoliberalism of Ronald Reagan in the US and Margaret Thatcher in the UK marked the definitive destruction of the welfare state consensus of previous decades (while weakening but not actually destroying welfare services), with the move to the deregulated world of globalisation, with extensive privatisation of nationalised industries, corporatisation of the public service and centralisation of state power. Such centralised state power was increasingly aligned with the interests of big business, with parliaments 'passing decisions prepared beforehand in the businessmen's organisation.'<sup>27</sup>

Neoliberal ideas and requirements increasingly permeated the IMF and World Bank, and US involvement in the UN and other institutions of transnational governance, with the former moving from debtor nations balance of payments as object of adjustment to 'the entirety of a country's macroeconomic structure' as subject to change.<sup>28</sup> Debtor nations were to be completely taken over and run by US economists in such a way as to ensure appropriately high returns on US investments. Import restrictions were to be wound back and currencies devalued to facilitate trade and investment, public expenditures were to be cut back to reduce fiscal deficits, increase savings and efficiency. Price controls, investment regulations and labour market regulations were to be removed in order to 'improve resource allocation.'<sup>29</sup>

As Patomaki and Teivainen point out, a US 'assault on UNESCO' paved the way for further pressure on the UN system.<sup>30</sup> Just at a time when the UN democracy could have provided a forum for poor countries to contest their increasing takeover by the IMF and World Bank, the US launched a systematic assault upon such democracy; negotiating with every country bilaterally, mobilising promises and threats, prior to votes in the General Assembly, refusing to pay for parts of the UN without weighted voting on budgetary matters, and insisting upon over-representation of US and UK citizens in top UN jobs under threat of with-holding all US financial support. While countries remain 'formally equal' in the General Assembly, 'agenda-setting powers and decision-making criteria have been, in practice, changed towards the one dollar/one vote principle.'<sup>31</sup>

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<sup>27</sup> Rees, above n 4, 99.

<sup>28</sup> Richard Peet, *Unholy Trinity; the IMF, World Bank and WTO* (Zed Books, 2nd ed, 2009) 139.

<sup>29</sup> Ibid.

<sup>30</sup> Heikki Patomaki and Teivo Teivainen, *A Possible World; Democratic Transformation of Global Institutions* (Zed Books, 2004) 18.

<sup>31</sup> Ibid 19.

The creation of the WTO in 1995, marked the culmination of the GATT round of multilateral trade negotiations from 1947-1994, aiming to steadily reduce tariff barriers. By the time of the final Uruguay round of talks, the US was pushing an agenda of comprehensive trade liberalisation, freeing the international movement of commodities, services and investment from governmental control and restriction. Supposedly, this would allow markets to operate more freely, competitively and efficiently at the international level, leading to more rapid economic growth for all concerned.

In contrast to earlier negotiations, the WTO introduced an institutionalised leadership, the General Council, and Dispute Settlement Body, along with various committees and working groups, to preside over the creation and enforcement of laws of international trade and development.

As with the UN General Assembly, the principle is supposed to be one country, one vote, with two thirds of the WTO membership being developing countries, theoretically able to direct policy in their own interests. But the US has played a key role in establishing the ground rules for all WTO discussions and dispute resolutions, 'limiting discussion to an approved set of topics using the language of neoliberal optimism,' and ensuring 'acceptable' appointments to the key leadership roles, including that of Director-General.<sup>32</sup>

Such ground rules include passionate opposition to protectionism and support for trade and investment liberalisation.<sup>33</sup> As Peet says, until recently, the US was able to ensure that the WTO acted 'in the interests of multinational corporations in creating a global space freed from governmental regulations that might otherwise restrict the movement of capital.'<sup>34</sup> At the same time it:

promoted the extension of its own powers of regulation into vast new areas, such as intellectual property rights, which are governed in the most undemocratic of ways, within closed rooms, where an already committed expertise rationalises foregone conclusions.<sup>35</sup>

As with the UN General Assembly, the US has mobilised promises and threats - and personal attacks - to secure the support of weaker, developing nations, with such nations leaders saying that they have

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<sup>32</sup> Peet, above n 28, 242.

<sup>33</sup> Ibid 193.

<sup>34</sup> Ibid 242.

<sup>35</sup> Ibid.

been pressured to accept the US position under the threat that not to do so would destroy the WTO and seriously damage the world economy.<sup>36</sup>

#### VIII. THE DEVELOPING WORLD

OPEC oil price rises in the 1970s had added huge amounts of funds to the international financial system leading to falling interest rates. The IMF encouraged low income countries to borrow this money from commercial banks to speed up their development in order to protect the western economies from further inflation. Much of this money was spent on western – particularly US – arms; much more went into large scale development projects – particularly big dams and hydro-power projects – that went nowhere, or into the private bank accounts of corrupt leaders. Developing world debt mounted up, with more borrowing to finance debts and imports.

The IMF and World Bank increasingly enforced structural adjustment programmes, requiring the debtors to generate foreign currency for repayment through increased exports and sale of government controlled infrastructures, mines, and communication systems. Increased exports of developing world raw materials forced down the prices of such commodities as coffee, copper, sugar etc. Farmers and miners incomes fell and developing world debts further increased.

In the later 1970s and early 1980s the central banks of western nations responded to the inflation produced in part by the circulation of inflated oil profits with big interest rate rises. These rises, along with a rising US dollar in the early 1980s hugely increased the costs of debt service in the developing world. Poorer countries became insolvent and vulnerable to ever more draconian structural adjustment programmes.

The Baker Plan of 1985 allowed moderate new loans to major debtors in exchange for such intensified adjustment. Western banks were protected from default while western investors and purchasers of developing world goods benefited from increased access and further reduced costs, at the expense of escalating inequality and desperate poverty for increasing numbers of developing world citizens, leading, as shown below, to increased misery and violence.

Where previously poor urban populations and farmers had continued to support state structures which offered them some protection

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<sup>36</sup> Ibid 227.

through import substitution, tariffs and subsidies on basic necessities, the removal of such protections led to the threat of starvation, and sparked austerity riots attacking state treasuries and legislatures, presidential palaces, national banks, luxury hotels and foreign businesses.<sup>37</sup>

As Peet says, tens of thousands of protestors have been killed during IMF austerity protests:

The number of people who die as a result of the social and economic effects of IMF austerity programs, from the increased incidence of starvation and the concomitant reductions in health programs has never been reliably estimated, although by one account 6 million African, Asian and Latin American children are said to die each year from the effects of structural adjustment.<sup>38</sup>

#### IX. THE NEW IMPERIALISM

A huge increase in US arms spending by the neo-liberal Reagan regime put renewed pressure on the Soviet economy. The Soviet attempt to match the arms spending contributed to the collapse of the soviet economy in 1989. At the same time, the US arms spending contributed to burgeoning US government debt. This opened up the US to Japanese exports which rose in the early 1980s financed by Japanese lending in the form of bond purchases. In response the US, in 1985, forced a rise in the value of the yen through threats of increased protectionism. A huge rise in the value of the yen led to a crisis in Japan's manufactured exports. Cheap credit provided by the Japanese state produced a brief boom but also led to huge asset inflation and debt. The Japanese government responded with interest rate rises in 1989 and 1990, leading to prolonged recession. As Rees says, the Japanese competitive threat to the US 'receded during the long stagnation of the Japanese economy in the 1990's'<sup>39</sup> which continues today.

Partly as a result of its huge arms spending the US was at this stage economically weaker relative to its rivals than in previous decades but militarily much stronger. The end of the Cold War saw reduced arms expenditure from 1985 to 1995. But key US leaders, closely associated with arms and oil, aimed both to continue to justify large scale US arms spending and to maintain control of key strategic regions of Eurasia, particularly regions involved the production and transport of oil,

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<sup>37</sup> Ibid 104.

<sup>38</sup> Ibid.

<sup>39</sup> Rees, above n 4, 58.

through identifying any significant overseas challenge as the action of a 'rogue' or criminal state, and being prepared to use military force against such designated rogue states.

With oil as the foundation of the US economy – particularly of its military industries – and the US importing more than half of its oil by 1988, control of the Middle East oil supplies was a major focus of foreign policy. The expulsion of overseas oil companies from Iran following the Islamic fundamentalist revolution of 1979 had created a major crisis for the US, only partially offset by increased production in Saudi Arabia. And President Carter had declared that any further threat to US access to Middle East oil would be taken as a direct threat to the US.<sup>40</sup>

With the rate of discovery of new oil deposits around the world peaking in the mid 1980's, and thereby signalling the advent of peak oil production in the not too distant future, with output decreasing and prices increasing thereafter, control of world oil supplies became an ever more urgent objective of US foreign policy.<sup>41</sup>

The first attack on Iraq was a response to the first significant post Cold War challenge to US power and access to Middle East oil.<sup>42</sup> But as Rees points out, the US leadership saw it as achieving little in terms of 'wider domination of the Eurasian land mass.'<sup>43</sup> The Kosovo war, while prosecuted by NATO and justified by humanitarian considerations, was seen by the US leadership as 'opening pathways to the former Russian republics...and the energy sources they control' for the big US oil companies.<sup>44</sup> The aim was to exclude Russia from control of the oil rich Caspian states and from the transportation of such oil to the west via the Balkans.

Saudi Arabia had long been the major US base in the Middle East, ensuring oil output and price levels acceptable to the US and handing its oil revenues back to the US in exchange for armaments. But increasing local opposition to such US domination in the 1990s provided added incentives for US takeover of Iraq as strategic centre for continued control of the region. The attack on the World Trade Centre in 2001 became a convenient justification, first for the attack on the Taliban regime in Afghanistan, then for the invasion of Iraq in 2003.

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<sup>40</sup> Ibid 81.

<sup>41</sup> Harvey, above n 5, 79-80.

<sup>42</sup> Ibid 77.

<sup>43</sup> Rees, above n 4, 19.

<sup>44</sup> Ibid 20.

But, as Rees points out, these developments proved much more difficult and costly than anticipated and failed to secure the support of other nations. In particular, the economically stronger nations of Europe, Germany, France and Russia were hostile to the use of US military power in the service of US based corporations.<sup>45</sup>

#### X. GLOBALISATION AND MELTDOWN

In some ways the growth of the Chinese economy in the years after 1980 paralleled that of Japan in earlier decades, with significant central state intervention to direct investment into key export industries, particularly focused upon the gaps or weaknesses in the US home market created, in part, by the US arms economy.

Japan still accounts for 12% of global GDP, but has not emerged from the crisis of the 1990s. Successive Japanese governments have failed to generate growth through big stimulus packages, including a one-trillion dollar budget in 2010, which have, instead, left Japan with increasing poverty and 'a public debt twice the size of its GDP, the worst ratio amongst industrialised nations and an interest bill amounting in 2008 to 20% of the budget.'<sup>46</sup>

As Rees points out, the scale of the threat posed by China to US economic and political power is altogether greater, with China traditionally controlling 'about one quarter of global production'<sup>47</sup> and now rapidly expanding its trade, investment and influence around the world. It is now 'the world's leading exporter' overtaking Germany in 2010<sup>48</sup> and 'the greatest recipient of global investment after the US, but its wage levels are one fiftieth of those of the US and Japan.'<sup>49</sup>

Fifteen years of 'negotiations, disputes and stand-offs' prior to approval for China to join the WTO show the extent of US ambivalence towards Chinese involvement.<sup>50</sup> On the one hand wary of the vulnerability of the US economy in face of Chinese manufactured exports, on the other seeking to gain some control over Chinese trade law (including intellectual property law) and greater access to Chinese markets for US goods and services.

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<sup>45</sup> Ibid 88.

<sup>46</sup> Mattick, above n 22, 75-76.

<sup>47</sup> Rees, above n 4, 58.

<sup>48</sup> Mattick, above n 22, 87.

<sup>49</sup> Rees, above n 4, 60.

<sup>50</sup> Peet, above n 22, 226.

But once inside the WTO, China has played an increasingly active part in discussions and policy formation. As Peet says, 'the WTO finds itself having to change radically, or be dismissed as a serious global governance institution.'<sup>51</sup> The growth of the Chinese economy can also be seen to have played a central role in the financial meltdown and subsequent recession of 2008-2009.

Neoliberal policies encouraged capital export from the developed world to take advantage of the huge pools of cheap – and desperate – labour created both by IMF and World Bank structural adjustment (leading to large scale dispossession and displacement of peasant populations). Such globalisation of production was facilitated by innovations in transport and communications technology (including container ships and satellites), as well as reduced political and economic barriers (with removal of tariffs, quotas and capital controls). Developed countries' access to cheap labour in developing countries put huge pressure upon workers' wages and conditions in the developed countries themselves, particularly the US, where workers are largely without wage protection or welfare.

The neoliberal policies resulted in a greater output of surplus in the hands of the owners and controllers of production, relative to production costs. But so too did it pose increasing problems of disposing of such surplus (which retains its value only through the prospect of continued profitable investment). As Harvey points out,

disempowered labour means low wages, and impoverished workers do not constitute a vibrant market. Persistent wage repression therefore poses the problem of lack of demand for the expanding output of capitalist corporations.<sup>52</sup>

As in the 1920s, where declining profits from real material production encouraged increasing resort to speculative acquisition of assets to absorb the surplus, so too did this occur in the 1990s. But by then, neoliberal deregulation had increased the possibilities for speculative spending, leading to ongoing inflation in the prices of property, shares, currencies and an expanding range of other financial assets. Attempts by the Federal Reserve to try to stabilise increasingly unstable financial markets through reduced interest rates and ready provision of credit only made things worse, with cheap borrowed money pouring into

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<sup>51</sup> Ibid 243.

<sup>52</sup> Harvey, above n 5, 16.

speculation and encouraging leveraged buyouts of viable productive operations, with their resources then sold to finance such borrowing.

China's willingness to continue to lend money to the US through its accumulation of (low interest) Treasury bond reserves facilitated low interest rates, massive borrowing and spending in the US. As Niall Ferguson said, 'the more China was willing to lend to the US, the more Americans were willing to borrow.'<sup>53</sup>

In the early post World War Two years US monetary gifts and loans to Europe benefitted both sides, with Marshall Aid and US imports used to reconstruct the productive base of European society. But Chinese money has gone into speculation, consumption and capital destruction, rather than productive investment.

Access to cheap money encouraged banks to lend to workers, with credit card debt increasingly bridging the gap between frozen wages and increased output resulting in household debt shooting up. Relaxation of rules separating the activities of retail and investment banks offered lenders new ways to insure their debts or offload them onto others (such as investment funds) through sale of new sorts of financial derivatives in unregulated, over the counter markets. 'Securitisation' of debt was supposedly a way to reduce risk through spreading it far and wide. Such derivatives themselves became a major source of profits for the banks that produced them, spreading around the financial world, with turnover in such 'shadow' markets massively overtaking trade in real material things.

The US government brought pressure to bear to encourage financial institutions to extend credit - particularly housing credit - to those on lower and lower incomes. Such institutions increasingly debt financed both property developers and buyers to keep the asset spiral going, more houses, more buyers, bigger prices etc. Increasingly, mortgages were sold to those without employment or collateral by brokers who then swiftly unloaded them onto investment banks who in turn on sold them as debt based securities.

With some big financial corporations selling billions of dollars of unregulated financial instruments/derivatives to act as financial insurance to others - far beyond anything they could actually honour in the event of massive bankruptcy, while others were betting billions on collapsing asset values, and taking actions which made such

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<sup>53</sup> Niall Ferguson, *The Ascent of Money* (Allen Lane, 2008) 335



collapse increasingly likely, the effects of the collapse in value of such securitised debts were hugely amplified throughout the world financial system.

The upshot of this process is now known to all, with Federal Reserve interest rate rises from 2005 being the straw that broke the camel's back, leading to increasing mortgage defaults, and falling house prices. 'By August 2007, 16% of sub-prime mortgages with adjustable rates had defaulted'<sup>54</sup> and the banks were 'fatally wounded'.<sup>55</sup>

Subsequent government bank bailouts and the deficit financed 'stimulus packages' put together to try to head off the resulting recession have massively increased government debt in the worst effected nations, including the US and UK, with increasing cuts in government spending now kicking in to begin to repay such government borrowings. Poorer working people are already bearing the brunt of such payback through cuts in government employment and welfare spending, and the deflationary multiplier effect of such cuts, with, as yet, no sign of any significant reform of the practices or institutions actually responsible.

Increasing and chronic unemployment coupled with increasing welfare reductions at the bottom, while those at the top continue to live in luxury, will lead to increasing social unrest and protest and increasingly violent state repression in response. What has started as street protests and mass strikes in Greece and France could spread to the US itself in the future.

## XI. CONTRADICTIONS

On the one hand, the urbanisation and industrialisation of China has played a major role in stabilising world capitalism, through maintaining profitable investment opportunities for massive pools of surplus capital, for foreign direct investment in industry and urban development, for sale of technology from Germany and Japan and raw materials from Australia, Chile, Brazil and Argentina, and through maintaining effective demand for the products of such investment, mainly in the form US consumerism funded by Chinese lending.

While US and European stimulus packages were of limited extent and duration, the Chinese government responded to the meltdown by

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<sup>54</sup> Skidelsky, above n 16, 6.

<sup>55</sup> Ibid.

putting hundreds of billions of dollars into infrastructural projects, expanded credit to local state and private initiatives, allowed some independent working class organisation and significant wage increases to expand their internal markets, and expanded public health and welfare provision.

On the other hand, the continued growth of the Chinese economy is the source of major future instability. A strongly authoritarian government is already using its economic and political power to shape the policies of other governments around the world, taking control of strategic raw materials, buying oil and gas from America's enemies in Iran and Sudan. With the US economy in chronic depression and its trade deficit and government debt continuing to increase, and the Chinese leadership failing to respond to calls for big upward revaluation of the yuan and massive opening up of Chinese markets to US imports, along with increasing conflict over access to strategic raw materials, there is huge potential for political and ultimately military conflict between the US and China.

Inside China itself, there are signs of significant overcapacity, with factories and towns idle and unoccupied, of stimulus funding driving increasing inflation in the prices of consumption goods and flowing into speculative asset price inflation, particularly in property markets.<sup>56</sup>

Despite recent concessions to working class organisation and wages, such wages and conditions remain grossly inadequate by developed world standards (long hours, not much more than US\$2 per hour on purchasing power parity in manufacturing industry, unhealthy living and working conditions and draconian labour discipline). This will inevitably lead to increasing working class militancy in the future.

China is also particularly vulnerable to the effects of accelerated climate change, as a result, in increasing part, of its own rapid industrialisation, principally its output of CO<sub>2</sub> from coal generated electricity production. Loss of fertile land due to urban expansion, pollution and increasingly, also sea level rise and the disappearance of Himalayan glaciers threaten the internal food supply at the basis of China's industrialisation.<sup>57</sup>

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<sup>56</sup> Leith 'China's Empty Cities', *The Unconventional Economist* (online) 15 December 2010 <<http://www.unconventionaleconomist.com/2010/12/chinas-empty-cities.html>>.

<sup>57</sup> Roger Harrabin, 'China's March to Green Revolution', *BBC News* (online) 19 October 2009 <<http://news.bbc.co.uk/2/hi/8311223.stm>>.

It is possible to see how these issues could begin to be addressed, with the Chinese leadership developing its own internal markets with improved wages and conditions for workers, while also taking a lead in shifting to sustainable industrial and agricultural techniques. But, as Harvey points out,<sup>58</sup> this would undercut the country's 'competitive advantage in the global economy. With less of its surplus available to lend to the US, this would further reduce global demand for its output.'<sup>59</sup> There are already signs that recent very modest wage increases in some industries are already leading investors to move to other lower-wage regions of south-east Asia.<sup>60</sup>

The continued growth of the Chinese economy which is currently moderating the crisis of the capitalist world is also threatening increasing tension and conflict in the future, as industrial expansion requires ever more inputs of scarce raw materials, including food stuffs from overseas, as it exacerbates ecological damage (forests torn down to make way for soya beans), and promotes chronic unemployment and debt in other countries. And with China and the US continuing down the current path it is easy to see how increasing internal destabilisation of the Chinese economy could intensify external destabilisation of the world political and economic system.

The US leadership has shown its willingness to resort to military force to try to secure oil supplies from central Asia and Iraq. The not too distant future could see increasingly desperate and militarised leaders in both China and the US attempting to solve their economic problems through the use of military power to secure resources and markets, leading to increased likelihood of global conflict.

## XII. INEQUALITY

The neoliberal phase of capitalist development has had a host of pernicious consequences, including the weakening of democracy and political accountability, increasing inequality within and between nation states and accelerated environmental damage – in addition to the intensified threat of large scale conflict. As Rees points out,

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<sup>58</sup>Harvey, above n 5, 109.

<sup>59</sup> Ibid.

<sup>60</sup>Jonathan Wright, 'The Current and Potential Impact of Wage Increases in China', *Supply Chain Asia* (online) 6 April 2011  
<[http://www.supplychainknowledge.asia/articles/20110406\\_4](http://www.supplychainknowledge.asia/articles/20110406_4)>.

in the US the ratio of the median workers income to salaries of chief executives was one to 30 in 1970. It was one to 500 by the year 2000. The top 0.1% of income earners had increased their share of national income from 2% in 1978 to 6% in 1999. Over the same period the share of the top 1% had risen to nearly 15% of the national income, close to the share in the 1930's.<sup>61</sup>

At a global level, the gap between poorer and richer countries continues to increase with the wealthiest 20% of nations controlling 84% of global GNP,<sup>62</sup> and half of the world population languishing in desperate poverty, including a billion suffering the consequences of grossly inadequate access to food and clean water. As Mattick points out, 'in 46 countries people are poorer today than in 1990. In 25 countries more people are hungry today than a decade ago.'<sup>63</sup>

With executive remuneration increasing and very limited taxation of high incomes and private wealth, the experience of an increasing number of working people in the developed world involves stagnating wages, postponed retirement, intensification of work and increasing insecurity, with more short term contracts, casualisation, supervision and disempowerment. For many it means chronic unemployment, very limited welfare and poverty.

In the developing world there is typically no state welfare provision at all for the millions displaced from, sustainable, subsistence agriculture every year to make way for cash-cropping, mining, urban expansion and tourist resorts. They are forced into dirty and dangerous slums and shanty towns, many trying to survive through begging, stealing, prostitution and reliance on relatives support. For those who do find employment there is no state protection for working and living conditions in the plantations, mines, factories, building sites and workers dormitories and camps, with frequently appalling working and living conditions.

It is the poor working population of the developing world that is most vulnerable to the effects of climate change, with major agricultural regions and populations close to sea level or reliant upon glacial melt waters, and very limited resources available for adaptation or defence.

The subversion of liberal democracy by corporate interests in the US and elsewhere in the developing world has long deprived the working

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<sup>61</sup> Rees, above n 4, 101.

<sup>62</sup> Ibid 107-108.

<sup>63</sup> Mattick, above n 22, 85.

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population of the west of any meaningful representation at the national or transnational levels of governance. The radically disempowered majority in the developing world are typically even further removed from meaningful participation or representation. And the increasing power of the Chinese leadership in shaping such transnational governance is the power of a totalitarian central administration presiding over ruthless exploitation of their working population, determined to keep down the wages and conditions of the majority while allowing the accumulation of vast wealth in a developing capitalist class.

Some agencies of the UN and some NGO's like Amnesty International and Greenpeace International have sought to assist and empower some of the most obvious victims of neoliberal inequality and repression. Various 'civil society' movements contest capitalist globalisation in various ways, pursuing 'localisation of both economic production and social and political life'<sup>64</sup> and/or destruction of the Bretton Woods institutions to try to escape control by big corporations. They seek to regain the national powers of regulation of the Bretton Woods era, or to create new democratic regional and global governance structures.<sup>65</sup>

There have been some limited successes of citizen action in slowing the progress of such destructive globalisation, including multinational gatherings of organised workers to oppose NAFTA in the early 1990s, the 50,000 strong protests at the Third WTO Ministerial meeting in Seattle in 1999, the FTAA negotiations in Quebec City in 2001, and the defeat of water privatisation in Bolivia.<sup>66</sup> Developing world workers and farmers have been active in all of these cases. It is amongst the workers and peasants of the developing world that major organised challenges to capitalism can be expected to increase in the future. There are already signs of increasing organisation and increasing militancy amongst the rapidly developing industrial working class of China and other newly industrialising regions. Around the world, peasants have been mobilising to fight against the seizure of land and resources by or for capitalist corporations. In Latin America such peasant movements have increasingly influenced mainstream politics, with the worker's party in Brazil, the Bolivarian movement in Venezuela and similar movements elsewhere challenging US imperialism and neoliberalism.

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<sup>64</sup> Patomaki and Teivainen, above n 30, 115-116.

<sup>65</sup> Ibid.

<sup>66</sup> Kristin Dawkins, *Global Governance* (Seven Stories Press, 2003) 97-101.

### XIII. THE DEVELOPED WORLD

In the developed world, Keynesians put their faith in further government borrowing and money creation to drive a renewal of growth sufficient to allow repayment of the borrowings without generating further crises in the future. They correctly criticise the stimulus packages in the US and Europe as inadequate to drive new growth, through failing to produce a sustained expansion of workers' consumption demand.

Big capital sees improved conditions for labour leading to increasing workers confidence and power, eating into its future profits and threatening its domination of the political process. The accumulation of government debt is seen as a threat of tax increases in the future, further eating into their profits. Money creation by governments threatens to produce accelerating inflation.

Hard line neoliberals bemoan the failure of 30 years of neoliberal reforms to cut back social welfare spending, taxation and government debt in the developed world sufficiently to drive genuine new profitability and new growth. They correctly highlight the increasing threat of default on developed world government debt whose servicing has become an ever greater component of government spending, and the problems of further borrowing in face of such a threat and such increased debt service.

The US leadership can continue to prop up its own economy and devalue Chinese bond holdings through money creation, thereby also increasing the cost of Chinese imports. But it is much more difficult for them to enforce a big upward revaluation of the Chinese currency as they did earlier with Japan, through threats of trade and investment protection. The running down of manufacturing industry in the US and the very high cost of trying to re-establish it, leaves US businesses dependent upon cheap Chinese imports.

Collaboration between East and West in the imposition of intensified structural adjustment in Europe and America, whether or not supervised by the IMF and World Bank, would indeed mark a substantial extension of transnational governance. But further moves in this direction would not be so much a 'golden era' as the continuation of an era of deepening darkness.

It currently takes around 8 hectares of productive land to provide food, water, energy and settlement area for an average US citizen. But the

world only has enough productive land to allow for around 1 billion people to live at this level, rather than the projected world population of 9 billion by 2060. With increasing numbers of Chinese aspiring to western living standards, with strategic mineral resources running out, all biological systems in decline and climate change threatening food and water supplies, it is difficult to see how future military conflict can be avoided.

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**RULING BY LAW OR THE RULE OF LAW:  
REVIEW OF MICHAEL HEAD, *CRIMES  
AGAINST THE STATE – FROM TREASON TO  
TERRORISM* (ASHGATE, 2011)**

HARRY GLASBEEK\*

*Crimes Against The State - From Treason to Terrorism* makes several important contributions: it adds to our knowledge and, undoubtedly, will be a spur to many scholars because of the questions it raises. And, for the most part<sup>1</sup>, it is easy-to-read, making valuable information available to a public likely to be intrigued by the many dramatic stories it tells. It will, as it should, reach a much wider readership than that which usually connects with a scholarly book on a specialist area of law. And this is important because, with this book, Professor Head asks us to confront many of the assumptions that inform our understanding of our legal and political spheres.

The mainstream media outlets in the mature liberal capitalist economies cheered on the manifestations that they came to call the Arab Uprisings.<sup>2</sup> They were glad that the people in Tunisia, in Egypt and in Libya had taken to the streets and were willing to take the terrible risks this entailed. They were doing what freedom-loving people had done elsewhere at different times, namely, stand up to tyrannical governments that had abused their powers. The Anglo-American and European media applauded this because it reminded

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<sup>1</sup> The reproduction of the provisions of some statutes is the reason for the caveat. While it is useful, indeed essential, to the technical reader who wants to follow the argument the author makes about the breadth and extent of the manipulation of the legislation, the lay reader may find this detailed presentation laborious. But, this will not spoil the work for her as the writer's summation of the laws, his conclusions as to how they were used and vivid accounts of the circumstances in which they were deployed provide both explanation and context for the lay reader.

<sup>2</sup> Of course, this did not, and still does not, include all of these uprisings. Cheering militancy and activism is not motivated as much by logic as it is by partisan politics. Head strongly documents the legal flip-side of this truth by telling many stories that show that severe criminal laws and penalties are used against certain political and economic actors rather than others, another indication of built-in partisanship that pervades our institutions and public discourses. Still, it is likely that many in the media may not be fully aware of their partisanship; such is the power of the conventional wisdom they share that they may sincerely believe that the unfavoured uprisings are not justifiable revolutions against undemocratic oppressors.



them of their nation states' histories. For instance, at some stage, the French, the English and the U.S. folk had rebelled. And it had paid-off: they had won liberties that had been denied them by their rulers. Today, the French, the English and the citizens of the U.S. are said to be free to believe what they will, to speak, to assemble and to associate as they see fit and governments are to respect their beliefs, their exercise of free speech, assembly and association.

Underlying the media support for the Arab Uprisings, then, is a sense of smugness. What we in the mature capitalist democracies already enjoy, indeed have enjoyed for a goodly time, is the people's unchallenged and unchallengeable right to constrain their governments – rather than the other way round. As Michael Head notes, the principle that the people have a legal right to overthrow a government is enshrined in the U.S. Constitution.<sup>3</sup> After all, a great deal of the U.S.'s perception of itself as a beacon of freedom in the world stems from the fact that its birth as a free nation, and the embedded civil liberties for one and all U.S. citizens that came to grace it, followed a revolution fought against a government that was, in legal terms, entitled to govern. But that government's abuses, so goes the U.S. story, legitimated the waging of war against it by guerilla/terror-like tactics. Born in this way, it is necessary for the U.S. to acknowledge, indeed to celebrate, the notion that the people have a residual right to overthrow an abusing government. As Thomas Jefferson wrote: 'When the people fear the government there is tyranny, when the government fears the people there is liberty.'<sup>4</sup>

It behoves those of us who live in mature liberal capitalist democracies, therefore, to be seen to support the many others in the world who are not yet blessed by having won the enriched civil and political liberties of our peoples. We should understand, and have empathy for, those who must fight the way our predecessors did. Of course, there are elements of paternalism, of self-congratulation, that colour our mainstream media's approval of (some) Arab Uprisings<sup>5</sup> and even a sense of relief.

This posturing about the impoverished state of liberty and democracy in other regions has provided a much-needed antidote to the growing sense that, maybe, just maybe, we in the more mature liberal capitalist

<sup>3</sup> Michael Head, *Crimes Against the State – From Treason to Terrorism* (Ashgate, 2011) 70.

<sup>4</sup> Good Reads, *Quotes About Liberty – Thomas Jefferson*  
<<http://www.goodreads.com/quotes/tag/liberty>>.

<sup>5</sup> And similarly, those of earlier overthrows of governments in nation states that emerged after the demise of the Soviet Union.

democracies might not have as much liberty, as great a scope to think and act as we loudly and repeatedly proclaim. After all, as the sub-title of this book reminds us, we have embarked on a struggle against terrorism. In so doing, our governments have reached-out for legal tools and measures that give governments the power to quell actions and conduct that, not so long ago, might have been seen as falling within the protected ambit of freedom of thought, speech, assembly and association.<sup>6</sup>

Naturally, this has been somewhat controversial. As Benjamin Franklin wrote: 'They who can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.'<sup>7</sup> A vigorous literature has been spawned by the manifest tension between this much-admired ideal and the willingness to cut the State some slack in parlous times.<sup>8</sup> On the whole, politicians, media pundits and scholars who are champions of our civil liberties acknowledge that the novel threats presented after 9/11 do require an appropriate response by government and, thus, are willing to go along with some rather draconian responses.<sup>9</sup> They justify this endangerment to our civil and political rights by expressing trust. They trust their legal institutions - often encapsulated by the phrase 'the Rule of Law' and featuring an independent judiciary preferably armed with a Bill of Rights - to be mindful of their roles as guardians of our system of governance. There is a tendency to see the current wave of State legislative powers to use criminal prosecutions, to enlarge the scope of guilt by association, to intensify surveillance and infiltration, as dangerous, but necessary,

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<sup>6</sup> The anti-terrorist legislation spawned by 9/11 is extensively discussed in Head, above n 3, Chapter 7 and some of the Australian responses are found at Head, above n 3, 12.

<sup>7</sup> Good Reads, *Quotes About Liberty - Benjamin Franklin*

<<http://www.goodreads.com/quotes/tag/liberty>>. The same source offers a number of similar punchy "bons phrases" by the likes of Ronald Reagan, 'I hope we once again have reminded people that man is not free unless government is limited. There's a clear cause and effect here that is as neat and predictable as a law of physics: As government expands, liberty contracts', and Thomas Jefferson, 'The spirit of resistance to government is so valuable on certain occasions, that I wish it to be kept alive.'

<sup>8</sup> For a sampling of Australian reactions to the anti-terrorist legislation, see Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007); Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (UNSW Press, 2006); Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (UNSW Press, 2004).

<sup>9</sup> Head, above n 3, 10-11 notes that Richard Posner (like Yale's Alan Dershowitz and the Canadian political theorist and former leader of Canada's Liberal Party, Michael Ignatieff) favours abandonment of safeguard like habeas corpus, the use of some torture to gather evidence and that, similarly, the Australian civil libertarians, Andrew Lynch, Nicola McGarrity and George Williams were perfectly comfortable with allowing the executive, acting behind closed doors, to ban organizations it deemed to be terrorist ones.

aberrations from the norm - a norm that will be safeguarded as much as possible by sensitive members of the executive and by the judiciary. Inherent in this approach is the belief that when the threat diminishes, the State will loosen its reins and return our full liberties.

This is where Michael Head's book becomes so important. He presents strong evidence that there is nothing novel about Anglo-American governments' recent roll-backs of supposedly guaranteed political freedoms. Just as it is today, the nation State has always proved itself more than eager to devise laws that created and defined crimes against the State in order to ward off its contemporary enemies. Head confronts those who argue that the dangers that today's 'exceptional' restraints may lead to abuses are likely to be diminished by our strong institutions, led by an independent judiciary. The book provides a mass of evidence that makes this seem more like a hoped-for outcome than one that, given our historical experiences, might confidently be expected. Moreover, his analysis of the data he assembles leads him to suggest that a class-based approach that posits a fundamentally conflicted society provides a better understanding of our legal and political regimes than does the social consensus model posited by the liberal pluralists who see the current restraint on freedoms as necessary and aberrational momentary evils. Head's is a formidably well-documented argument that questions the political understandings that pervade our policy-making, academic writings and teaching.

To make it, Professor Head takes us on a journey of discovery. He tabulates the many legal tools that have been used over time by Anglo-American governments to protect themselves from perceived dangers: the statutory offences of 'subversion, rebellion, treason, mutiny, espionage, sedition, terrorism, riot and unlawful assembly.'<sup>10</sup> These are discussed in groupings defined by their conceptual overlaps (chapters 3 through 9). This enables the author to show the genesis of many of our current laws and to talk about the way in which so many of these established crimes against the State have been used episodically; frequently in some periods, falling into desuetude for a while and, then, enjoying surprising revivals. This attention to continuities and discontinuities furthers the author's project as it is persuasive evidence that the dominant class of various and quite distinct political economic regimes always have used legally legitimated, and startlingly similar, coercive measures to defend their interests. One telling example amongst many on offer is the tale of how the uppity parliamentarians were subjugated by Charles I to the hated Star Chamber sedition laws

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<sup>10</sup> Head, above n 3, 1.

but, how after their victory, they did not shy away from using the very same repressive laws to hound their enemies after the so-called Glorious Revolution they had fostered.<sup>11</sup>

Integral to this presentation of continuities and discontinuities is the imparting of details of the dozens of pieces of legislation relied on by various governments in Great Britain, the U.S., Australia and Canada. The somewhat painstaking parsing of language about every one of the many crimes discussed may be a trifle more than is needed to make the point that the laws frequently are used with disregard for their original purpose or interpreted by judges in breach of their norms of their own methodology. But, on the positive side, these carefully statutory interpretation exercises do support key components of the theoretical framework proffered by Professor Head.

First, they underscore that 'in every period of military, economic and political fragility'<sup>12</sup> feudal lords and elected governments have defended themselves against threats from below by the use and abuse of legalized coercion.<sup>13</sup> Second, they furnish evidence for the author's claim that even though these tools are known as *crimes* against the State they are not deployed or interpreted as ordinary crimes. The nature and use of these offences do not fit easily within the rubric of criminal law in liberal polities that purport to respect the rights of the individual and to distrust the State and its capacity to use coercion. Head makes a convincing case that when it comes to defending their powers by the use of legally justified coercion our mature capitalist democracies all too often show themselves to be contemptuous of liberal ideals and ideas.

Professor Head repeatedly shows how vague the definitions and scope of the many offences created are. If we really adhered to a Fuller-type

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<sup>11</sup> Head, above n 3, 150 and onwards. Indeed, the book's theme is how different regimes (ab)used already existing tools of repression in the name of saving quite different kinds of status quo. The contemporary angst as to whether we are reacting in an unusual manner to a threat after 9/11 look somewhat banal from the vantage point offered by the rich historical context provided in this book.

<sup>12</sup> Ibid 32.

<sup>13</sup> The many illustrations of the politicised use of criminal tools found in the work are presaged at Head, above n 3, 21: '...no shortage of legally dubious and politically-motivated decisions, including outright abuse of the extensive surveillance, investigatory, detention, prosecution and punitive powers available to the authorities.' Amongst the many abuses recorded in the book are a number of instances where the State invented threats in order to use repressive mechanisms against feared enemies, for instance, against socialists in the inter-war periods Palmer raids or strikers from the birth of market capitalism onwards and the more recent Weapons of Mass Destruction episode.

model of the Rule of Law, this should have led the courts to strike down these laws. To the contrary, the book has dozens of examples that show that courts are only too eager to use the vagueness of the laws to give them the scope that the (often malicious) prosecuting State claims for them. A number of cases are discussed where the attempted repression of political actors by enlarged readings of the governing statutes were sought was so out of step with the sentiments of the population that juries simply would not convict, despite the presiding judges' best efforts to tell them it was their patriotic or Christian duty to do so.<sup>14</sup>

This brings us to the judges. The telling of the story of how laws were used in many different periods and settings illuminates the way in which the judiciary consistently sided with the State, whether the apprehended danger was to the life or reputation of the sovereign, the political decisions of an elected government, the reputation and standing of a government or the economic interests of employers. This constancy, Head shows, was achieved by reading the statutes – from a legal method perspective – in a highly elastic manner. His diligent account of how the same provisions were interpreted in different settings, in different jurisdictions, in different social, political and economic times, makes it clear that reliance on the judiciary to defend civil and political freedoms is a romantic notion. The judges have not acted so much as independent, non-partisan umpires as they have acted as integral members of the dominant classes.<sup>15</sup>

Michael Head has used his legal skills to analyse crimes against the State and, by using historical, political and economic data, has made a strong case that law

is an instrument of the *de facto* ruling class: it both defines these rulers' claims upon resources and labour-power—it says what shall be property and what shall be a crime—and it mediates class relations with a set of appropriate rules and sanctions, all of which, ultimately, confirm and consolidate class power. Hence the rule of law is only another mask for the rule of class.<sup>16</sup>

*Crimes Against the State* is a fine book. It puts law in its political-economic context. It makes it clear why standard criminal law texts do

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<sup>14</sup> See the engaging account of the Eureka Stockade, Head, above n 3, 81-85.

<sup>15</sup> For an older conclusion to the same effect, after an examination of judicial decision-making in English domestic civil and criminal law, see JAG Griffith, *The Politics of the Judiciary* (Fontana/Collins, 1977).

<sup>16</sup> Edward Palmer Thompson, *Whigs and Hunters* (Pantheon Books, 1975-6).

not pay much attention to the crimes against the State; to do so would be to raise the very hegemony-threatening question: how is it decided what is criminal and what is not? By showing how normal legal reasoning and the purported separation of politics from the administration of law and its prosecution is abandoned so often, the book throws down a challenge to the liberal lawyers who assert that mature capitalist democracies are sites of civil and political freedoms which occasionally have to take measures to defend themselves against threats. It asks them: 'might we not be a class-divided society in which such civil liberty and political freedom we enjoy will always, with the aid of law, be subjugated to the dominant class's will?'

Professor Head has cleverly used the recently invigorated anxiety about the state of our polity to ask bigger questions. I hope that he will complement this work with another that offers his views, as a lawyer, on the nature of the State that is the ubiquitous subject of the reviewed book. Manifestly, he is better placed than most to make a major contribution to the debates on this subject.

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# LIMITS TO STATE PARLIAMENTARY POWER AND THE PROTECTION OF JUDICIAL INTEGRITY: A PRINCIPLED APPROACH?

SIMON KOZLINA\* AND FRANCOIS BRUN\*\*

Case citation; *Wainohu v New South Wales* (2011) 243 CLR 181; [2011] HCA 24

## I. BACKGROUND

The case of *Wainohu v New South Wales* (2011) ('*Wainohu*') was a challenge by Derek Wainohu, a member and former president of the Sydney Branch of the Hells Angels Motorcycle Club, against the constitutional validity of the *Crimes (Criminal Organisations Control) Act 2009* (NSW) ('the Act'). The case revisits the limits to State parliamentary power outlined fifteen years ago in *Kable v Director of Public Prosecutions (NSW)*<sup>1</sup> ('*Kable*') and the scope of possible exceptions provided by the *persona designata* rule, against the backdrop of community uproar over gang violence that sparked the enactment of the impugned law.

The shooting of a bikie member at the Qantas terminal of Sydney Airport in March 2009 and the subsequent community outrage and media coverage prompted the New South Wales Parliament to consider and pass the Act all in one day on 2 April 2009. The Act received assent the next day and commenced immediately.

In relation to Derek Wainohu, the Act was enlivened on 6 July 2010 when the New South Wales Acting Commissioner of Police lodged an application with the Registry of the New South Wales Supreme Court seeking a declaration under Pt 2 of the Act by an 'eligible Judge' of the New South Wales Supreme Court that the Hells Angels Motorcycle Club was a 'declared organisation' under the Act. The declaration, if made, would give rise to further powers under the Act, which would have the effect of creating limitations on the activities in which members of the organisation could engage. Under s 35 of the Act, such

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<sup>1</sup> (1996) 189 CLR 51.

a declaration could not be reviewed (although as noted in the case of *Kirk v Industrial Court (NSW)*,<sup>2</sup> such ouster clauses have limited effect in relation to claims of jurisdictional error). Significantly, s 13(2) of the Act exempts an eligible Judge from any duty to give reasons for making or refusing to make a declaration (other than to a person conducting a review under s 39 if that person so requests). Under s 39(2), the Ombudsman may require an eligible Judge to provide 'information' about the exercise of police powers pursuant to such a declaration. The right of appeal in s 24 is limited to control orders under Pt 3 of the Act.

The basis for the challenge to the Act's validity was the proposition that the Act confers functions upon eligible Judges of an Australian court that could undermine the institutional integrity of that court. Supporting this proposition was the argument that under the Act an eligible Judge would be exercising an administrative power without being subject to the rules of evidence or providing reasons for decisions. The plaintiff also contended that the Act infringed the freedom of political communication and political association implied from the Constitution.

## II. THE MAJORITY JUDGMENT

The majority of Gummow, Hayne, Crennan and Bell JJ ultimately found that Part 2 of the Act was invalid due to the application of the principles found in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*<sup>3</sup> ('*Wilson*') and *Kable*. These cases stand for the principle that the appointment of a judge to a position with executive powers could undermine the institutional integrity of the judge's court if the non-judicial function was incompatible with the judge's judicial position. The Court emphasised that the *Kable* principle applies through the entire Australian integrated court system because the many levels of the national court system cannot provide 'different grades or qualities of justice'.<sup>4</sup>

The majority in *Wainohu* determined that there was no statutory requirement for reasons to be provided by a judge making a declaration or decision under the Act.<sup>5</sup> The Court then found that the

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<sup>2</sup> (2010) 239 CLR 531.

<sup>3</sup> (1996) 189 CLR 1.

<sup>4</sup> *Wainohu v State of New South Wales* [2011] HCA 24 [105], quoting *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 [103].

<sup>5</sup> *Wainohu v State of New South Wales* [2011] HCA 24 [95-104].



absence of a requirement to provide reasons was incompatible with the Supreme Court's institutional integrity.<sup>6</sup>

According to the majority, reasons are a key aspect of judicial decision-making,<sup>7</sup> and there is likely to be an obligation under *Public Service Board of NSW v Osmond*<sup>8</sup> to provide reasons in this instance given the seriousness of the consequences for the person subject to the application.

The majority judgment relied on two key precedents. The first authority is the joint judgment of Mason and Deane JJ in *Hilton v Wells*<sup>9</sup> ('*Hilton*') which clearly stated that an eligible Judge discharging substantial non-judicial functions under the relevant act could undermine the integrity of the court system. For example, an application for a declaration in respect of an organisation would require that the judge take into account 'information' and 'submissions' that would not be admissible in a court of law or subject to any judicial process. The second authority relied upon by the majority is the reasoning of Gaudron J in *Wilson*<sup>10</sup> which identified the limits of the *persona designata* doctrine – ensuring impartiality, providing reasons and maintaining public confidence.

In this case, the majority found that there was too much overlap between the judge's non-judicial role as a *persona designata* and their judicial role; the hearing of the application would result in a decision similar to that of a judicial outcome but without a fundamental aspect of the judicial process – the giving of reasons.

In other words, the decision of a judge acting in a non-judicial role (which may appear to the public to be a judicial role) without the provision of reasons for such decision undermines the institutional integrity of the judge's judicial role and function. As the majority noted, quoting *Hilton*, '[A]n observer might well think, with some degree of justification, that it is all an elaborate charade.'<sup>11</sup>

The majority struck down the operation of Part 2 of the Act because it would undermine the public's confidence in 'impartial, reasoned and public decision-making' by eligible Judges through supporting

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<sup>6</sup> *Wainohu v State of New South Wales* [2011] HCA 24 [104-109].

<sup>7</sup> *Wainohu v State of New South Wales* [2011] HCA 24 [92].

<sup>8</sup> (1986) 159 CLR 656.

<sup>9</sup> (1985) 157 CLR 57 (83-84).

<sup>10</sup> (1996) 189 CLR 1.

<sup>11</sup> *Wainohu v State of New South Wales* [2011] HCA 24 [106].

‘inscrutable decision-making’ under s 9 and s 12.<sup>12</sup> The majority found that the statute limits the requirement to provide reasons and thus undermines the Supreme Court’s integrity, regardless of the actions, probity and integrity of individual judges acting in the non-judicial role – a direct dismissal of the core of Justice Heydon’s dissenting judgment.

The majority found that the operation of Part 3 relied on the valid operation of Part 2 and that the effect of invalidating s 13(2) was that the entire Act was invalid as the remaining parts of the Act could not be severed.<sup>13</sup>

### III. THE CONCURRING JUDGMENT OF FRENCH CJ AND KIEFEL J

French CJ and Kiefel J concurred with the majority in stating that the nature of the power conferred on the eligible Judges of the Supreme Court by the provisions in the Act undermines the integrity of that court. Their judgment is noteworthy for the detailed examination of the relevance of, and limits on, the *persona designata* mechanism<sup>14</sup> and its relationship to the separation of powers doctrine and other limits on (State) legislative power.

Although States are not bound by notions of the separation of powers, State Parliaments cannot give courts or judges functions that are incompatible with a court’s essential and defining characteristics and every court’s role in the integrated Australian court system created by Ch III of the *Commonwealth Constitution*. The provision in s 13 of the Act that a judge is not required to give reasons for a decision of such importance makes the Act incompatible with a court’s essential characteristics.

French CJ and Kiefel J noted that judges can be appointed to non-judicial functions but caution must be exercised in such an appointment because such function may affect the independence and impartiality of courts, may attract political controversies, and/or may be onerous. The justices reviewed the High Court’s recent development of these concepts starting with *Drake v Minister for Immigration and Ethnic Affairs*,<sup>15</sup> (*‘Drake’*) which determined that a Federal Court judge could

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<sup>12</sup> *Wainohu v State of New South Wales* [2011] HCA 24 [109].

<sup>13</sup> *Wainohu v State of New South Wales* [2011] HCA 24 [115].

<sup>14</sup> The *persona designata* mechanism refers to a situation in which a judge acting in their personal capacity, rather than as a member of the court to which they belong, can exercise non-judicial powers without breaching the separation of powers doctrine.

<sup>15</sup> (1979) 24 ALR 577.

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also sit in a non-judicial role on the Administrative Appeals Tribunal. The Court in *Drake* did not engage in any discussion of possible limits on this arrangement. In *Hilton*,<sup>16</sup> the High Court upheld the *persona designata* concept to allow Federal Court judges to exercise an administrative function in authorising telephone taps. The dissent in *Hilton* by Mason and Deane JJ noted the appearance to the public of a connection between the judge's judicial and non-judicial activity may be a limit on the concept's application. The majority in *Hilton* observed that a potential limit on the *persona designata* mechanism may exist if the non-judicial function is incompatible with the judge's judicial role. The *persona designata* concept was also applied successfully to allow a judge to exercise a non-judicial function in *Grollo v Palmer*<sup>17</sup> ('Grollo'), but with two conditions – the need for a judge's consent to acting in the role and the requirement that there be no incompatibility with the proper discharge of the judicial function. McHugh's J dissent in that case adopted the incompatibility principle, but stated that the public could not distinguish between the judge's judicial and non-judicial roles and thus McHugh J found that institutional independence had been undermined in that case. Next, French CJ and Kiefel J held that *Wilson*<sup>18</sup> expanded the application of the doctrine to judges even if their judicial office was not a requirement of their non-judicial appointment. Significantly, in *Wilson*, the *persona designata* argument failed and the High Court struck down the non-judicial appointment as incompatible with the judge's position on the Federal Court. Importantly, the Court in *Wilson* determined that it is irrelevant what measures an individual judge may take to avoid the incompatibility as the issue is whether the functions themselves are incompatible.

Moving to the States, the justices argue that the incompatibility doctrine is also found in *Kable*,<sup>19</sup> although it does not find its basis in the separation of powers doctrine. The limit on State power is that the State legislature cannot undermine the 'institutional integrity' of a court in the integrated Australian court system. The concept of institutional integrity is equated with the 'essential characteristics' of a court – impartiality, procedural fairness, open courts and the giving of reasons. In that sense, there cannot be different grades of justice between federal and State courts.

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<sup>16</sup> (1985) 157 CLR 57.

<sup>17</sup> (1995) 184 CLR 348.

<sup>18</sup> (1996) 189 CLR 1.

<sup>19</sup> (1996) 189 CLR 51.

The justices inferred from *Kable*<sup>20</sup> that, even if the non-judicial function is conferred on the judge in their individual capacity, the function may nevertheless create a close connection between the judge's non-judicial function and their court role in a way that undermines the integrity or fundamental characteristics of that court. The justices argue that *persona designata* does not resolve the question of incompatibility. The fact that the judge is 'detached' from their judicial role is relevant, but if it is their status as a judge that forms the basis of their appointment to the non-judicial role, then the detachment may be insufficient to remove the incompatibility.

The justices warned of the risks of adopting the principle of incompatibility too swiftly and warned that it should be exercised with 'restraint' as courts should recognise the 'long history' of legislatures creating extra-judicial roles for judges.

French CJ and Kiefel J also examined the requirement of courts to provide reasons. While the justices cited the judgment of Gibbs CJ in *Public Service Board of New South Wales v Osmond*<sup>21</sup>, which stated that there was no 'inflexible rule of universal application' that reasons be given for judicial decisions, they emphasise the subsequent development of the duty to provide reasons in *Grollo*<sup>22</sup> and *AK v Western Australia*.<sup>23</sup> The justices found that the duty to give reasons is an incident of the judicial function, strongly supported by policy considerations.<sup>24</sup> They emphasised that the duty will arise in judicial decision-making, even if there is no appeal available from that decision. The policy reason identified by the justices in support of this notion is the 'open court' principle which states the courts should be subject to public scrutiny.<sup>25</sup>

In considering the function of an eligible Judge under the Act, the justices argued for a focus on 'substance' rather than 'form' and noted that the eligible Judge performing their non-judicial function under the Act would appear to the public to be a judge of the Supreme Court. Such a non-judicial function, fulfilled without the requirement to provide reasons, was incompatible with the Supreme Court's integrity and fundamental characteristics.

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<sup>20</sup> (1996) 189 CLR 51.

<sup>21</sup> (1986) 159 CLR 656.

<sup>22</sup> (1995) 184 CLR 348.

<sup>23</sup> (2008) 232 CLR 438.

<sup>24</sup> *Wainohu v State of New South Wales* [2011] HCA 24 [53-55].

<sup>25</sup> *Wainohu v State of New South Wales* [2011] HCA 24 [57].

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Like the majority, French CJ and Kiefel J emphasised that the personal conduct of an eligible Judge, such as choosing to provide reasons for a declaration, does not resolve the issue of whether the limits on legislative power have been exceeded in a particular case.<sup>26</sup>

#### IV. HEYDON'S J DISSENT

Heydon J argued in favour of the Act's validity because, in his opinion and amongst many other grounds, there was insufficient empirical evidence to support the contention that a judge exercising the powers given under the Act would in fact undermine public confidence in the integrity of the judiciary.

The dissent argued strongly against any expansion of the incompatibility doctrine in limiting State legislative power. Heydon J asserted that judges would be likely to provide reasons for their decisions regardless of the Act's insistence that reasons are not required to be given. Heydon J also argued that the judicial duty to provide reasons (if it does exist) is not sacrosanct and has been removed by parliament in other situations without any ensuing invalidity of the Act removing the duty. His Honour also supported counsel's arguments that some of the High Court's previous jurisprudence on this issue overstated both the concern of the public about the exercise by judges of non-judicial functions and the extent to which State powers should be fettered in relation to State courts.

In the earlier decision in *South Australia v Totani*<sup>27</sup> on similar legislation, Heydon J referred to the difficulties caused by the *Kable* doctrine. In particular, he noted that intermediate appellate courts have experienced difficulties in understanding and applying the doctrine, which is a reason for courts to be cautious about expanding its scope.<sup>28</sup>

#### V. FURTHER COMMENT

Narrowly construed, *Wainohu* is another example of the common law method of developing principle: an ongoing, case-by-case evolution based on the constant re-interpretation of a signal case. However, it is arguable that the judgment of French CJ and Kiefel J provides a new basis for limiting State parliamentary sovereignty, as it presents an extended rationale for a more interventionist approach by courts to parliamentary interference with judicial independence. The concurring

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<sup>26</sup> *Wainohu v State of New South Wales* [2011] HCA 24 [69].

<sup>27</sup> (2010) 242 CLR 1.

<sup>28</sup> (2010) 242 CLR 1, 95-97.

judgment of French CJ and Kiefel J develops the principles in this area by de-centering the importance of the 'label' *persona designata* (and its possible implicit limits) and re-focusing attention on the real or underlying concern, that is, the interaction between the judicial and non-judicial roles of eligible Judges.

The main concern with the concept of incompatibility is not the empirical one raised by Heydon J. The law deals with many areas of 'public concern' without reliance on public polling or other means of ascertaining public opinion, such as 'attending barbecues' or 'gladhanding at public events'. Judges' independence and their daily involvement in court life are suitable and sufficient bases for making determinations on matters of institutional integrity and public confidence. The real concern with incompatibility is how to logically justify the 'grandparenting' of historic non-judicial functions that essentially are incompatible with judicial decision-making but are still to be maintained under the guise of 'long standing practice'. While it is right to avoid 'the application of a Montesquieuan fundamentalism',<sup>29</sup> at the same time it is difficult to clearly see when historical practice will be sufficient justification for an ongoing arrangement, such as the example mentioned by French CJ and Kiefel J of the appointment of a judge to chair the National Crime Authority.

A clearer approach may emerge from following McHugh's J dicta in *Hilton*<sup>30</sup> on the importance of maintaining judicial independence from executive or legislative interference. The concept of independence was also central to the actual analysis by French CJ and Kiefel J of the actions of an eligible Judge under the Act. The notion of 'decisional independence' may provide future courts with a fruitful direction in relation to understanding the limits of State legislative power by allowing an evaluation of the real risk associated with parliamentary overreach: abuse of power through the absence of proper checks and balances.

All three judgments went beyond a formal analysis of the text of the Act and adopted a realist approach to the assessment of an eligible Judge's role under the Act. However, the difference between the majority and concurring judgments on one hand, and the dissenting judgment on the other, is the extent to which 'reality' may be used to trump formalism. The majority and concurring judgments pursue a limited degree of realism in adopting a functionalist perspective but

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<sup>29</sup> *Wainohu v State of New South Wales* [2011] HCA 24 [30].

<sup>30</sup> (1985) 157 CLR 57.

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eschew a consideration of what judges may actually do in individual cases. The dissent rejects the functionalist approach and focuses sharply on the professional and learned response of experienced judges to argue that it is highly unlikely eligible Judges will refuse to provide reasons when justice requires it. Both views of 'reality' are defensible but it will be a challenge for future courts to determine a rational basis for determining which level is correct in a particular case.

The most significant aspect of this case is the return to the Court's recent jurisprudence on the protection of State courts from legislative interference as initially outlined in *Kable*.<sup>31</sup> The justification for the outcome in *Kable* now seems to have been based on the importance of maintaining an 'intergrated national court structure' for the possible exercise of federal jurisdiction by State courts at some point in time. Even reposing a very minor federal power in a State court now carries very significant consequences for State courts, State parliaments and State judicial officers acting in non-judicial functions. The development of the *Kable* principle now means significant restraints on State parliamentary power can be justified on a very tenuous connection between State courts and federal authority. At some point it is conceivable that the tension between 'protecting' the potential future exercise of a marginal federal power by curtailing non-judicial functions and the maintenance of significant State responsibilities (such as stopping organised crime) may become too great and the High Court will need to re-examine the justification. The consequence may be the recognition that State courts are part of an integrated court system, not because of potential federal powers but because the users of State courts possess rights to a fair justice system that should be protected in all Australian courts.

## VI. CONCLUDING REMARKS

*Wainohu* highlights the judiciary's jealous protection of an independent court system from legislative interference, even when the legislation deals with judges acting in a non-judicial capacity. Given the constitutionally broad scope of State legislative power, the High Court's dogged insistence on finding novel means to limit State power is remarkable. This decision is an example of how quite onerous legislation is defeated by the identification of one key flaw in its drafting – the removal of the requirement for reasons. The New South Wales Parliament's response to *Wainohu* is the Crimes (Criminal Organisation Control) Bill 2012, which repeals the Act and re-enacts it

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<sup>31</sup> (1996) 189 CLR 51.

with the inclusion of an explicit obligation in Clause 13 on eligible Judges to provide reasons when making declarations under the act. The tension between the competing arms of government is readily apparent. As is so often the case, the judiciary's curtailment of legislative action results in a legislative response that addresses the Court's concern and shifts the conflict to another day.



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## BACK TO THE FUTURE: RETROGRESSION AND THE HIGH COURT'S DECISION IN *BYRNES V KENDLE*

LUDMILLA ROBINSON\*

Case citation; *Byrnes v Kendle* (2011) 243 CLR 253; [2011] HCA 26 (3 August 2011)

### I. INTRODUCTION

*Byrnes v Kendle*<sup>1</sup> ('*Byrnes*') is an interesting and arguably contentious decision regarding the law of trusts in Australia. On the one hand, the case clarifies the duties of a trustee when no duties have been provided in the trust instrument. This in itself is useful but unremarkable. On the other hand, the noteworthy aspect is the Court's approach to the interpretation of a trust instrument, the issue of intention to create a trust and the unanimous overruling of *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178 ('*Jolliffe*'). Certainty of intention to create a trust is one of the three 'certainties' necessary for the establishment of a valid trust. For just over ninety years, *Jolliffe* has provided authority for the proposition that the subjective as well as the objective<sup>2</sup> intention of a settlor at the time a trust was created should be considered by the court, and, if necessary, should outweigh the objective intention expressed in the trust instrument. Thus, prior to *Byrnes*, if a settlor created a trust for a purpose other than holding legal title to property for the benefit of a beneficiary,<sup>3</sup> the court could take this ulterior motive, together with other relevant facts and circumstances, into consideration when determining whether a valid trust had been created. Now, it would appear, such a broad and traditionally equitable approach to the construction of a trust instrument has been overruled, to be replaced by the requirement of a narrow and purely textual, rather than contextual, interpretation.

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<sup>1</sup> (2011) 243 CLR 253.

<sup>2</sup> The objective intention is evidenced by the actual words used in the document.

<sup>3</sup> For example, as a means of circumventing statute, as in *Jolliffe*, income redistribution or as a business strategy.

In addition to the consideration of the interpretation and validity of trust instruments, all three judgments in *Byrnes* present comprehensive, helpful discussions of the defences of acquiescence, consent and waiver.

There were three judgments handed down in the case. An individual judgment by French CJ, and two joint judgments by Gummow and Hayne JJ and Hayden and Crennan JJ. Although the reasoning and approaches taken in each of the decisions differ, they are all in agreement as to the conclusions drawn in relation to the major issues. As may be gathered from the following discussion, another common feature exhibited by all three is an implicit, and in some instances explicit, conservatism, manifested by a preference for restatement and explication.

## II. BACKGROUND

Joan Byrnes and Clifford Kendle were married in 1980. They separated in 2007, but at the time of the High Court proceedings, had not divorced. Both parties had adult children at the time of their marriage. In 1984 Mr Kendle purchased a unit in Brighton, South Australia, which was financed with a loan under the *Defence Service Homes Act 1918* (Cth). The unit was registered in Mr Kendle's name.

In 1989, Martin Byrnes, Mrs Byrnes' son and a solicitor, advised the parties to execute a document in regard to the property which was described as an 'Acknowledgement of Trust.' The instrument provided (inter alia):

1. Subject to clause 2 [Mr Kendle] stands possessed of and holds one undivided half interest in the Property as tenant in common upon trust for [Mrs Byrnes] absolutely ('the Byrnes Interest').

It went on to provide that, should one of the parties predecease the other, the survivor would hold a life interest in the share of the deceased party.

The instrument constituted a deed pursuant to s 41 of the *Law of Property Act 1936* (SA), because it was executed by both parties, their signatures duly witnessed and the document was expressed as being sealed.

In 1994, the Brighton property was sold and with the proceeds, the parties purchased a house in Rachel Street, Murray Bridge, South Australia. The Defence Services loan was transferred to the new

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property and a mortgage was also taken out with Westpac. As with the first property, Mr Kendle was the sole registered proprietor. In 1997 the parties executed a deed in relation to the Rachel Street property, which created Mr Kendle trustee of a half share in the Rachel Street properties on similar terms as the 1989 instrument.

In 2001, the parties moved into a property which had been purchased by Martin Byrne. In early 2002, Mr Kendle rented the property to his son for a weekly rental of \$125.00. The son, however, paid only the first two weeks rent. In January 2007, Mr Kendle, on the advice of his daughter, terminated the son's tenancy in the Rachel Street house and it was subsequently let to his grandson. The parties separated in March 2007.

At about this time, Mrs Byrnes assigned her interest in the Rachel Street property to her son, Martin, including her rights under the 1997 deed, for \$40,000.00. The Rachel Street property was sold in 2008.

### III. THE SLIPPERY PATH OF LITIGATION

In September 2008, Martin Byrnes commenced proceedings in the District Court of South Australia against Mr Kendle alleging, inter alia, that he had committed breaches of trust in failing to collect the rent for the Rachel Street house from his son and in breaching the duty to account. The plaintiff claimed one half of the proceeds of sale of the property, an order that Mr Kendle provide a full accounting of the income from and costs of the property and that any moneys found to be due as a result of the account be deducted from Mr Kendle's share of the proceeds of sale. In his defence, Mr Kendle alleged that Mrs Byrnes had consented or acquiesced to his conduct regarding the collection of the rent, thereby waiving her rights. Mr Kendle also raised estoppel as a defence.

The primary judge, Boylan DCJ, found that Mr Kendle held half of the net proceeds of the sale of the property on trust for Mr Martin Byrnes, but dismissed the allegations of breaches of trust on the basis that Mrs Byrnes had "co-operated" in the breaches by failing to take action to require Mr Kendle to collect the rent. A costs order was made against Mr Byrnes and his mother.

Mr Byrnes appealed the decision and on 18 December 2009, the Full Court of the Supreme Court of South Australia (Doyle CJ, Nyland and Vanstone JJ) dismissed the appeal and ordered costs against the Byrnes.

#### IV. ISSUES

There were three significant issues considered by the High Court in this case. These are as follows:

1. whether a valid trust had been created by the Acknowledgement of Trust of 1997.
2. if so, whether Mr Kendle had breached his duties as trustee by failing to collect the rental owed on the property.
3. if there had been breaches of trust, whether Mrs Byrnes had acquiesced or in some way consented to these breaches, thereby waiving any rights she might have had to seek redress against the trustee.

#### V. CREATION OF A VALID TRUST

The starting point for the deliberations of the Court was the issue of the validity of the trust created by the Acknowledgement of Trust of 1997. In their judgments, French CJ and Gummow and Hayne JJ found that the Acknowledgement of trust conformed to the requirement of s 29 (1)(b) of the *Law of Property Act 1936 (SA)*, which provides that all declarations of trust in regard to an interest in land be evidenced in some form of writing. Thus, the validity of the trust instrument pursuant to statute was not in question. What was at issue was, the intention of the respondent when the trust was created, since he alleged (inter alia) that at the time of executing the deed, he had no intention to create a trust.<sup>4</sup> Naturally, if there was no valid trust, the respondent owed no fiduciary duties to the appellant and, therefore, no breaches of trust could have occurred.

Consideration of the questions of validity and intention centred upon two interrelated but nevertheless separate and arguable conflicting issues raised by the facts and circumstances of the case. These are:

1. validity as determined solely by the words of the trust instrument and whether extrinsic factors could or should be used to determine meaning;
2. the effect upon validity of the subjective intention of the settlor, Mr Kendle, at the time the trust instrument was executed, and the use of extrinsic circumstances to determine this ulterior, subjective purpose.

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<sup>4</sup> *Byrnes*, above n 2, 256.

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As noted above, these issues are related but, arguably, also at variance. If the sole criterion upon which the validity of a trust is to be determined is to be the face of the document itself, then one of the three certainties necessary for the creation of a valid trust, intention, could be rendered otiose if some form of writing has been used to create the trust.

A. *Validity as determined on the face of the instrument*

French CJ does not engage in any lengthy discussion of this particular issue, preferring to concentrate instead upon the examination of the concept of the subjective intention of the settlor as a means of determining validity. He quotes with approval, however, a passage from Thomas and Hudson, *The Law of Trusts* in regard to the importance of inferring trust from the instrument alone:

In circumstances in which there has been an express trust declared over land, the terms of that trust will be decisive of the parties' equitable interests in land, in the absence of any fraud, undue influence or duress.<sup>5</sup>

His Honour goes on to add:

The relevant intention in such a case is that manifested by the declaration of trust. Such a case does not require any further inquiry into the subjective 'real' intention of the settlor.<sup>6</sup>

Similarly, Gummow and Hayne JJ are brief and to the point in expressing their opinion that the intention to create a trust should be construed from the trust instrument alone and not through the examination of external factors.<sup>7</sup>

In contrast to the brief, if not precisely terse, statements of principle of French CJ and Gummow and Hayne JJ, the joint judgment of Heydon and Crennan JJ deals at length with the question of the determination of validity of a trust solely from the face of the instrument.

In their efforts to discredit the "common misconception" that it is necessary "to establish a subjective intention by the respondent to create a trust,"<sup>8</sup> their Honours draw upon the principles of

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<sup>5</sup> Ibid 263, quoting G Thomas *The Law of Trusts* (Oxford University Press, 2<sup>nd</sup> ed, 2010) 95-96.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid 273.

<sup>8</sup> Ibid 282.

constitutional and statutory construction. While not stating explicitly that the approach to the interpretation of the trust instrument should be the same as the approach taken to statutory interpretation, this implication is self-evident.

An interesting, and arguably controvertible, prelude to their discussion is their approval of the approach taken to statutory and literary interpretation of Charles Fried, whom they describe as ‘the conservative at the Harvard Law School,’<sup>9</sup> no doubt intending to suggest that he is the only conservative in that venerable institution.<sup>10</sup> Fried rejects the notion that:

in interpreting poetry or the [United States] Constitution we should seek to discern authorial intent as a mental fact of some sort . . . we would not consider an account of Shakespeare’s mental state at the time he wrote the sonnet to be a more complete or better account of the sonnet itself.<sup>11</sup>

Apart from the fact that Fried appears to accept without question the validity of the approach to textual interpretation of the movement in literary criticism known as the New Critics,<sup>12</sup> he is arguably mistaken in attempting to compare the approach taken to a work of art and imagination to that which must be taken to statute. Such an analogy fails to consider the fact that, unlike statutory interpretation, there are no rules which prescribe a particular approach to literary criticism. Indeed, the New Critics, whose views Fried embraces with such enthusiasm, was just one of many schools of criticism theory, and by no means the most important. Thus, whilst it may be accurate to state that, in regard to statutes, ‘the text is the intention,’<sup>13</sup> a similar ‘black ink’ method applied to literary analysis, especially poetry, devalues not only the efforts of the author to communicate, but also the ability of the reader to construct multiple and parallel levels of meaning.

After their brief, but misguided, excursion into literary theory and criticism, Heydon and Crennan JJ proceed to discuss the more traditional approaches to statutory interpretation, stressing ‘the

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<sup>9</sup> Ibid.

<sup>10</sup> It is arguable that their Honours hold the view that the appellation “conservative” gives credence and authority to Fried’s pronouncements.

<sup>11</sup> Charles Fried, ‘Sonnet LXV and the ‘Black Ink’ of the Framers’ Intention’ (1987) 100 *Harvard Law Review* 751, 758-759.

<sup>12</sup> Thereby, potentially stirring a hornets’ nest of controversy from the stalwart and vocal opponents of this highly questionable school of literary criticism.

<sup>13</sup> Fried, above n 10, 759.

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irrelevance of the subjective intention of legislators.<sup>14</sup> It is the meaning of the statute which is paramount, not what the legislators meant.<sup>15</sup> This is a reasonable view, after all, a statute is a regulatory instrument, not a work of art and imagination.

Moving from statutory interpretation, their Honours turn their attention to examining approaches to contractual construction:

Contractual construction depends on finding the meaning of the language of the contract – the intention which the parties expressed, not the subjective intentions which they may have had, but did not express.<sup>16</sup>

Thus, evidence of any pre-contractual dealings or negotiations between the parties is inadmissible ‘unless it demonstrates knowledge of “surrounding circumstances.”’<sup>17</sup> Their Honours go on to state that ‘the actual state of mind of either party is only relevant in limited circumstances, for example, where one party relies on the common law defences of non est factum or duress.’<sup>18</sup>

After having emphasised the necessity for a purely textual interpretation of the meaning of the terms in a contract, their Honours proceed to discuss the correspondences between the construction of contracts and the interpretation of trust instruments, stating unequivocally that the rules of construction are the same for both.<sup>19</sup> Heydon and Crennan JJ quote with approval from the judgment of Mason and Dean JJ in *Gosper v Sawyer*,<sup>20</sup> in which their Honours state that: ‘the contractual relationship provides one of the most common bases for the establishment or implication and for the definition of a trust.’<sup>21</sup> Thus, Heydon and Crennan JJ conclude that:

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<sup>14</sup> *Byrnes*, above n 2, 283.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid* 284.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid* 285. It is interesting to note that this strict textual approach to contractual interpretation was re-stated in the recent High Court decision in *Western Export Services v Jireh International Pty Ltd* [2011] HCA 45 (28 October 2011), in which Gummow, Heydon and Bell JJ emphatically reaffirmed the principles laid down in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337. Thus, evidence of circumstances surrounding the formation of a contract are only admissible if there is a patent ambiguity on the face of the document. The significance attached by the Court to its rejection of the use of extrinsic factors to aid contractual interpretation is highlighted by the fact that the Court took the unusual step of publishing its reasons for the denial of an application for special leave to appeal.

<sup>19</sup> *Ibid* 286.

<sup>20</sup> (1985) 160 CLR 548.

<sup>21</sup> *Ibid* 568-569.

The authorities establish that in relation to trusts, as in relation to contracts, the search for the 'intention' is only a search for the intention as revealed in the words the parties used, amplified by facts known to both parties.<sup>22</sup>

Although the alignment of the construction of trust instruments and contracts may provide a collection of neat and tidy rules, the comparison tends to discount the differences in both purpose and content between the two types of instrument. Contracts are, by nature and definition, bilateral arrangements. The interests of both parties must be considered and, as far as possible, protected. Thus, a strict approach to the construction of terms is necessary to ensure contractual certainty. However, although there may be some trusts which are created pursuant to a bilateral agreement, there are many, such as testamentary trusts, which are created by the testator/settlor, unilaterally.

Further, all three judgments affirm the necessity of interpreting a trust document solely on the basis of the language used in the instrument, with no reference to surrounding circumstances, unless there is some vitiating factor which renders the language obscure. This is a purely objective rather than quasi-subjective exercise. However, whilst this approach may produce a literal construction, it may not always produce an equitable outcome. Although in *Byrnes* the language of the trust instrument was unambiguous, this may not always be the case. The judgment does nothing to address the situation in which the language of a document fails to convey the precise intentions of the settlor. In any proceedings for rectification or construction, it is arguable that the court would need to take some cognisance of the facts and surrounding circumstances of the creation of the document in order to arrive at an interpretation which to some extent approximates to the intention which gave rise to its creation. The judgment does little to assist in situations where a beneficiary is seeking the enforcement of an imprecisely drafted trust instrument and thereby fails to mirror the intention of the settlor and which was created unilaterally.

#### B. *Relevance of the intention of the settlor*

In their joint judgment, Heydon and Crennan JJ, note that 'the truth tends to be obscured by constant repetition of the need to search for an "intention to create a trust."' That search can be seen as concerning the

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<sup>22</sup> *Byrnes*, above n 2, 286.



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first of the three “certainties.”<sup>23</sup> Even in context, it is difficult to ascertain what their Honours meant by ‘the truth.’ It is probable that it is an epithet for ‘literal and accurate construction of a trust instrument.’ What is clear, however, throughout all three judgments, is the intense suspicion, even antipathy that the five justices appear to have formed for the proposition that the settlor’s intention should be considered when construing a trust instrument.

Traditionally, in both Australia and England, a valid express trust must display all three ‘certainties:’ certainty of intention of the settlor to create the trust; certainty of subject matter or property subject to the trust and, certainty of object or beneficiaries.<sup>24</sup> It is the first and most important of these, certainty of intention, which exercises the learned justices in this case.

Heydon and Crennan JJ state that:

the intention referred to is an intention to be extracted from the words used, not a subjective intention which may have existed but which cannot be extracted from those words.<sup>25</sup>

This appears to reflect a concerted attempt to quarantine the concept of the subjective intention of the settlor in relation to the purpose or provisions of the trust, from any considerations of meaning. Further, their Honours go on to state that:

As with contracts, subjective intention is only relevant in relation to trusts when the transaction is open to some challenge or some application for modification – an equitable challenge for mistake or misrepresentation or undue influence or unconscionable dealing or other fraud in equity.<sup>26</sup>

Thus, the logical outcome of the above statement would appear to be, that if a settlor alleges that a trust instrument does not accurately reflect his intentions, perhaps as a defence to a suit by a beneficiary or third party, his subjective intention is irrelevant. On the other hand, if the trust is challenged in some way by a beneficiary or third party, the settlor’s intention may be examined.

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<sup>23</sup> Ibid 290.

<sup>24</sup> See JD Heydon and MJ Leeming, *Jacob’s Law of Trusts in Australia* (LexisNexis, 7<sup>th</sup> ed, 2006) 55-71 for an authoritative discussion of the three certainties.

<sup>25</sup> *Byrnes*, above n 2, 290.

<sup>26</sup> Ibid.

Further, and surprisingly in view of their subsequent rejection of the use of intention as an indicia of validity, Gummow and Hayne JJ raise the spectre of the equitable maxim: 'equity looks to the substance rather than the form.'<sup>27</sup> Although this maxim is often regarded as the basis for the remedy of rescission,<sup>28</sup> it is also invoked in regard to 'the so-called "illusory" trust where equity will regard no trust as existing although words of trust are used.'<sup>29</sup>

Their Honours go on to state that:

The fundamental rule of interpretation of the 1997 deed is that the expressed intention of the parties is to be found in the answer to the question, 'What is the meaning of what the parties have said?' not 'What did the parties mean to say?'<sup>30</sup>

At the risk of appearing to quibble, it is suggested that this statement, if taken in a broad sense, is inconsistent with the maxim of equity discussed above. However, they then quote *Norton on Deeds* in an attempt to provide a definition of intention, viz:

The word 'intention' may be understood in two senses, as descriptive of either (1) of that which the parties intended to do, or (2) of the meaning of the words that they have employed.<sup>31</sup>

It would appear that their Honours have chosen to ignore the first meaning in favour of the second, despite their subsequent acknowledgement that when a dispute arises as to the intention to create an express *inter vivos* disposition of an interest in property by way of trust, the dispute may be resolved by examining 'evidence of all of the surrounding circumstances.'<sup>32</sup>

Thus, the emphasis throughout their Honours' discussions of intention is upon the need to ascertain the settlor's manifest or obvious intention,<sup>33</sup> in preference to acknowledging the influence upon the settlor's actions of some concealed or ulterior purpose. Whilst this approach is preferable when the trust is bilateral in nature, as in *Byrnes*,

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<sup>27</sup> Sometimes expressed as: "equity looks to the *intent* rather than the form." On this point, see R Meagher, JD Heydon and ML Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 4<sup>th</sup> ed, 2002) 106.

<sup>28</sup> Michael Evans, *Equity and Trusts* (LexisNexis, 3<sup>rd</sup> ed, 2011) 29.

<sup>29</sup> Heydon and Leeming, above n 26, 106.

<sup>30</sup> *Byrnes*, above n 2, 273.

<sup>31</sup> *Ibid* (Gummow and Hayne JJ), quoting RF Norton *A Treatise on Deeds* (Sweet and Maxwell, 2<sup>nd</sup> ed, 1928) 50.

<sup>32</sup> *Ibid* 274-275.

<sup>33</sup> *Ibid* 275.

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it presents a limited and limiting option for those situations in which either the trust has been used as a device or where the language of the trust document is at variance with the alleged intentions of the settlor.

### C. *Jolliffe*

A feature of the discussion in all three judgments in relation to the intention to create a trust is the unanimous overruling of *Jolliffe*.<sup>34</sup> Traditionally, *Jolliffe* has provided authority for the principle that there is no form of words which can create a trust 'contrary to the real intention of the person alleged to have created it.'<sup>35</sup> This pronouncement is consonant with the equitable maxim 'equity looks to the substance rather than the form.' In *Jolliffe*, the settlor alleged that he had not intended to hold a bank account on trust for his wife, and that the creation of the trust had, in fact, been a device to circumvent the provisions of the *Queensland Government Savings Bank Act 1916* (Qld). The Act prohibited a person from holding more than one interest bearing bank account. Mrs Jolliffe died and the Commissioner claimed that duty was owing to the State on the administration by Mr Jolliffe of his deceased wife's estate. Mrs Jolliffe had been unaware of the existence of the bank account. Knox CJ and Gavan Duffy J found for Mr Jolliffe, with Isaacs J dissenting. In arriving at their majority decision, Knox CJ and Gavan Duffy J had examined and accepted the Mr Jolliffe's subjective intention of circumventing the provisions of the Act.

Gummow and Hayne JJ state quite categorically, if somewhat cryptically that:

What is important for the present case is that *Jolliffe* should not be regarded as retaining any authority it otherwise may have had for the proposition that where the creation of an express trust is in issue, regard may be had to all the relevant circumstances not merely to show the intention manifested by the words and actions comprising those circumstances, but to show what the relevant actor meant to convey as a matter of 'real intention.'<sup>36</sup>

French CJ, on the other hand, approves Isaacs J's dissenting judgment, in which His Honour unequivocally prefigures the attitude of the current High Court to the relevance of subjective intention and the primacy of the trust instrument.

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<sup>34</sup> (1920) 28 CLR 178.

<sup>35</sup> Ibid 181 (Knox CJ and Gavan Duffy J).

<sup>36</sup> Byrnes, above n 2, 277.

Heydon and Crennan JJ are even more forthright in condemning the decision in *Jolliffe*:

The majority in *Jolliffe's* case relied on a passage in the eleventh edition of *Lewin on Trusts* stating that the court will not impute a trust where the settlor did not mean to create one. In the light of the authorities discussed above, that statement is wrong. The majority denied that 'by using any form of words a trust can be created contrary to the real intention of the person alleged to have created it.' Denials to that effect are incorrect as statements of the law generally.<sup>37</sup>

Throughout the three judgments, however, no distinction was made between the facts of *Jolliffe* and those of *Byrnes*. In *Jolliffe*, Mr Jolliffe had not told his wife, the putative beneficiary, of the existence of the trust of the account. Therefore, Mrs Jolliffe was not only ignorant of her 'beneficial interest,' but she had no corresponding expectations in regard to her rights and entitlements, nor had she contributed any funds to the account. Had she been told that she was a beneficiary of the account and perhaps even contributed to the funds, it is arguable that the Court's decision would have been different, and a valid trust might have been found. In *Byrnes*, however, Mrs Byrnes was well aware of the trust and, indeed, relied upon the beneficial interest it conferred. It is also probable that she had contributed time, effort and money to the maintenance of the property while living there between 1994 and 2001. The trust was, therefore, what could be described as a bilateral trust.

Therefore, the unequivocal overruling of *Jolliffe* in *Byrnes* leaves a 'gap' in trust law. If a trust can only be construed according to the words of the instrument which creates it, it is arguable that unilateral and putative or illusory trusts, similar to the one in *Jolliffe*, which are created to circumvent, but not defeat legislation, must stand.

## VI. DUTIES OF THE TRUSTEE

Once the Court had decided that the Acknowledgement of Trust of 1997 had created a valid trust, the learned justices turned their attentions to the duties of Mr Kendle as trustee. Although they arrived at this conclusion along slightly different paths, all were in agreement that the respondent was in breach of duty by failing to collect the rent due on the property.

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<sup>37</sup> Ibid 290-291.

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The trust instrument was silent as to the duties imposed upon Mr Kendle by the trust, and merely provided that the trustee 'stands possessed of and holds the undivided interest in the Property as tenant in common upon trust for [Mrs Byrnes] absolutely.'<sup>38</sup> Indeed, it was argued by the respondent that under the instrument he had no active duties to perform and characterised himself as a 'bare trustee.'<sup>39</sup> In discussing this submission, French CJ cited both *Jacobs' Law of Trusts in Australia*<sup>40</sup> and *Lewin on Trusts*,<sup>41</sup> and noted that whilst Jacobs defines a bare trustee as one 'who has no interest in the trust assets other than that existing by reason of the office of trustee and the holding of the legal title . . .',<sup>42</sup> Lewin observed that a bare trustee may 'owe active duties to manage the trust property, with corresponding powers.'<sup>43</sup> Accordingly, His Honour concluded that the trust was not a bare trust, stating that:

The co-existence of beneficial interests, one held by the trustee in his own right and the other by Mrs Byrnes as beneficiary under the trust, are consistent with the necessity for, and existence of, a power on Mr Kendle's part to manage the property and to let it when he and Mrs Byrnes vacated it. That power was associated with a duty, existing at general law, to manage the property in spite of the absence of any specific direction to that effect in the Acknowledgement of Trust.<sup>44</sup>

Thus, Mr Kendle had exercised his power to grant a lease over the property and, by doing so 'may be assumed to have discharged his duty to let the property by letting it to his son.'<sup>45</sup> Once let, however, Mr Kendle had a continuing duty to ensure that the rent was paid. This duty was fiduciary in nature and 'which he assumed when he declared the trust and retained legal title to the land.'<sup>46</sup> His Honour concluded that the Full Court of the Supreme Court of South Australia Court of Appeal had erred in finding that Mr Kendle's failure to collect rent from his son did not constitute breach of duty.

Gummow and Hayne JJ took a slightly different approach, but arrived at the same conclusion. The opening statement of their joint judgment

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<sup>38</sup> Ibid 268.

<sup>39</sup> Ibid 264.

<sup>40</sup> Heydon and Leeming, above n 23.

<sup>41</sup> Thomas Lewin, *Lewin on Trusts* (Sweet and Maxwell, 18<sup>th</sup> ed, 2008).

<sup>42</sup> Heydon and Leeming, above n 23, 48.

<sup>43</sup> Lewin, above n 41, 18.

<sup>44</sup> *Byrnes*, above n 2, 265.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

in regard to this issue indicates both their approach and their conclusion:

As a general proposition, where the trust estate includes land, it is the duty of the trustee to render the land productive by leasing it, and this is so even if the instrument does not expressly so provide.<sup>47</sup>

Therefore, although the trust instrument did not expressly require Mr Kendle to lease the property, upon such 'ordinary principles'<sup>48</sup> he had a duty to lease the property so rendering it productive during the remainder of the joint lives of the respondent and Mrs Byrnes.<sup>49</sup>

Their Honours then go on to review the decision of Doyle CJ handed down in the appeal, and who had disposed of the trust issue upon the basis that the trust was a device used by the parties for holding the property. His Honour had therefore concluded that had Mr Kendle and Mrs Byrnes been merely co-owners, there would have been no fiduciary relationship between them and, consequently, no obligations on either side. Upon this basis, therefore, 'the Chief Justice decided that there had been "no affirmative duty on Mr Kendle to let out the property."' <sup>50</sup> Their Honours, however, eschewed the apparent lack of reasoning presented in Doyle CJ's judgment, stating that, by executing the Acknowledgement of Trust in 1997:

... the co-owners chose in a formal fashion to create a particular trust relationship. This operated upon what would otherwise have been the legal incidents of their co-ownership. It is to reverse the relationship between law and equity, and is without logic, to base considerations as to the obligations assumed by Mr Kendle as trustee from the position which would have obtained at common law had there been no trust.<sup>51</sup>

The comments of Heydon and Crennan JJ were slightly less trenchant in regard to the decision of the lower courts, both at first instance and on appeal. Their Honours conceded that, while Mrs Byrnes and Mr Kendle lived in the property at Rachel Street, no duties devolved upon Mr Kendle to let it: a logical and obvious conclusion. Once the parties had vacated the property, however, the duty to let it crystallised. On this point they state:

Even if there is no direction in the trust instrument that the trust property be invested, it is the duty of the trustee to invest the trust

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<sup>47</sup> Ibid 277.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid 277-278.

<sup>50</sup> Ibid 278.

<sup>51</sup> Ibid.

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property subject to the limits permitted by the legislation in force under the proper law of the trust and subject to any limits stated in the trust instrument. If there are no limits of that kind, a trustee who receives a trust asset must . . . obtain income from the trust property if it is capable of yielding an income.<sup>52</sup>

Thus, if the subject property is money, it should be invested in some way capable of producing income. If the property is land which can be let, it should be leased.

Heydon and Crennan JJ also considered whether s 6 of the *Trustee Act* 1936 (SA) placed any limits upon the duty of the respondent, and decided in the negative. There were no restrictions upon Mr Kendle leasing the land.

Finally, the attention of their Honours turned once more to the deficiencies of the decision of Full Court of the Supreme Court of South Australia Court of Appeal, which had held that although Mr Kendle was trustee, the 'co-ownership displaced the trust duties. This is not so. Whatever the position at law if there had been no trust, the position in equity once the trust was created was that Mr Kendle's duty as trustee prevailed.'<sup>53</sup>

## VII. ACQUIESCENCE AND CONSENT

As a defence to the appellant's claim of breach of duty, the respondent had raised the defence of acquiescence, and/or consent, in that Mrs Byrnes and later her son, had acquiesced in or consented to the breach or otherwise waived their rights to seek a remedy. The respondent also raised estoppel, based upon his reliance upon Mrs Byrnes alleged acquiescence. The latter defence received scant attention from all five justices once the defences of acquiescence, consent and waiver had been dismissed. It was likewise dismissed.

Far more interesting, however, is the Court's various approaches to and discussion of the defences of acquiescence and consent. Whilst neither defence offers any great complexity, the various comments in the three judgments provide an interesting review of the applicable principles.

In his judgment, French CJ begins by quoting with approval the distinction between acquiescence and consent made by both Handley

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<sup>52</sup> Ibid 291-292.

<sup>53</sup> Ibid 292.

JA and Young AJA in *Spellson v George*.<sup>54</sup> In this case, Handley JA addresses the issue of what constitutes consent and notes that:

Consent may take various forms. These include active encouragement or inducement, participation with or without direct financial benefit, and express consent. Consent may also be inferred from silence and lack of activity with knowledge. However consent means something more than a state of mind. The trustee must know of the consent prior to the breach.<sup>55</sup>

French CJ goes on to mention that Young AJA, on the other hand, distinguishes between consent, which implies 'concurrence in a breach,'<sup>56</sup> and acquiescence, which arises after the breach.<sup>57</sup> Thus, it can be inferred that consent to a breach must be given prior to or during the occurrence of the breach, whilst acquiescence occurs after the breach has been committed.

Furthermore, in order for the defence of consent to succeed, it is necessary to examine all of the circumstances surrounding the breach in order to determine 'whether it was fair and equitable to allow the plaintiff to sue the defendants for the breaches of trust.'<sup>58</sup> Thus, on the facts of the case, French CJ found that the evidence did not support a defence of consent.

His Honour then turned his attention to the defence of acquiescence and outlined the two different senses in which the term is used. First, it may be raised in circumstances when a person 'who is aware that an act is about to be done to his or her prejudice, takes no steps to object to it.'<sup>59</sup> Second, it will arise when a person fails to take 'timely proceedings' to remedy an infringement of his or her rights. Such a delay in taking proceedings founds the defence of laches.<sup>60</sup> No defence of laches was raised by the respondent and French CJ considered the first category of acquiescence in relation to the facts of the case, finding that nothing in Mrs Byrnes' conduct suggested acquiescence to the breaches of the respondent. Rather, 'Mrs Byrnes' inaction, if it can be called that, is to be understood by reference to the matrimonial

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<sup>54</sup> (1992) 26 NSWLR 666.

<sup>55</sup> *Ibid.*, 669-670.

<sup>56</sup> *Byrnes*, above n 2, 266.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.* 267.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*



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relationship and the fact that a member of Mr Kendle's family was at the centre of his ongoing failure to insist on the rental payment.'<sup>61</sup> Finally, His Honour found that in the circumstances it was not either unfair or inequitable to allow Mrs Byrnes to seek a remedy for the breach of trust.<sup>62</sup>

Gummow and Hayne JJ deal with the issue of consent and acquiescence more succinctly, concentrating upon the definition and explication of terminology associated with the defences in preference to a statement of and analysis of the underlying principles. Although there is a fine distinction between the definition of a term and an examination of the principles and circumstances necessary to invoke its application, that line, nevertheless, exists. Thus, whilst the definitions in themselves are interesting, they only partly serve to elucidate the application of the concepts to the facts of the case.

Gummow and Hayne JJ, however, do provide an interesting and possibly useful observation regarding the word 'waiver.' They conclude that rather than representing a discrete defence in its own right, 'in the present case "waiver" is best understood as a genus comprising consent, estoppel and acquiescence.'<sup>63</sup>

Like French CJ, Heydon and Crennan JJ take a more substantive approach to the examination of Mrs Byrnes' conduct and the relevant defences. This approach is the result of what they describe as 'the unclarity of the applicable law.'<sup>64</sup>

After outlining the facts upon which Mrs Byrnes' alleged acquiescence or consensual conduct was based, their Honours examine the concept of acquiescence in some detail, with reference to the judgment of Dean J in *Orr v Ford*,<sup>65</sup> in which he 'set out the various meanings of acquiescence'.<sup>66</sup> These meanings coalesce into a knowing acceptance of what would be an infringement of rights.

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<sup>61</sup> Ibid 268.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid 279.

<sup>64</sup> Ibid 293. This "unclarity" may also explain the concentration of Gummow and Hayne JJ upon defining the terms, in an attempt to impose some degree of semantic precision and intelligibility upon the amorphous terminology.

<sup>65</sup> (1989) 167 CLR 316.

<sup>66</sup> Ibid.

Having resolved that 'there was no evidence to support contemporaneous consent by the appellant,'<sup>67</sup> their Honours move on to consider what the respondent must prove to sustain a claim to release of liability from the appellant. Briefly, he must show that if a release was given, it was given by the appellant beneficiary with full knowledge not only of all of the facts and circumstances, but also of his or her own rights and potential claims against the trustee.<sup>68</sup> On this basis, their Honours found that Mrs Byrnes did not act 'deliberately and advisedly or with knowledge of her own rights and claims against the respondent,'<sup>69</sup> and therefore, did not release Mr Kendle of liability for the breaches.

#### VIII. CONCLUSION

There is little doubt that the decision in *Byrnes* represents a contribution to the annals of equitable principle. Although no new insights were offered, the re-statement and explanation of the duties of a trustee where the trust instrument is silent in regard to the powers and duties conferred under the deed, provides succinct and authoritative guidance for lower courts and practitioners alike, when faced with a deed such as the one upon what the litigation devolved. Similarly, the clarifications offered in all three decisions in relation to the defences of acquiescence, consent and waiver both elucidate and affirm the established principles. However, it is arguable that the Court's decisions in regard to the construction of trust instruments and the minimisation of the importance of the settlor's intention, will cause consternation among practitioners.

The trust has, in effect, become central to contemporary private and commercial financial arrangements. It is not unusual for trusts to be used a devices to further an ulterior purpose. Some of these ulterior purposes may be nefarious, others bona fide. For example, as discussed previously, the trust in *Jolliffe* was declared to circumvent statute. On the other hand, trusts may be declared over property to place that property beyond the reach of certain parties, or for the purposes of income distribution and re-distribution. It is not always the case that the beneficiaries are aware of the trust. Of course, where such trusts are created to contravene statute, they may be terminated. For example, if a trust is caught by s 106B of the *Family Law Act 1975* (Cth), as a transaction intended to defeat a property settlement and thereby the power of the Court.

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

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However, the question remains as to what happens when a trust is created as a device, but is not voidable pursuant to statute. Arguably, under the principles expounded in *Byrnes*, the trust will stand, irrespective of the intention of the settlor and, indeed, any knowledge of the trust on the part of the beneficiary. Depending upon the circumstances of the case, this state of affairs could lead not merely to unfairness, but also prove to be contrary to the very principles of equity itself. The maxim 'equity looks to the substance (or intent) not the form' is central to the resolution of such cases. It could be suggested that ignoring the 'intent' in favour of the 'form' effectively reduces equitable principles to the level of inflexible dogma, more reminiscent of pre-Judicature Acts common law than equity in the twenty first century.

It will be interesting to note any further decisions by the Court on this point. There is a danger, however, that the issue will languish in the doldrums in the same way as the once lively debate undertaken by the High Court, in a previous incarnation, in relation to the nature of equitable estoppel, and thus become an innocent victim of the High Court's conservatism.

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# THE FAIR WORK AUSTRALIA DECISION ON QANTAS: ENTRENCHING THE IMBALANCE OF POWER BETWEEN EMPLOYEES AND EMPLOYERS?

ELFRIEDE SANGKUHL\*

Case Citation; *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444 (31 October 2011).

## I. INTRODUCTION

Although it is unusual to see a case note written on a decision by Fair Work Australia (FWA), the recent decision by FWA on the disputes between Qantas and their employees was unusual as it was initiated by the Minister for Tertiary Education, Skills, Jobs and Workplace Relations (the Minister). On 29 October 2011 the Minister made an application to FWA to terminate or suspend industrial action at Qantas Airways Limited (Qantas).<sup>1</sup>

The decision is important as it has the potential to provide further encouragement to employers to use the tactic of locking out their employees and forcing them into binding arbitration rather than engaging in good faith bargaining.

At the time of the Minister's application three groups of Qantas employees, represented by three unions, had been engaged in protected industrial action against Qantas. The employee groups had 'been negotiating with Qantas for three separate enterprise agreements to apply to pilots on long haul routes, ramp, baggage handling and catering employees and licensed aircraft engineers.'<sup>2</sup>

The unions involved were:

- The Australian Licensed Aircraft Engineers Association (the Engineers)

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<sup>1</sup> *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444 (31 October 2011), 1 [1] ('*Qantas decision*').

<sup>2</sup> *Qantas decision*, 2 [3].

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- The Transport Workers' Union of Australia (TWU) and
  - The Australian International and Pilots Association (the Pilots).

At the time the Minister made the application Qantas had given notice that it proposed to engage in protected industrial action by way of a lockout of its employees. The application made by the Minister was against all of the above parties, that is, the employee organisations and the employer. This case note will consider the protected industrial action taken by the employee groups and intended to be taken by the employer, the government reaction and the decision of FWA. The note will then argue that the impact of the legislation, the *Fair Work Act 2009 (Cth)*, and this decision is to entrench the power imbalance between employers and employees. It is also argued that the decision sends a signal to employers that, if faced by employee industrial action when negotiating workplace enterprise agreements, then the legislation and FWA will support employer protected industrial action. The impact of the legislative right of employers to engage in lockouts of their employees as protected industrial action, supported by this decision, has given employers a de facto power to impose 'unilateral arbitration' on their employees.<sup>3</sup>

## II. THE EMPLOYEES' PROTECTED INDUSTRIAL ACTION

At the time of this decision Qantas was engaged in negotiations for three separate enterprise agreements with three of their employee groups represented by their unions; the Engineers, the TWU and the Pilots. In all cases the negotiations had not progressed to resolution and the workers, through their union representatives, were undertaking protected industrial action. FWA accepted the following evidence from Qantas as to the status of negotiations and subsequent protected industrial actions:

1. The Engineers had been in negotiations with Qantas since August 2010. The negotiations comprised 47 formal bargaining meetings, other meetings and 27 conferences of the parties conducted by Senior Deputy President of FWA, Kaufman and at FWA.<sup>4</sup>

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<sup>3</sup> Unilateral arbitration is arbitration imposed by one party to a dispute on the other party to the dispute. Peter Scherer, 'The Nature of the Australian Industrial Relations System: A Form of State Syndicalism?' in GW Ford, JM Hearn and RD Lansbury (eds), *Australian Labour Relations: Readings* (Macmillan, 1987) 81, 83.

<sup>4</sup> *Qantas decision*, 2 [4].

The Engineers had undertaken protected industrial action since 12 May 2011.<sup>5</sup> However, this protected action did not commence in any substantive way until 25 August and continued intermittently until 3 October with the Engineers announcing a suspension of all protected action for three weeks commencing 20 October.<sup>6</sup>

The actual industrial action by the Engineers consisted of the following:

- i. 12 May 2011, a one hour stoppage by a single employee;
- ii. 25 August 2011, one hour stoppages at the commencement of night shifts each weekday evening at various airports;
- iii. 3 September 2011, weekend overtime bans;
- iv. 30 September 2011, full shift stoppages, for one shift, at the heavy maintenance facilities at Avalon and Tullamarine in Victoria;
- v. 3 October 2011, full shift stoppages at the heavy maintenance facilities; and
- vi. 14 October 2011, Sydney based Engineers hold a four hour stop work meeting.<sup>7</sup>

As can be seen from the above breakdown of actual industrial action undertaken by the Engineers, at no time, except for weekend overtime bans, did the stoppages engage all the Engineers in industrial action at the same time. In other words, the Engineers managed the stoppages so that the business of Qantas could continue.

2. The TWU had been in negotiations with Qantas since May 2011. The negotiations consisted of 17 formal negotiating meetings.<sup>8</sup> The TWU had undertaken protected industrial action since 20 September 2011.<sup>9</sup> The actual industrial action by the TWU consisted of the following:

- i. 20 September 2011, four hour stoppages at all mainland capital cities, except for Darwin, and higher duties bans for 48 hours;
- ii. 30 September 2011, a one hour stoppage at each major airport, again, excepting Darwin;

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Qantas decision*, Chronology, Attachment 1.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Qantas decision*, 2 [6].

<sup>9</sup> *Ibid.*

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- iii. 13 October 2011, two, two hour stoppages by the TWU baggage handlers and ground crew at Sydney and Melbourne airports; and
  - iv. 28 October 2011, a nationwide one hour stop work meeting by ground staff.<sup>10</sup>

As with the industrial action by the Engineers it can be seen that the TWU stoppages were managed so that the business of Qantas could continue, albeit with interruptions.

3. The Pilots had been in negotiations with Qantas since August 2010. The negotiations consisted of 35 formal negotiating meetings and a number of mediation sessions conducted by Vice President Watson of FWA.<sup>11</sup>

The Pilots had undertaken protected industrial action since July 2011.<sup>12</sup> The actual industrial action by the Pilots consisted of the following:

- i. 22 July 2011, the Pilots start making passenger announcements endorsed by their Association and not according to Qantas' passenger announcement policy;
- ii. 23 July 2011, one pilot implements a ban on working on days off;
- iii. 24 July 2011, one pilot engages in two, two minute stoppages; and
- iv. 29 July 2011, one pilot refuses to work beyond scheduled times on a flight from Hong Kong to Melbourne.<sup>13</sup>

Again, it can be seen that the industrial action by the Pilots was managed so as to cause virtually no interruptions to the normal business operations of Qantas.

### III. THE QANTAS PROTECTED INDUSTRIAL ACTION IN RESPONSE TO EMPLOYEE INDUSTRIAL ACTION

Qantas had given notice on 29 October 2011 'of a lock out of pilots, ramp, baggage handling and catering employees and licensed aircraft

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<sup>10</sup> *Qantas decision*, Chronology, Attachment 1.

<sup>11</sup> *Qantas decision*, 2 [5].

<sup>12</sup> *Ibid.*

<sup>13</sup> *Qantas decision*, Chronology, Attachment 1.

engineers' which was to take effect from 31 October 2011.<sup>14</sup> In other words Qantas was proposing to lock out the members of the three unions where there had been no resolution of the workplace agreement negotiation. This proposed industrial action by Qantas is also classed as protected industrial action under the *Fair Work Act 2009 (Cth)*. Section 408(c) provides that industrial action is '**protected industrial action**' for a proposed enterprise agreement' if it is an employer's response action to employee industrial action.<sup>15</sup>

Employer response action is defined in s 411 as follows:

**Employer response action** for a proposed enterprise agreement means industrial action that:

- a) is organised or engaged in as a response to industrial action by:
  - i. a bargaining representative of an employee who will be covered by the agreement; or
  - ii. an employee who will be covered by the agreement; and
- b) is organised or engaged in by an employer that will be covered by the agreement against one or more employees that will be covered by the agreement; and
- c) meets the common requirements set out in Subdivision B.

On the day that Qantas announced the impending lock out it grounded its worldwide fleet indicating 'that the lock out will continue until the three unions abandon a number of identified claims'.<sup>16</sup> The industrial action by Qantas halted the international business of Qantas. The proposed industrial action would have halted all of the business of Qantas.

#### IV. GOVERNMENT REACTION

Until the announcement of the lock out there had been no Government reaction to the long running disputes between Qantas and its employees. These disputes had been in progress for five months in the case of the TWU, and fourteen months in the Engineers' and Pilots' cases. However, on the day that Qantas gave notice of a lock out to take effect from 8pm on 31 October 2011<sup>17</sup> the Minister applied to FWA to terminate or suspend 'protected industrial action being engaged in and/or threatened impending or probable by...'<sup>18</sup> Qantas, the Engineers, the TWU or the Pilots.

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<sup>14</sup> *Qantas decision*, 3 [8].

<sup>15</sup> *Fair Work Act 2009 (Cth)*, s 408(c).

<sup>16</sup> *Qantas decision*, 3 [8].

<sup>17</sup> *Ibid.*

<sup>18</sup> *Qantas decision*, 1 [1].



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Although not a party to the disputes, the Minister made the application pursuant to s 424(1) of the FW Act 2009 (Cth) which provides as follows:

**FWA must suspend or terminate protected industrial action - endangering life etc.**

- (1) FWA must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:
  - (a) is being engaged in; or
  - (b) is threatening, impending or probable:if FWA is satisfied that the protected industrial action has threatened, is threatening, or would threaten:
  - (c) to endanger the life, personal safety or health, or the welfare of the population or of part of it; or
  - (d) to cause significant damage to the Australian economy or an important part of it.

The government reaction was immediate and the operation of the FW Act ensured a swift decision. The FW Act provides, in s 424(3), that:

If an application for an order under this section is made, FWA must, as far as is practicable, determine the application within 5 days after it is made.

At the hearing, unchallenged evidence 'as to the importance of airline passenger and cargo transport to the economy and the effect of grounding of the Qantas fleet on the aviation and tourism industries'<sup>19</sup> was presented by the Secretary, Department of Infrastructure and Transport and the Secretary, Department of Resources, Energy and Tourism.<sup>20</sup>

## V. THE DECISION

Section 424 of the FW Act provides that FWA must suspend or terminate protected industrial action 'if FWA is satisfied that the protected industrial action has threatened, is threatening or would threaten ... to cause significant damage to the Australian economy or an important part of it.'<sup>21</sup> The unchallenged evidence presented at the hearing was that 'the tourism industry, including aviation, was estimated as contributing 2.6 per cent to GDP and as having 500,000 employees. The value of inbound tourism is estimated at \$24 billion a

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<sup>19</sup> *Qantas decision*, 3 [9].

<sup>20</sup> *Ibid.*

<sup>21</sup> *Fair Work Act 2009* (Cth), s 424(1)(d).

year.<sup>22</sup> Further, Qantas provided evidence that the cost to Qantas, of their proposed lockout of employees, is '\$20 million per day'.<sup>23</sup>

It appears that all the evidence mentioned above was unchallenged, which combined with the fact that FWA was required 'as far as practicable, (to) determine the application within 5 days after it is made',<sup>24</sup> meant that the evidence was not able to be analysed to determine its relevance to the protected industrial action.

The size of the Australian tourism industry, the number of its employees and its dollar value do appear significant. However, the significance of the contribution of Qantas to that industry was not presented in evidence. The fact that the lockout would cost Qantas \$20 million per day is not actually relevant to the matter of economic harm to the Australian economy or part of the Australian economy. In fact, the potential economic harm to Qantas was self inflicted as it only arose because of the lockout threat initiated by Qantas itself.

FWA acknowledged that '(i)t is unlikely that the protected industrial action taken by the three unions, even taken together, is threatening to cause significant damage to the tourism and air transport industries.'<sup>25</sup> FWA found that it was the 'response industrial action of which Qantas has given notice'<sup>26</sup> that would cause the economic damage.

Once this finding had been made FWA had to consider whether to make an order to suspend or terminate protected industrial action 'for a proposed enterprise agreement'.<sup>27</sup> The application to FWA was in respect of three proposed enterprise agreements: the agreements for the Engineers the TWU, and the Pilots. Even though FWA had determined that the protected industrial action taken by the Engineers the TWU, and the Pilots was unlikely to 'cause significant damage to the tourism and air transport industries'<sup>28</sup> the final order was to terminate, not only the response industrial action of Qantas, but also the protected industrial actions of the Engineers the TWU, and the Pilots. FWA stated that '(w)e find that the requirements of s 424(1)

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<sup>22</sup> *Qantas decision*, 3 [9].

<sup>23</sup> *Ibid* 3 [10].

<sup>24</sup> *Fair Work Act 2009* (Cth), s 424(3).

<sup>25</sup> *Qantas decision*, 3 [10].

<sup>26</sup> *Ibid*.

<sup>27</sup> *Fair Work Act 2009* (Cth), s 424(1).

<sup>28</sup> *Qantas decision*, 3 [10].

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have been made out with respect to the action of which *Qantas*<sup>29</sup> has given notice in relation to the three proposed enterprise agreements.’<sup>30</sup>

The final order of FWA was ‘to terminate protected industrial action in relation to each of the proposed enterprise agreements immediately.’<sup>31</sup> The order provided ‘an opportunity for further negotiation during a period of 21 days, extendable for a further 21 days, if the parties agree that progress is being made.’<sup>32</sup> The reasons for the final order were that FWA:

1. Should act ‘to avoid significant damage to the tourism industry’;<sup>33</sup>
2. Considered ‘that there were still prospects for a satisfactory negotiated outcome in all three cases’;<sup>34</sup> and
3. Considered that the option of suspending the protected industrial action ‘leaves open the possibility there may be a further lockout with its attendant risks for the relevant part of the economy.’<sup>35</sup>

In considering the three reasons for the decision it appears that:

1. The uncontested evidence as to the value of Australia’s tourism industry to the Australian economy and the losses to the corporation, Qantas, were taken by FWA to equate to ‘significant damage to the tourism industry’ when that is not necessarily the case;
2. The fact that at the time of the lockout two of the employee groups had been in negotiation with Qantas for 14 months and the other employee group for 5 months would appear to suggest that the ‘prospects for a satisfactory negotiated outcome’ were not good. However, FWA still decided that there were ‘good’ prospects of a negotiated outcome even though the history of the negotiations to date would have suggested the opposite to be the case; and
3. The final reason given for terminating rather than suspending protected industrial action was that suspension left open the risk that Qantas could engage in a further lockout. In other

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<sup>29</sup> Author’s emphasis.

<sup>30</sup> *Qantas decision*, 3 [11].

<sup>31</sup> *Ibid* 4 [16].

<sup>32</sup> *Ibid* 4 [17].

<sup>33</sup> *Ibid* 4 [13].

<sup>34</sup> *Ibid* 4 [14].

<sup>35</sup> *Ibid* 4 [15].

words, the protected industrial action by Qantas provided the economic risk, not the protected industrial actions by the employee groups. This leaves open the question of why FWA did not terminate the protected industrial action of just Qantas. FWA could have allowed the employee groups to continue with their industrial actions as they did not pose a threat to the tourism industry.

Examining the reasons for the decision makes it clear that FWA considered that the threatened protected industrial action<sup>36</sup> by Qantas posed the economic risk to the Australian economy. However, the order terminating the protected industrial action did not differentiate between the differing types of protected industrial action that were taking place. Section 424 of the FW Act provides that FWA must suspend or terminate protected industrial action if satisfied that the industrial action has threatened, is threatening or would threaten to cause significant damage to the Australian economy.<sup>37</sup> It was found that the industrial action by Qantas, not their employees was causing the economic harm. The decision could, therefore, have terminated only the industrial action causing the economic harm, that is, the protected industrial action by Qantas.

#### VI. IS THE DECISION A RETURN TO COMPULSORY ARBITRATION?

The question arises as to whether this decision represents a return to compulsory arbitration?

The FW Act gives employers the right to take industrial action in response to action by employees, or their bargaining representatives,<sup>38</sup> for a proposed enterprise agreement.<sup>39</sup> This gives employers a statutory right to engage in a lockout of their employees. This right was first introduced in the Federal jurisdiction in 1993 by the *Industrial Relations Reform Act 1993* (Cth) and maintained in the *Workplace Relations Act 1996* (Cth).<sup>40</sup> In 2007, when Briggs was writing, lockouts were 'almost entirely concentrated in the Federal jurisdiction'.<sup>41</sup> However, since 2010, 'with the exception of non-constitutional

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<sup>36</sup> The proposed action by Qantas is defined as protected industrial action by the *Fair Work Act 2009* (Cth), s 408.

<sup>37</sup> *Fair Work Act 2009* (Cth), s 424(1)(d).

<sup>38</sup> *Ibid* s 411.

<sup>39</sup> *Ibid* s 408.

<sup>40</sup> Chris Briggs, 'Lockout Law in Australia: The Case for Reform' (2007) 49 *Journal of Industrial Relations* 167, 168.

<sup>41</sup> *Ibid* 170.

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employers in Western Australia, the private sector throughout Australia is now covered by the ... Fair Work Act'.<sup>42</sup> Therefore the Act now covers all Australian employers with the exception of 'state government employment and, in most States, local government employment'<sup>43</sup> and of course non-constitutional employers in Western Australia, that is, employers in Western Australia that are not 'foreign corporations and trading or financial corporations formed within the limits of the Commonwealth'.<sup>44</sup> This means that most employers in Australia now have a statutory right to engage in a lockout of their employees.

Briggs states that:

If employers have an equal right to lockout, the lockout is too powerful a weapon and therefore undermines the capacity of employees to access and exercise these legal rights. While the parties must be allowed to deploy coercive power as part of the bargaining process, strikes and lockouts should be regulated differently to maintain the broad equilibrium of power that underpins effective agreement making.<sup>45</sup>

The legal rights of employees that Briggs was referring to were 'freedom of association, collective bargaining and to strike.'<sup>46</sup>

In Australia employees have a number of legal workplace rights which are derived from Chapter 3 of the FW Act. These include:

1. Protection from adverse action for exercising or proposing to exercise workplace rights;<sup>47</sup>
2. Protection from adverse action for engaging, or proposing to engage in industrial activity;<sup>48</sup>
3. Protection from discrimination;<sup>49</sup>
4. Protection from unfair dismissal;<sup>50</sup>
5. The right to take protected industrial action;<sup>51</sup> and

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<sup>42</sup> Geoffrey Guidice, 'The Evolution of an Institution: The Transition from the Australian Industrial Relations Commission to Fair Work Australia' (2011) 53 *Journal of Industrial Relations* 556, 560.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Commonwealth of Australia Constitution Act (Imp)*, s 51(xx).

<sup>45</sup> Chris Briggs, above n 40, 169.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Fair Work Act 2009 (Cth)*, s 340(1).

<sup>48</sup> *Ibid* s 346.

<sup>49</sup> *Ibid* s 351.

<sup>50</sup> *Ibid* Part 3-2.

<sup>51</sup> *Ibid* Part 3-3.

6. The right to enter workplaces by employee representatives.<sup>52</sup>

Briggs was also suggesting that strikes and lockouts by employers should be more heavily regulated and encumbered than employee rights to take industrial action. As will be shown, however, the FW Act does the opposite leaving employer industrial action less regulated and encumbered than it does employee action.

Although employees have the right to take protected industrial action this right is heavily encumbered with restrictions and procedural requirements. For example protected industrial action can only be engaged in for a range of 'permitted matters'<sup>53</sup> and only in respect of negotiating a proposed enterprise agreement.<sup>54</sup>

The procedural requirements imposed on employees and employee groups intending to take protected industrial action are procedurally onerous and time consuming. For example, Division 8 of the FW Act sets out the requirements to hold protected action ballots. These requirements include making application to FWA for a protected action ballot order,<sup>55</sup> giving notice to the employer of the application to hold the ballot,<sup>56</sup> directions for the conduct of the ballot<sup>57</sup> and a timetable for the ballot.<sup>58</sup> In addition to the requirements for a ballot, employees must give the employer written notice of any action proposed with a minimum period of notice of three days.<sup>59</sup>

In contrast, for an employer to take protected response action to employee action all that is required is for written notice to be given to the employees' bargaining representatives and for reasonable steps to be taken to notify affected employees.<sup>60</sup> Briggs, above, stated that giving employers an equal right to take industrial action as that given to employees would undermine the power of employees to exercise their rights. The FW Act however, gives employers a less encumbered right than employees to take industrial action.

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<sup>52</sup> Ibid Part 3-4.

<sup>53</sup> Ibid s 409(1)(a).

<sup>54</sup> Ibid s 409(1).

<sup>55</sup> Ibid s 437.

<sup>56</sup> Ibid s 440.

<sup>57</sup> Ibid s 449.

<sup>58</sup> Ibid s 451.

<sup>59</sup> Ibid ss 414(1)-(2).

<sup>60</sup> Ibid s 414(5).

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The decision of FWA in this matter, to terminate all protected industrial action had the effect of ‘rewarding’ the employer action by forcing all parties into binding arbitration.<sup>61</sup> Unsurprisingly, none of the parties in dispute with Qantas managed to negotiate a ‘satisfactory outcome’ within the 21 days specified in the FWA decision. This allowed the Qantas chief, Alan Joyce to announce on 22 November that:

Fair Work Australia arbitrating and imposing an outcome in the airline’s disputes with pilots, licensed engineers and ground workers was the best move after 21 days of fruitless talks since the airline was grounded.<sup>62</sup>

This statement by Joyce confirms that the decision by FWA in this matter led to the imposition of arbitration on the employee groups as a direct result of the employer’s actions.

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<sup>61</sup> Kim Arlington, ‘Qantas Engineers Happy but Pilots, Handlers Fight On’, *Sydney Morning Herald* (Sydney), 19 December 2011.

<sup>62</sup> Neil Wilson, ‘Fair Work Australia to Settle Qantas Dispute After Union Talks Fail’, *Herald Sun* (Sydney), 22 November 2011.





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