INDIGENOUS RIGHTS UNDER THE AUSTRALIAN CONSTITUTION:

A Reconciliation Perspective

PhD Thesis

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Thanks

I am indebted to my supervisor Professor Garth Nettheim for the advice and assistance he has provided me in the writing and researching of this thesis. His advice that I take a reconciliation approach to the topic was particularly valuable. I wish also to thank a number of my colleagues at the Law School, Griffith University for the ideas they have helped me to develop over cups of coffee, and the suggestions for revisions they have provided to draft chapters. In particular I am truly grateful to Dr John Touchie for our many conversations on constitutional rights which assisted me in the writing of the final two chapters. He also introduced me to Hayek, who is someone I would otherwise not have thought to have been a useful source for this topic. I also thank Shaunnagh Dorsett who helped me formulate ideas in the early stages of the thesis, again over a number of cups of coffee. Thanks also go to Dr Geoff Airo-Farulla for reading and commenting on an early draft of chapter 4.

Special thanks go my family; Juliet, Ben, Isaac and Joel. They frequently asked whether I had finished yet, and I regularly responded by saying “It will be soon”!

Abstract

This thesis examines the possibilities for building a reconciliatory jurisprudence for the protection of indigenous rights under the Australian Constitution. The thesis first examines what could be meant by the term "reconciliation" in a legal context and argues that it requires (1) acknowledgement of and atonement for past wrongdoing, (2) the provision of recompense, and (3) the establishment of legal and constitutional structures designed to ensure that similar wrongs are not repeated in the future. The thesis focuses on the last of these three requirements. It is further argued that developing a reconciliatory jurisprudence first requires the courts to free themselves from the dominant paradigm of strict positivism so that they are liberated to pay due regard to questions of morality.

Given this framework, the thesis then sets out to examine the purpose and scope of the race power (section 51(xxvi)) of the Australian Constitution, with particular regard to the case of *Kartinyeri v Commonwealth* in which the High Court directly considered the power. The thesis concludes that the majority of the Court had not, for various reasons, properly considered the nature of the power. An appropriate ruling, it is argued, should find that the power does not enable Parliament to discriminate adversely against racial minorities.

The thesis then proceeds to consider whether there are implied terms under the Constitution that protect fundamental rights. It is argued that these rights are indeed protected because the Constitution is based upon the rule of law. In addition constitutional provisions are to be interpreted subject to the presumption that its terms are not to be understood as undermining fundamental rights unless a constitutional provision expressly states otherwise. The thesis also considers whether

there is an implied right to equality under the Constitution. The conclusion drawn is that such a right exists and that it is both procedural and substantive in nature.

Statement of Candidate

I hereby declare that this submission is my own work and to the best of my knowledge it contains no material previously published or written by another person, nor material which to a substantial extent has been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis.

I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.

Signed

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Chapter 1

INTRODUCTION

In north-central Spain is a city largely ignored by tourists. This is rather odd because Valladolid boasts the usual features to intrigue and fascinate tourists. The city was Spain's capital for a time, before the capital eventually settled in Madrid some 120 kilometres to the south. There are museums that offer testament to its former glory days. This is the place where Cervantes wrote *Don Quixote* and Columbus died after arriving to petition King Ferdinand and Queen Isabella for lands in the Americas he believed he'd been promised. Ferdinand and Isabella were zealots who pursued Moors and Jews throughout the Iberian peninsular with singular violence to achieve Catholic domination. Their reign of terror ended centuries of relative religious and multi-ethnic tolerance in Spain. They achieved their ambitions for peninsular domination in 1492, the same year they relented to Christopher Columbus' persistent requests for royal patronage for his quest to find a western passage to India.

Columbus' "discoveries" of the Americas ignited debates about the entitlement of European colonists to wage war on the native people of the newly found lands. In order to resolve increasingly contentious debates about the matter, King Charles V of Spain convened a Council of fourteen judges which sat at Valladolid in the late summer of 1550.[1] Two leading advocates were summonsed to put the case for and against the validity of Spain's dominion over the Indians. Dr Juan Gines de

[1] L Hanke *All Mankind is One: A study of the disputation between Bartolome de Las Casas and Juan Gines de Sepulveda on the religious and intellectual capacity of the American Indians* (Northern Illinois University Press, DeKalb, Illinois 1974) at 67.

Sepulveda, a scholar, lawyer and leading authority on Aristotle, put the case that Spain was entitled to wage war on the Indians. Bartolome de Las Casas, who had held lands and slaves in the Americas before becoming a Dominican missionary, argued that Spain had no such entitlement. The Indians, he argued, could not be compelled by violent means to become Christians, rather they were to be persuaded by teaching and reasoning. Sepulveda put his case to the Council of Fourteen in three hours, Las Casas launched a prolonged defence lasting five days. In the end members of the Council fell into argument with each other and failed to reach a collective decision on the matter.[2]

The dispute between Sepulveda and Las Casas essentially came to this: Sepulveda argued along Aristotelian lines that the Indians were natural slaves because they were inferior to the Spanish. The Spanish were therefore entitled to conquer Indian territories to educate and civilise them so as to raise them from their low, barbarian status. Las Casas passionately disputed the claim they were barbarians. He believed the Indians had many of the attributes of a civilised people and were not natural slaves. On the face of it Las Casas has the more compelling and humane case. On a closer examination, however, it becomes evident that he believed the Spanish had a right to educate and civilise the Indians, even if they had not sought or consented to be educated. Las Casas should not be mistaken for a wholly tolerant and humane monk. He believed for instance that the Moors and Jews were wilful anti-Christs against whom war could justifiably be waged. On this he was a passionate supporter of Ferdinand and Isabella's brutal program of repression and expulsion.

Sepulveda's arguments regarding Spanish dominion over the Indians were vigorously attacked by Las Casas at Valladolid. He persisted with his campaign against Sepulveda in books and papers

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[2] *Ibid* at 113.

until his death. In response, Sepulveda appeared to qualify his Valladolid stance by maintaining that he did not believe that the Indians should be reduced to slavery, but that they be subject to Spanish rule. He added that they should not be deprived of their property, but that they be conquered without the commission of unjust acts. Spanish dominion, he maintained, should be "noble, courteous, and useful for them".[3] However noble and courteous the dominion might be, it was clear in Sepulveda's mind that under the Aristotelian slave/citizen dichotomy the Spanish were the citizens and the Indians the slaves.

The debate appears to have arisen in part out of a contest between the papacy and the emerging modern Spanish state for jurisdiction over the Indians. The implications of Las Casas' stance was that the church had the entitlement to educate and civilise the Indians (and therefore have effective dominion over them), the implication of Sepuleveda's stance was that the Spanish state had dominion over the Indians. At another level the debate was about something deeper and more fundamental – the quest for legitimacy. No matter how powerful and unyielding a dominant nation may appear it invariably craves recognition of the legitimacy of its dominion. The need for legitimacy was noted recently in the Canadian context by Williamson J in *Campbell v Attorney General of British Columbia* in which he said that

> the concept of legitimacy underlies all political and legislative institutions and indeed accounts in large measure for the efficacy of court orders. Canada is not a nation governed by the military nor by a state police force. Laws are, by and large, accorded respect because the overwhelming majority of the citizenry accepts

[3] *Ibid* at 117.

> the legitimacy of the exercise of power by the executive, legislative and judicial branches.[4]

Mabo and the highly charged debate that followed the decision in Australia was likewise a quest for the high moral ground of legitimacy. The decision challenged widely held preconceptions about the non-indigenous legal entitlement to their traditional lands. It had been widely believed before the decision, for example, that previously enacted land rights legislation were effectively exercises in benevolence towards the Indigenous people, rather than grants of land to which Indigenous people were already entitled. But the Court extracted a heavy price for recognising the validity of native title. With recognition came the assertion that Parliament had the full and unqualified power to extinguish that title. The claim made in this thesis, particularly in the final two chapters, is that Parliament does not in fact have the unqualified power of extinguishment. The effect of Mabo is that it legitimises the mass appropriation of property from Indigenous people. Such mass appropriation is contrary to the rule of law and is distinguishable from Parliament's power to compulsorily acquire property for public purposes. Parliament has never attempted such mass appropriation from any group other than the Indigenous people.

Some other more plausible account of the legal basis for the Crown's acquisition of the territory and property of the Indigenous people is required than that offered by *Mabo (No.2)*. A more compelling account can be adduced from the discordant voices of debate in Valladolid which now faintly echo down the hallways of history. The claims and counter-claims of Sepulveda's slave/citizen dichotomy may at first appear to be a rather quaint and arcane genuflection to Aristotle, but on closer analysis it does help explain the attitudes, policies and laws that were adopted in Australia regarding the status of the

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[4] (2000)156 DLR (4th) 713 at para 106.

Indigenous people. Returning for a moment to Aristotle's original construction of the slave/citizen dichotomy we find that in his idealised city-state the citizen has the right to participate in its governance.[5] The citizen, as he defined him, played both a more restrictive and inclusive role than the modern citizen in that Aristotle did not envisage elective government. His citizen participated more directly in deliberative or judicial office than the modern citizen. Other inhabitants of his city-state were women, slaves and foreigners. Natural slaves, he believed, needed a master to direct them because they lacked deliberative faculty.[6] Aristotle effectively conceded that the master/slave relationship primarily benefited the master, but he claimed that the slave also benefited because the master helped his slave to attain the noble life, which was the ultimate ends of society.

If we modernise the Aristotelian categories it is possible to conceive the citizen as a person who in entitled to fully participate in the life of the community – to vote for representatives in the legislature, to seek work, to own and transfer property, and so forth. The slave, on the other hand, is denied these entitlements because of their inherent inferiority. They lack the sufficient attributes of advanced civilisation to be able to enjoy the benefits and to take on the burdens of citizenship. It is their inherent inferiority that denies them the benefits and burdens of citizenship. It was the purported inferiority of the Indians that led Sepulveda to argue that they were natural slaves who were subject to Spanish dominion.

The Australian Aborigines were not officially defined as natural slaves. Their status was kept ambiguous until well into the 20th century. They were relentlessly depicted as being inherently inferior. Sir Joseph Banks was one of the first of many correspondents who

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[5] Aristotle, *Politics* III translated by TA Sinclair, revised and re-presented by T Saunders (Penguin, Harmondsworth, 1981).

[6] Aristotle, *ibid Politics* I.13.

claimed that the Aborigines were inferior. He conjectured that "their reason must be suppos'd to hold a rank little superior to that of monkies".[7] Equal or worse insults were to come from correspondents in the decades that followed. By the late 19th century social-Darwinism held sway, which claimed a scientific basis for declaring the social and biological inferiority of Aborigines; a point that is discussed at some length in chapter 5. It seems that this claimed inferiority served as a justification for effectively enslaving the Indigenous people. They provided free labour on farms and rural properties as domestics and cattle drovers. They were held as virtual prisoners upon Aboriginal and Torres Strait Island reserves and missions. Their movement was restricted, as was their right to marry and to work. It was their de facto slave-status which presumably justified the systematic removal of Indigenous children from their parents during the 1940s-1970s.

The Indigenous people were not, however, consistently treated as a slave class. There was some debate in the early 19th century between colonial officials and the British Colonial Office as to whether Aborigines were British subjects,[8] however each Aboriginal born after 1829 became a British subject by birth.[9] But being a British subject meant little in name only if the subject was deprived of the substantive attributes of citizenship. Aborigines were, however, entitled to vote in a number of States for much of the 20th century, and certainly before the 1967 referendum. In Western Australia] Aborigines who met certain

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[7] J Banks Vol 2, *The Endeavour Journal* (Angus and Robertson, Sydney 1962) 123.

[8] B Galligan and J Chesterman "Aborigines, Citizenship and the Australian Constitution: Did the Constitution exclude Aboriginal People from citizenship?" (1997) 8 Public Law Review 45 at 58.

[9] Note however per Brennan J at 38 in Mabo 2 and Toohey J at 182 that the Aborigines became British subjects as the result of the application of British colonial law, usually without the knowledge or consent of the indigenous people. Note also per Brennan J in *Mabo 2* at 38 that upon British acquisition, the indigenous people became British subjects, and consequently were "equally entitled" along with other British subjects to the protection of the common law. See also K McNeil "Racial Discrimination and Unilateral Extinguishment of Native Title" (1996) 1 Aust Indigenous Law Rev 181 at 219.

requirements were able to apply for "citizenship". The precise legal status of Western Australian citizenship (or at least the status of Aborigines who did not hold such citizenship) was somewhat vague.[10]

The ambiguous, and indeed contradictory, stance of Australian law and policy reflected to some degree Blackstone's contradictory stance on the issue. In chapter 3 part 3 (b) of this thesis I discuss Blackstone's contradictory stance in more detail. This then raises the question as to why the contradiction existed in the first place. It is difficult to escape the conclusion that it was convenient for the British (and later Australian) colonisers so do so. At the very least, highlighting the contradiction was discomforting and inconvenient. Explicitly adopting the Sepulvedian argument that the Aborigines were natural slaves was clearly a repellent one, and one that Sepulveda was severely attacked for by Las Casas and others even when it was proposed. At the very least the British Colonial Office would not have been prepared during the mid-19th century to categorise the Aborigines as natural slaves, not the least because prominent members of the Office were actively involved in the British Anti-slavery Movement. But granting Aborigines the full status of citizens in the true sense was problematic because it would render as illegitimate and illegal the taking of their lands, the use of their free labour as farm-hands, cattle-drovers, and domestics, and their effective incarceration on reserves and missions.

As a matter of reasoning and justice, however, the Indigenous people cannot be both slave and citizen. To this extent Sepulveda maintained a clear and consistent position – they were in his view natural slaves, pure and simple. Australian law, on the other hand, maintained a contradictory stance, and deployed a narrow, positivist,

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[10] See *Natives (Citizenship Rights) Act 1944* in which Aborigines were required to apply for citizenship to become full members of the community. An Aborigine could make an application to obtain "full rights of citizenship". A magistrate could grant the application by an Aborigine to become a citizen if, amongst other things, the magistrate was satisfied that the applicant had for two years "adopted the manner and habits of civilised life". The statute remained in force until 1971.

legalistic approach to the interpretation and development of the law to avoid confronting the contradiction. The courts separated the positive law from considerations of morality to maintain steadfast ignorance of the legal injustice being perpetrated, a process which is examined in more detail in chapter 3. What is of current concern is that strict positivism continues to maintain an undue influence over more recent decisions dealing with Indigenous rights.

The contradictory slave/citizen status accorded to Indigenous people is maintained in more recent cases, including *Mabo (No.2)*[11] and *Kartinyeri*.[12] In *Mabo (No2)* the indigenous people begin as citizens. Brennan J, for example, found that the Indigenous people have an equal entitlement to the land, he held that they were not inferior and therefore their possessory title survived the British claim to Australian territory. In the second part of Brennan J's judgment the Indigenous people become, in effect, natural slaves. The government is entitled to dispossess the indigenous people on a grand scale, and may do so without any requirement for compensation or remedy of any kind. This reasoning is disingenuous. The Court suggests, without explicitly saying so, that the extinguishment power is part of the ordinary and natural range of powers possessed by a sovereign parliament. That is, the power is presented as being a component of its general power to acquire property for public purposes or the public benefit, and that the power therefore does not discriminate against a particular racial group. In reality, this proposition is a non-sense. The reasoning is plausible, however, if one adopts (as the court did) a narrow positivist approach. In this way the fantasy can be maintained that the State and Territory Parliaments have the power to dispossess its own citizenry of their property if it so desired on a massive scale, and may do so without recompense of any kind.

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[11] *Mabo v Commonwealth (No.2)* (1991) 175 CLR 1.

Part of the reason for the courts maintaining the contradictory stance arises from their reluctance to break from the unjust past. As Brennan J famously described it, the courts do not wish to fracture the skeleton of the common law. Although it is appropriate for the common law to maintain consistency and harmony with prior decisions, this is an occasion for making a break from the injustices of the past. A way gaining release from the chains of history is to adopt a reconciliatory approach. This approach consciously seeks to be both pragmatic and just. As will be explained in the next chapter, a reconciliatory approach has the virtue of drawing a line in the sand. That is to say, it allows us to acknowledge the past injustices and to make an amends by introducing mechanisms and a jurisprudence that will avoid similar injustices in the future. This approach also requires establishing a jurisprudence that truly frees indigenous people from their de facto slave status. That is, establishing true equality and entitlement to participate in the governance of the society in the real sense.

The project for developing a reconciliatory jurisprudence is an enormous one, and one that this thesis cannot hope to accomplish. Rather the ambitions are far more modest. Part 1 of this thesis examines the meaning of reconciliation in a legal context and argues that a reconciliatory approach is essential to maintain legal legitimacy. As a first step in the reconciliatory process the courts need to free themselves from the moral vacuousness of strict positivism; this argument is put more fully in chapter 3. Part 2 builds on the discussion in Part 1 by examining how the law may avoid mistakes of the past by building constitutional structures to protect and promote the rights of indigenous peoples in a way that is founded upon a natural law/moral based jurisprudence. This places limits on the positivist conception that parliament as the lawmaker has virtually unfettered power to undermine the fundamental rights of indigenous people.

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[12] *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

Thus, it is argued, the Constitution is to be read and understood as placing limits on Parliament's powers and that these limits are based on fundamental principles that can be derived from the common law and the natural law. This, at the very least, advances the reconciliation objectives of requiring equality, freedom of movement, freedom of religion and the right not to be arbitrarily deprived of property.

This thesis involved the writer exploring the justice of the law applying to Australia's indigenous people. The writing began with chapter 3, and was followed by an analysis of the High Court's decision in *Kartinyeri*, which is covered in chapters 4 and 5. Because the debate on indigenous rights was very much a public one during the 1990s when writing began on the thesis, I decided I would publish some of the chapters as I was progressing through the thesis. This had the two-fold objective of putting my views into the academic arena whilst there was currency in the debate, and of meeting my obligations as an academic to publish. As a result chapter 3 also largely appears as "Natural and Positive Law Influences on the Law Affecting Australia's Indigenous People" (1997) 3 Australian Journal Legal History 1; chapter 4 as "Avoiding the Hindmarsh Island Bridge Disaster" (2002) 6 Flinders Journal of Law Reform 43 and chapter 5 as "The Race Power under the Australian Constitution: Altered meanings" (1999) 21 Sydney Law Review 80.

My initial concern for writing the thesis, as I recall it now, was that after having heard the full arguments of counsel in the High Court for *Mabo (No.2)* and having read the decision numerous times, I felt there was something unsettling about its reasoning, although I could not quite explain why, at least to myself. It seemed to me that what the Court had given with the one hand it was taking with the other, but I

could not articulate what was wrong with the Court doing so. I became even more concerned about the reasoning in *Kartinyeri v Commonwealth*, which was the first High Court case to directly consider the meaning of the race power under the Constitution. In that case some of the judges appeared to be suggesting that the Commonwealth could enact racially discriminatory laws, and that there was very little the courts could do about it by means of judicial review. The response, in this thesis, is to argue for the development of a morally based jurisprudence which enables the courts to disallow laws that breach the fundamental tenets of human decency. On this point I agree with Stone that the High Court must "depart from its commitment to text and a limited kind of structural implication" and develop constitutional rights[13] "by reference to some values or ideas that are not, at least according the High Court's avowed interpretive method, readily identifiable in the *Constitution*."[14]

It became apparent to me (and many others) during the debate about the *Native Title Amendment Act* that any protection the *Racial Discrimination Act* provided against the arbitrary taking of indigenous lands was tenuous. *Mabo (No.2)* effectively relied on the *Racial Discrimination Act* to shield Indigenous people from arbitrary and racially discriminatory takings by government. It became evident that a federal government could, and indeed would, readily amend or repeal the *Racial Discrimination Act* to permit the States and Territories to arbitrarily extinguish title on a racially discriminatory basis. It seemed to me that there was a need, consistent with reconciliation objectives, for a firmer basis for protecting fundamental rights. Part 2 of the thesis inquires into the possibility for the development of a constitutional jurisprudence that is founded upon notions of fundamental justice for

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[13] Although she only refers to the right of freedom of political communication.

[14] "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication" (1999) Melbourne University Law Review

indigenous people. Developing such a jurisprudence is a huge undertaking, and one that this thesis cannot hope to complete. Rather the thesis narrows itself to inquiries into the scope of the race power and considerations of whether fundamental rights jurisprudence can be developed that will at least protect the basic fundamental rights of all people including minorities. What is not covered includes the possibilities for the recognition of aboriginal rights along the lines of section 35 of the Canadian Constitution. Nor does this thesis consider possibilities for protecting the religious and other belief structures and traditions of indigenous people or their rights to self government. Given the narrowness of the Australian jurisprudence, this thesis largely attempts the relatively unambitious task of considering how the Australian jurisprudence can catch-up with other jurisdictions that protect fundamental rights.

The ambitions of this project are probably still too high. Nevertheless, it seeks to argue for a greater infusion of a morally based consideration into our jurisprudence than presently exists in the field of indigenous rights. This, it is argued, requires at the very least an unchaining from the strictures of strict positivism. There is also a need to make a break from the slave/citizen subtext that has promoted an ambiguous and contradictory policy and legal stance towards the Indigenous people. A reconciliatory approach allows for such a break without unduly unsettling existing property holding and our existing legal order.

PART 1:

SETTING THE SCENE

This part examines the meaning of the term reconciliation and what it means in a legal context. It argues for the development of a constitutional law jurisprudence that seeks to ensure that the legal wrongs done to Indigenous people are not repeated in the future. This part also argues that the Australian courts have tended towards a narrow positivistic approach to the interpretation and development of the law.

Chapter 2

Reconciliation

> It should, I think, be apparent to all well-meaning people that true reconciliation between the Australian nation and its indigenous peoples is not achievable in the absence of acknowledgment by the nation of the wrongfulness of the past dispossession, oppression and degradation of the Aboriginal peoples.
>
> Sir William Deane, Governor General of Australia, August 1996

> And if there's gonna be healing
> There has to be remembering
> And then grieving
> So that there can be forgiving
> There has to be knowledge and understanding
>
> Sineade O'Connor[1]

1. Introduction

This thesis explores ways in which the Constitution can advance the goal of reconciliation. A preliminary question is what reconciliation is, and is it anything more than a slogan or a political aspiration? The argument in this chapter is that reconciliation is of central concern to the Australian constitutional system. It is about our legal system attaining moral legitimacy, at least in so far as it relates to Australia's indigenous people.

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[1] From the song "Famine" performed by Sinead O'Connor on her *Universal Mother* CD, written by S O'Connor, D Clayton, T Simenon and J Reynolds.

This chapter begins by discussing the relevance of reconciliation to the law and justice. It then proceeds to consider more precisely what is meant by reconciliation. Reconciliation has two essential purposes regarding indigenous people. The first acknowledgement and atonement by the dominant group for the systemic wrongs they inflicted upon the indigenous group, the provision of reparations, and the establishment of legal and constitutional protections to prevent the wrongs reoccurring. This process of reconciliation has been adopted in South Africa and Latin American countries. The second reconciliation approach starts from the premise that the indigenous people have *sui generis* rights and interests, which exist within the framework of the dominant legal system. The courts consequently play a role in mediating, or reconciling, the competing interests of the majority and the minority, who hold inherent *sui generis* rights and interests. This approach has been adopted by Canada, and to a lesser extent, the US and (with certain differences) New Zealand.

There is no clear recognition of the indigenous constitutional rights in Australia as yet, consequently the second reconciliation approach is probably somewhat premature. Attention will therefore be given to the three elements of the first approach: acknowledgement and atonement, reparation, and constitutional structures to prevent a repeat of the wrongdoing in the future. The second approach to reconciliation offers possibilities for a more dynamic relationship between the government and indigenous people based on a true sense of equality and a relationship based on mutual respect. It is fair to say that true reconciliation will not be achieved until it is recognised, in a fundamental and constitutional sense, that the relationship between government and indigenous people is founded upon a genuine recognition of the equal standing of the two parties.

2. The law's interest in reconciliation

Reconciliation, it might be claimed, is a matter for the political process and not of primary interest to the law. This chapter argues that reconciliation is in fact central to our understanding of the law's purpose and operation, and is intimately related to our constitutional traditions and the operation of the rule of law. Reconciliation speaks to the issue of justice. According to Brennan

> Reconciliation is an obligation of justice, not a manifestation of benevolence. It is bilateral, healing the division created by past injustice. Past injustice would be compounded and divisions would be more entrenched by a continuing failure to reconcile and be reconciled.[2]

It might also be said that justice itself is not a manifestation of benevolence, but related, in the most intimate sense, to the law. Indeed, the law devoid of justice is not law at all, merely an instrument of social ordering and control with a ready capacity for repression. Law and justice are more likely to sing in harmony in nations where its people are subjects rather than mere objects of the law's concern. This fairly obvious point has unfortunately become obscured by the pervasive influence of strict Austinian and Diceyean positivism upon the Australian legal system. The impact of this influence is traced in the next chapter. The positivists, in their desire to bring greater order and coherence to the law and to free it of its more mystical sources (something about which natural law was less concerned), separated justice from law, leaving the law dangerously unanchored.

What then is law, and what does it have to do with justice, morality, or reconciliation for that matter? In answer, it can be said that the law is both an art and a science. It is an art in the sense that it

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[2] Sir Gerald Brennan (former High Court Chief Justice) "Reconciliation" (1999) 22 UNSWLJ 595 at 595.

"operates within a tradition, and a body of learning and precedent and judicial reasoning".[3] This distinguishes it from mere assertions of right and wrong drawn from individual consciences. Law is a science in the sense that, without embracing the whole of the morality, "the law takes place within the realm of moral science, of which it constitutes a well-defined part".[4]

Law is an art in the sense that it operates within a tradition; the legal tradition. This tradition restrains the application of "mere sentiment and whimsy and a gratuitous dressing up of ill-founded subjective preferences which allows a fallacious cover of intolerance".[5] Thus law should not be confused with dogmatism. Nor does the law permit the mere application of an individual judge's person whimsy and personal sentiments about law and justice. According to Gaudron J it is "beyond controversy that the role of Australian courts is to do justice according to law - not to do justice according to idiosyncratic notions as to what is just in the circumstances".[6] Thus the courts are required to apply "the rule of law and not the rule of judges."[7] Van Krieken believes, however, that when the High Court asserts that it is responding to 'the contemporary values of the Australian people', "it is in fact choosing to play an active role as a moral entrepreneur, rather than simply reflecting something that exists independently of itself".[8] To be fair though, marking the boundary between the taking of judicial notice of a generalised perception of contemporary values, and the imposition of personal or idiosyncratic values under the guise of

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[3] M Villey "Epitome of Classical Natural Law" (2000) 9 GLR 74 at 90 at 92.

[4] *Ibid* at 89.

[5] *Ibid.*

[6] *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63 at para 59.

[7] *Ibid.*

[8] R Van Krieken "From *Milirrpum* to *Mabo*: The High Court, *Terra Nullius* and Moral Entrepreneurship" (2000) 23 UNSWLR 63 at 75.

reflecting community values is more difficult than may first be apparent. A court that studiously avoids having regard to a generalised sense of contemporary values in favour of a strict application of the traditional values of the law (which themselves were no doubt informed by perceived community values) risks legitimate criticism about the court becoming detached and disdainful of the concerns of society. Judges will sometimes respond to criticism about imposing personal values by retreating into strict formalism. As Harvey notes, formalism "offers comfort to judges when presented with serious moral problems about the activity they are engaged in".[9] Formalism, however, does not necessarily prevent the imposition of personal values, indeed it allows them to be imposed under the guise of objectivity.[10] In the case of statutory interpretation, for example, formalism allows a judge to *construct* the meaning of a statute in a way that reflects the judge's unarticulated personal values rather than require the judge to *find* its meaning by examining materials to aid the discovery of the intentions of the statute's authors.[11]

Law can also be seen to be a science. According to Villey justice has no relation to the refinement of private morality, because it concerns law.[12] He adds that the classical doctrine of natural law never assimilated law to *the whole* of morality, or even of the duties towards others.[13] This is because (1) the law as the "science of the just" is but a *moment* of morality, it is "a stage and an instrument of concrete morality"; and (2) justice is something *relative* and its formula varies

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[9] CJ Harvey "The Politics of Legality" (1999) 50 Northern Ireland Legal Quarterly 530 at 531.

[10] See chapter 4, below.

[11] TW Merrill "Textualism and the Future of the *Chevron* Doctrine" (1994) 72 Washington University Law Quarterly 351 at 372.

[12] *Ibid* at 84.

[13] *Ibid* at 88.

according to the nature of the act and the situation of the agent".[14] It is a point of frustration for some, in an age when so much store is placed on proving the merits or otherwise of a social activity through empirical examination, that justice does not readily yield to such examination. Van Krieken argues, for example, that values, norms and moral principles are inherently contested in advanced industrial societies, and therefore appeals to 'community values' are "attempts to *construct* a particular moral community, rather than descriptions of a value consensus which actually exists".[15] This criticism misses the point somewhat. The law is not built on a value-set that is either provable or disprovable by opinion polls or any other means. Rather, it is built on an institutionalised value-set (which may be informed by a generalised sense of community values) which requires practical application to the society it serves. That is, justice "is not only the private moral virtue which respects the right of the other, supposedly known in advance: it fulfils a *public* function; it inquires into the consistency of the reciprocal rights of each".[16] It is therefore not solely provable science or wholly subjective art.

Reconciliation, in the legal context, is about the restoration of justice, and the reclamation of a moral universe, in which we do not seek to apply legal rules and procedures with steadfast ignorance of their impact on individuals in our community. The legal interest in and concern about justice, although it has been repressed by the overbearing hand of strict positivism, is not a novel concept to the Anglo-Australian legal system. It comprehends the people, or the citizenry, as the subjects rather than the objects of the law, which has important implications for the way in which conceptions of justice are instilled in the tradition of the law. Krygier alerts us to the significance

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[14] *Ibid.*

[15] Van Krieken, *supra* note 8 at 75.

[16] Villey, *supra* note 3 at 88.

of the subject/object of the law distinction. He distinguishes between the constitutional traditions of some central European and other nations, in which the people are merely the objects of the ruler's concern, from the Anglo-Australian tradition in which the people are the subjects of the law's concern. Krygier observes that many legal orders have no ambition to restrain and civilise power.[17] Rather, they conceive the law as an instrument for repression or at least top-down direction of subjects, and nothing more. The citizenry are seen as mere objects of power, allowing the rulers to use various instruments of state, including the law for their own purposes. He adds that:

> Legal orders whose primary aim is repression, or managerial direction, or social transformation, for example, will embody – not simply serve but literally embody - different views of the nature and proper relationships between ruler and ruled, and between the ruled themselves, views different both from each other and all the more from one which has as a central purpose to guard individual interests and facilitate co-operative interactions among agents pursuing their own self-chosen projects. Moreover, not only are the ends very different, but the character of the legal means will also differ systematically… The nature and identities of principals and agents will be differently understood and located, the degrees of official discretion allowed, publicity required, flexibility thought warranted, formality insisted upon, all will be affected by the often unarticulated but presupposed point of the law.[18]

The subject/object dichotomy is significant for the purposes of understanding Australia's constitutional development. All but one of the Australian colonies began as a penal settlement, which had "no

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[17] M Krygier, "The Grammar of Colonial Legality: Subjects, Objects, and the Australian Rule Of Law" in *Australia Reshaped. Essays on Two Hundred Years of Institutional Transformation,* (Cambridge UP, 2002, forthcoming) (G.Brennan and F.Castles, eds) at 5.

[18] *Ibid* at 7.

representative political institutions, no jury trials, almost no lawyers (except for some convicts), a dominant military presence, and governors whose formal powers were great and whose practical autonomy, in this wilderness at the end of the world, was even greater".[19] They were places, one would assume, where the law presumed that the settlers were mere objects of its exercise and enforcement of power. However, as Neal depicts in *The Rule of Law in a Penal Colony*, within 50 years, and despite the majority being convicts or ex-convicts, the Australian colonies were free societies with representative legislatures and considerable legal protection against arbitrary power.[20] Krygier observes in this context that

> There is no evidence that the British government planned it that way. Nor was the result inevitable. Nevertheless the transformation occurred, and most Australians are its beneficiaries. Why that happened is a matter of more than local or antiquarian interest.[21]

The reason for the rule of law taking root in Australian soil so quickly was because the ideas and ideals, and the culture and vocabulary of the rule of law was transported to Australia in the heads of those who arrived in the colonies. And so parties to an action expected, and the courts largely insisted upon, "their independence under British law, and the subordination of the apparently autocratic governors to that same law".[22]

The situation was not so clear-cut for the Aborigines. The Australian legal system maintained a deep ambivalence about their entitlement to the equal protection of the law. From the early stages of

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[19] *Ibid* at 15.

[20] D Neal *The Rule of Law in a Penal Colony* (Cambridge University Press, Cambridge, 1991) chapter 1.

[21] Krygier, *supra* note 17 at 16.

[22] *Ibid* at 17.

British settlement the law and imperial policy claimed Aborigines were British subjects and therefore entitled to the equal protection of British law.[23] This was often not the case in practice. Aborigines were rarely seen to be the equal of non-Aborigines as we will see in the following chapters in this thesis. Although attempts were made during the early stages of colonisation to treat them as subjects of the law, these were largely (and rather conveniently) perceived to be failures. It was not in Britain's interests or those of the settlers to give indigenous people the equal protection and benefit of the law, particularly with regard to the entitlement to the peaceful possession and occupation of land.

The British system of justice, when introduced to Australia, was essentially contradictory. If Aborigines were British subjects entitled to the equal protection of the non-indigenous law, why then were they not entitled to the peaceful possession and occupation of their land, which was the entitlement due to non-Aborigines? Harring notes that

> the obvious logic that if Aborigines were British subjects for the purposes of the penal law, they must have full civil rights also, including some title to their lands, was not applied anywhere in Australia, although it was too obvious an idea to be ignored by contemporary Australians. Paul Hasluck captured the essence of this contradiction as "still Black, though British": although the rights of Aboriginals as "British subjects" were acknowledged this had no meaning as a general proposition in law.[24]

Reynolds attempts to mask the contradiction by arguing that the British Colonial Office tried to protect the legal interests of the Aborigines, but that their attempts were thwarted by land grabbing

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[23] See discussion in Part 4 of the next chapter. See also *Mabo (No.2)* (1991) 175 CLR 1 per Brennan J where he says at p 38 that upon settlement "The common law thus became the common law of all subjects within the Colony [including Aborigines] who were equally entitled to the law's protection as subjects of the Crown".

[24] S Harring "The Killing Time: a history of Aboriginal Resistance in Colonial Australia" (1994) Ottawa Law Review 385 at 391.

settlers in Australia who ignored or sought to subvert the Colonial Office policy.[25] In reality a policy of violence towards Aborigines, including the forced removal from their lands, was implied by Cook thrusting the British flagpole into the soil at Possession Island and claiming the eastern portion of the Australian continent for Britain, and by the similar claim made by Captain Arthur Phillip in 1788 in Sydney Cove. No treaties were negotiated and no consent was sought for the taking of land.[26] This could only have been done upon the assumption that the indigenous people were indeed of a lesser status than the settlers. The de facto "more equal" status of the colonists in effect acted as a justification for the arbitrary and sometimes violent taking of Aboriginal lands. Thus, despite the official claims that Aborigines were British subjects, in reality they were mere objects of the law. They rarely if ever instigated, let alone succeeded in bringing, actions to protect their property rights.[27] It was obvious that non-Aborigines, even if they were convicts, had a reasonable chance of a fair hearing, whilst an Aborigine would not. And so, as Van Krieken argues,

> If the practitioners of Australian colonialism have been able to grin smugly at us across the two centuries prior to 1971, it is not because they have made such astute *use* of law in dispossessing

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[25] H Reynolds *The Law of the Land* (Penguin Books, Australia 1987). See particularly chapters 4 –6.

[26] Captain James Cook's instructions required that he was "with the consent of the Natives to take possession, in the name of the King of Great Britain, of convenient situations in such countries as you may discover". This requirement was never met in relation to the Australian natives. J Cook *The Voyage of the Resolution and Discovery* (JC Beaglehole, Cambridge Uni Press, Cambridge, 1967) at p.CCXXIII.

[27] Per Deane and Gaudron JJ, *Mabo (No.2) supra* note 23, where they said at 93:

> In theory, the native inhabitants were entitled to invoke the protection of the common law in a local court (when established) or, in some circumstances, in the courts at Westminster. In practice, there is an element of the absurd about the suggestion that it would have even occurred to the native inhabitants of a new British Colony that they should bring proceedings in a British court against the British Crown to vindicate their rights under a common law of which they would be likely to know nothing.

> the Aborigines; it is precisely because they have managed to *evade* law, to keep questions of indigenous interests in land out of law's reach, and wholly within the realms of politics and administrative governance.[28]

The arbitrariness of political and administrative governance and the rulings of the courts in the few cases that dealt with Aboriginal claims (which are considered in the next chapter) made it evident to even the most ardent believer in the rule of law that Aborigines were not to be accorded equal entitlement and equal redress in a court of law. There are many recitations of the wrongs the law perpetrated upon Aborigines, whether through direct legal process or by unchallenged (and unchallengeable) administrative and legislative processes, but perhaps one of the best and most succinct descriptions of those wrongs is the famous statement by Deane and Gaudron JJ in *Mabo (No.2)* that the acts and events of dispossession which were carried out in accordance with a legal theory that failed to recognise aboriginal rights "constitute the darkest aspect of the history of this nation".[29] They added that "the nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices".[30] The process of acknowledgement and retreat from the past injustices can neatly be described as the reconciliation process.

3. What is reconciliation?

Before proceeding, it is worth considering what reconciliation is and what it involves. Overseas experience suggests that there are essentially two broad approaches to reconciliation. One involves an acknowledgement of past wrongs and the establishment of mechanisms

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[28] Van Krieken *supra* note 8 at 74.

[29] (1992) 175 CLR 1 at 109.

[30] *Ibid.*

to ensure such wrongdoing does not reoccur in the future. The other operates on the assumption that indigenous people have certain inherent constitutional rights to equality and to flourish as a distinct people within the broader community. With this assumption, the courts may be required at times to reconcile any competing interests of certain indigenous people with those of the community as a whole. The latter approach is pursued in Canada, where for example the courts are required to reconcile the aboriginal right to traditional hunting and fishing with the general community interest in protecting the environment.

It is debateable (a debate that is entered into at some length in this thesis) whether Australian indigenes have fundamental constitutional rights beyond those of non-indigenes, and arguably they have had fewer of their rights recognised than members of the general community. The second approach to reconciliation (which applies in Canada) would therefore appear not to be a possible model for present Australian circumstances (at least in the constitutional context), and will not be so until (and if at all) the indigenous people are truly seen to hold equal status in our community.

During the 1990s Australia, somewhat painfully, embarked on the process of reconciliation. The Council for Aboriginal Reconciliation was established in 1991 under the *Council for Aboriginal Reconciliation Act 1991* (Cwlth), which was enacted with the stated aim of promoting reconciliation between the indigenous and non-indigenous communities. There was an added significance regarding the Act because, as Evelyn Scott observed

> Parliament noted that there had never been a formal process of reconciliation in Australia despite the dispossession and dispersal

of many Aboriginal and Torres Strait Islander people from their traditional lands after many thousands of years of occupancy.[31]

The Preamble states that the Act is being enacted because:

(a) Australia was occupied by Aborigines and Torres Strait Islanders who had settled for thousands of years, before British settlement at Sydney Cove on 26 January 1788; and

(b) many Aborigines and Torres Strait Islanders suffered dispossession and dispersal from their traditional lands by the British Crown; and…

(e) as a part of the reconciliation process, the Commonwealth will seek an ongoing national commitment from governments at all levels to co-operate and to co-ordinate with the Aboriginal and Torres Strait Islander Commission as appropriate to address progressively Aboriginal disadvantage and aspirations in relation to land, housing, law and justice, cultural heritage, education, employment, health, infrastructure, economic development and any other relevant matters in the decade leading to the centenary of Federation, 2001.

The Preamble, consistent with the first reconciliation approach, admits to wrongdoing and makes a commitment to atoning for the wrongdoing by addressing the disadvantages it created for the indigenous people. The Act does not (and probably could not) establish structures to ensure there will be no repeat of the wrongdoing in the future. In any event, any formal structures the Act might have established could readily be abolished by a future parliament. Indeed, in chapters 4 and 5 we examine the Hindmarsh Island Bridge Case (*Kartinyeri*) in which the Federal Government removed the entitlement of particular indigenous people under the *Heritage Protection Act* to seek a ministerial declaration preventing desecration of a site of significance.

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[31] E Scott "The Importance of Formal Reconciliation" (1999) 22 UNSWLJ 604 at 605.

The High Court found that the removal of the right was constitutionally valid. The final reconciliatory step requires a protective constitutional framework because statutory protection alone does not afford sufficient long-term protection against arbitrary conduct by government.

As we will see in Part 3 below, *Mabo (No.2)* took the reconciliatory step of admitting to past wrongs to indigenous people and advanced their legal status by finding that the common law could recognise native title. The Court also found, however, that the Crown has the absolute entitlement to extinguish that title without compensation (absent the *Racial Discrimination Act* in the case of the States and Territories), which is an entitlement the Crown does not have under the rule of law in relation to non-indigenous people. Indeed the only property rights the Crown has abolished on any mass scale are those of indigenous people. The High Court, reinforced the secondary status of indigenous people by employing the positivist notions of absolute crown sovereignty. The effect of this is to allow in the future the State and Territory Governments (with the indulgence of the Federal Government) to arbitrarily and capriciously remove the fundamental rights of indigenous people.

A crucial step in the reconciliation process is the establishment of mechanisms to lessen or remove the likelihood of systematic rights abuses in the future. As a result of the rights abuses in Nazi Germany, and the abuse of rights in South Africa, constitutional structures were established in those countries to protect fundamental rights for the present and the future. The vast majority of democratic nations have established during the post World War II period written constitutional provisions to protect fundamental human rights. In the case of the United Kingdom, rights are protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1953.[32]

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[32] See ZM Nedgati "Human Rights Under the European Convention" (North-Holland Publishing, Amsterdam 1978) at 1.

Australia is one of the few democratic nations that do not have an extensive written constitutional bill of rights. This thesis examines whether and to what extent fundamental rights can be protected under the Australian constitutional system.

There are then, two broad reconciliation models; one which has been adopted in post-War Germany and post-Apartheid South Africa, the other in Canada, where there is constitutional recognition of aboriginal rights. The first model is probably most apposite in Australia as there is not as yet clear constitutional recognition of their rights. The first model essentially requires (a) an acknowledgment of past wrongs and an apology or atonement to those who were affected, or the relatives of those affected; (b) to some extent, some kind of recompense; and (c) a development of constitutional and other structures to ensure the wrongdoing will not occur in the future.

(a) Acknowledgement and Atonement

The first reconciliatory step involves an acknowledgement of past wrongs. This is particularly important for the victims and descendants of the victims of the wrongdoing. Indeed, the exercise of establishing the truth about the past is itself a critically important form of reparation.[33] The Chief of Staff of the National Commission for Truth and Reconciliation in Chile noted this, saying that it became clear during their proceedings that "a full disclosure of the truth had enormous links with the beginning of a reparative process".[34] He added that "that a meaningful reparative process must express a recognition of

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[33] D Orentlicher, "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation", in L Henkin and J Hargraves (eds), *Human Rights: An Agenda for the Next Century* (American Society of International Law, Washington DC 1994) at 457.

[34] Correa, "Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship" (1992) 67 *Notre Dame Law Review* 1455 at 1478, quoting *Report of the National Commission for Trust and Reconciliation* (1991) at 824, quoted by S Pritchard "The Stolen Generations and Reparations" (1998) 21 UNSWLR 259 at 261.

the truth, both by the state and society".[35] Pritchard notes that numerous submissions to the Human Rights and Equal Opportunity Commission, *Bringing Them Home* Inquiry emphasised the importance of confronting the truth.[36] She adds that:

> In eloquent, skilfully articulated and forceful submissions, Aboriginal and Torres Strait Islander organisations and individual witnesses spoke of the need to have their stories heard and their pain recognised, of their need for an apology, for assistance in reuniting with their families, in locating files, in returning to their traditional country, in recovering language and culture. The Inquiry's broad, holistic understanding of reparations is grounded in survivors' subjective perceptions of what is required to repair the harms they have suffered. This methodology is one of the more exceptional features of a most extraordinary report.[37]

Post-apartheid South Africa embarked upon a reconciliation process that aimed, as part of its deliberations, to discover the truth. A Truth and Reconciliation Commission was established under the *Promotion of National Unity and Reconciliation Act*, 1995 with the aim of discovering past wrongs and seeking recognition of the harm done. The Act required the Commission to gain as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed from 1 March 1960. The stated aim in the Act was to find out the fate or whereabouts of the victims of violations of human rights, providing an opportunity to victims to relate the violations they suffered, to grant reparations, to restore the human and civil dignity of victims, and the making of recommendations aimed at the prevention of the

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[35] *Ibid.*

[36] Human Rights and Equal Opportunity Commission, *Bringing Them Home: A report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Commonwealth Government, 1997).

[37] Pritchard, *supra* note 34 at 267.

commission of gross violations of human rights in the future. The Act also stated that it aimed to provide a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race, class, belief or sex. The Act emphasised that it was aimed at promoting understanding and not vengeance, reparation and not retaliation, and ubuntu[38] and not victimization.

(b) Reparation

The injury done to the indigenous people result from causes that are complex and multilayered. The very claim to and occupation by Britain of Australian territory was based on the premise that the British could subsume the rights and entitlements of indigenous people. Subsequent injury suffered by indigenous people can be related back to the validity or otherwise of the original claim. This raises a number of questions from the reparations perspective. First, was the original claim valid, and on what legal basis can that decision be made? Second, if there were invalid actions by the Crown resulting from the claim, what are the forms of remedy or reparations available?

The first question raises deep moral, political and legal issues, which go to the heart of questions regarding the legitimacy of the colonial claims. The underlying issue of legitimacy has created a quandary for legal commentators and has led to rationalisations by the "courts of the conqueror" that are variously bigoted, implausible or contradictory. The quandary has also led to inconsistent and

[38] Ubuntu is a Nguni word meaning personhood. It means to live and care for others; act kindly towards others; be hospitable; be just and fair; be compassionate; assist those in distress; be trustful and honest; and have good morals.

contradictory stances by commentators.[39] Let us take Blackstone as an example. In *Mabo (No.2)* Brennan J quoted Blackstone as saying that so long as the settlement "of desert uninhabited countries" "was confined to the stocking and cultivation", then it kept strictly within "the limits of the law of nature".[40] Blackstone links the validity of British claims to colonial territory to compliance with the law of nature. This would, at a minimum require the transplantation of British laws that can be relevantly applied to the colony. Their laws carry with them the underlying assumption that the Crown is bound by the rule of law. Which means, at the very least, that barbarism is not permitted. Yet there was widespread barbarism towards the native people. Blackstone noted this, saying

> But how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.[41]

Clearly such acts of barbarism were against the law of nature, and throw the legality of the British claims in doubt. Even if acts of wanton violence and killing were not officially sanctioned, the Crown was actively involved in the genocidal activity of systematically (and arbitrarily) taking of indigenous lands and parcelling them out to the

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[39] See generally chapters 1 and 3 H McRae, G Nettheim and L Beacroft *Indigenous Legal Issues: Commentary and Materials* 2nd ed (LBC Information Services, Sydney 1997).

[40] W Blackstone *Commentaries on the Laws of England*, 17th ed (1830), Bk II, ch 1, p 7. Quoted by Brennan J in *Mabo (No.2) supra* note 23 at 33.

[41] Blackstone *ibid* at p 7.

settlers, and dispersing indigenous groups.[42] The very arbitrariness of these takings was contrary to the rule of law and the law of nature. So the quandary for Blackstone was this; in terms of real politick and historical reality the British were proceeding with the claims to peopled territories. It was unrealistic to expect that Britain would abandon their colonial territories simply because it breached the rule of law or of nature, particularly as, in the case of the American territories at least, the colonies were substantially contributing to Britain's economic, military and political standing. The rule of law existed for the benefit of the British citizenry who were not harmed, and indeed benefited, from its breach. In any event, another rival European claimant who was not so scrupulous would probably take the territory if it were vacated by Britain. Yet, violence and forceful taking of lands was not an unfortunate by-product or an unintended consequence of the original claim to territory, it was a direct and necessary consequence of the claim. Various attempts were made in North America to coat the colonial takings with a sheen of legitimacy by negotiating treaties with various Indian tribes. But these were never conducted on the basis of any genuine equality of bargaining positions, or anything resembling genuine consent on the part of the Indians, as Lee's account in *Bury My Heart at Wounded Knee* makes relentlessly clear. But for a legal commentator to argue that the rule of law and the constraints of natural law principles do not apply to colonial acquisition risked

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[42] See Article 2 of the UN Convention on the Prevention and Punishment of the Crime of Genocide, which defines genocide as the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

justifying barbarism. This is something from which most commentators recoiled. Understandably, the British were somewhat squeamish about adopting laws and policies which had the express aim of perpetrating the genocide of native people.

The quandary left Blackstone raising a disapproving eyebrow at those who drove out or massacred the innocent and defenceless natives, whilst ultimately justifying the taking of their lands anyway, as we shall see in the next chapter. The quandary leaves the colonial law confused and wildly inconsistent. It led to the Crown variously treating the indigenous people as British subjects and as non-citizens who where denied even the most essential entitlements of the rule of law.

The majority in *Mabo (No.2)* offered interesting responses to the quandary. Brennan J said that the law had wrongly operated on the assumption that there was an absence of Aboriginal laws and that their practices were barbaric. This characterisation, no doubt, justified the application of barbaric laws and practices to indigenous people. Brennan J added that we now know these assumptions were fallacious and therefore the correct position is that the Aborigines as British subjects were entitled to the full benefit and obligations of the law.[43] Thus, the false assumptions need now to be corrected so that the common law is capable of recognising native title. Deane and Gaudron JJ said that the Aborigines were always full subjects of the law and therefore entitled to its benefits and subject to its obligations. Indeed a "strong assumption of the common law was that interests in property

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[43] See Brennan J in *Mabo (No.2) supra* note 23 at 39 where he said:

> The facts as we know them today do not fit the "absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory. It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands. Yet the supposedly barbarian nature of indigenous people provided the common law of England with the justification for denying them their traditional rights and interests in land…

which existed under native law or customs were not obliterated by the act of State establishing a new British Colony but were preserved and protected by the domestic law of the Colony after its establishment".[44] As a consequence indigenous people were entitled to bring an action, from the beginning, for the wrongful taking of their lands. Deane and Gaudron JJ admitted that in reality this was not done, and probably could not have been done at the time.[45] Indigenous applicants would have faced an uphill battle to protect their rights because even if it could have been established that the Crown had acted wrongfully, the "Crown immunity from curial proceedings was, however, such that, no breach of contract being involved, no action would have lain against the Crown to prevent the wrongful act being done or against the Crown or its agents for compensatory damages after it was done".[46]

As the damage done can be traced to the original acquisition of territory by the Crown, it is appropriate for the Crown to make reparations. In determining the domestic law principles regarding reparations, regard may be had to the international law. International law and the domestic law are not hermetically sealed off from each other. As Brennan J noted in *Mabo (No.2)* "Although the manner in which a sovereign state might acquire new territory is a matter for international law, the common law has had to march in step with international law in order to provide the body of law to apply in a territory newly acquired by the Crown".[47] He added that:

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[44] *Ibid* at 82.

[45] Per Deane and Gaudron JJ, *Mabo (No.2) ibid*, where they said at 93:

> In theory, the native inhabitants were entitled to invoke the protection of the common law in a local court (when established) or, in some circumstances, in the courts at Westminster. In practice, there is an element of the absurd about the suggestion that it would have even occurred to the native inhabitants of a new British Colony that they should bring proceedings in a British court against the British Crown to vindicate their rights under a common law of which they would be likely to know nothing.

[46] *Mabo (No.2) ibid* at 94.

[47] *Ibid* at 32.

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[48]

Slattery describes the law regarding the acquisition of British colonial territory as colonial law.[49] It is constituted by a combination of international law, common law and administrative practice regarding the application and operation of British laws in their colonies. Any obligations the Crown may have to protect and promote the interests of the indigenous people may be located in the colonial law, and exhibit itself in the form of constitutional obligations and restraints and under the common law.[50]

The relevant principles in international law regarding reparations for wrongful acquisition of colonial territory are contained in the doctrine of state responsibility. Under the doctrine, a State is responsible for an act or omission that is attributable to the State under international law and which breaches a primary rule of international

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[48] *Ibid* at 36.

[49] See B Slattery "The Hidden Constitution: Aboriginal rights in Canada" (1984) 32 Amer. Jour. Comparative Law 361at 367, "These principles [of Colonial Law] were often generated by opinions given by the Crown law officers on colonial matters and by official practice influenced by those opinions...[I]t would not be a great exaggeration to say that the courts superintended the development of the common law, but did not create it themselves".

[50] In Canada, for example, the Crown has been found to owe a fiduciary duty to indigenous claimants, which is a *sui generis* obligation actionable under a civil law claim; see *Guerin v The Queen* [1984] 2 SCR 335.

law. Primary rules now include the prohibition of the use of force to invade another State.[51] It might be doubted whether Britain breached a primary rule of international law at the time of colonial acquisition because it is not clear that the claim constituted a breach of the international law of the time. However, for reasons discussed in this chapter, the arbitrary takings by the Crown of native lands were breaches of the rule of law, for which the Crown is responsible, and not the non-indigenous (and sometimes indigenous) people who were granted titles by the Crown. The Crown is therefore responsible for the breaches. What then is the appropriate remedy? Here we may again refer to the doctrine of state responsibility for assistance. The Permanent Court of International Justice ruled in the *Chorzow Factory Case* (1928) that reparation must, as far as possible, "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[52] This must either be accomplished by restitution in kind, or if that is not possible, through just compensation. This involves "payment of a sum corresponding to the value which a restitution in kind would bear," and "the award, if need be, of damages for loss sustained which would not be recovered by restitution in kind or payment in place of it", such as lost profits.[53] These principles were subsequently codified as the "Hull Formula" which required "prompt, adequate and effective compensation". More recently the International Law Commission qualified the Hull Formula, largely because of the financial burden it would place on States. In 1996 the ILC published Draft Rules on State Responsibility which provide that full monetary

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[51] See Articles 1, 3, 4, 17, 18(1) of the Draft Articles on State Responsibility prepared by the International Law Commission: *Report of the International Law Commission on the Work of its Forty-Eighth Session,* 6 May - 26 July 1996 (A/51/10).

[52] Chorzow Factory Case (Germany v. Poland), 1928 PCIJ (Ser. A) No. 17 (Judgment of Sept. 13, 1928).

[53] *Ibid.*

reparations or restitution in kind might be limited if 1) reparation would "result in depriving the population of a State of its own means of subsistence"; or 2) in-kind restitution would involve "a burden out of all proportion to the benefit which the injuring State would gain from obtaining restitution in kind instead of compensation"; or 3) in-kind restitution would "seriously jeopardize the political independence or economic stability of the State which has committed the wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind".[54]

Reparations need not involve the payment of money calculated in the way a court calculates damages, nor need it require the return of lands now owned and occupied by non-indigenous people. The remedy may take the form of a range of political and social measures. The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, recommends, for example, that reparation include rehabilitative measures, such as "legal, medical, psychological and other care and services".[55] The *Bringing Them Home* Inquiry found that indigenous children who were removed from their families typically had lost the use of their traditional language, been denied cultural knowledge and inclusion, been deprived of opportunities to take on cultural responsibilities and are often unable to assert their native rights.[56] The Inquiry recommended restitution of land, culture and language with the aim of re-establishing to the extent possible, the situation prior to the perpetration of gross human rights violations.[57]

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[54] Articles 42 and 43 and Commentary 8(a) and (b), Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May - 26 July 1996 (A/51/10).

[55] *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law* (UN,1996) Recommendation 27-9, quoted by Pritchard, *supra* note 34 at 264.

[56] Pritchard, *supra* note 34 at 263.

[57] *Ibid.*

Remedial action though court processes cannot, however, be ruled out. As Deane and Gaudron JJ noted in *Mabo (No.2)*

> as legislative reforms increasingly subjected the Crown or a nominal defendant on its behalf to the jurisdiction of the courts and to liability for compensatory damages for a wrong done to a subject, the ability of native title-holders to protect and vindicate the personal rights under common law native title significantly increased. If common law native title is wrongfully extinguished by the Crown, the effect of those legislative reforms is that compensatory damages can be recovered provided the proceedings for recovery are instituted within the period allowed by applicable limitations provisions.[58]

(c) Establishing constitutional structures and rights

A final component in the reconciliation process is ensuring that the wrongs of the past are not repeated in the future. A significant means for ensuring this is to establish constitutional structures and rights that protect and promote indigenous interests. The South African Constitution is designed to achieve this. Section 1 of their Constitution, for example, states that the Republic of South Africa is one, sovereign, democratic state founded on the following values:

a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.

b. Non-racialism and non-sexism.

c. Supremacy of the constitution and the rule of law.

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[58] *Mabo (No.2) supra* note 23 at 112. Note however that the majority (Mason CJ, Brennan and McHugh JJ) rejected liability for compensation.

d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Paragraph c mentions the supremacy of the constitution and the rule of law, which are also foundations upon which the Australian constitution is constructed, despite the fact that no express mention is made of them in the Constitution.[59] The Australian High Court has not considered the implications of these assumptions regarding indigenous rights. According to Nettheim, the Court in *Mabo (No.2)* corrected the convenient assumption that "the inhabitants had no property in the land and, indeed, no law" with "a belated recognition of native title, based on Indigenous law".[60] The Court, however, found that the Crown has the power to extinguish native title. There are two qualifications to this power, first is that the Commonwealth Parliament may legislate with respect to the acquisition of property only subject to just terms under section 51(xxxi) of the Constitution, and the State and Territory Parliaments cannot extinguish if doing so is inconsistent with a valid Commonwealth law, more specifically, the *Racial Discrimination Act* (RDA) and the *Native Title Act* (NTA). The potential exists, if the RDA is repealed or modified, that State and Territory governments could in the future arbitrarily abolish or impair indigenous rights, including their right to land, unless the Constitution prevents them. Whether those governments can arbitrarily abolish indigenous rights is a question that goes to the legitimacy of the initial claim and continued occupation of Australian territory. As Nettheim observes, "a State's very existence is predicated on the accumulation of lands from prior Indigenous inhabitants, one might logically expect to see such foundational matters addressed in the Constitution of the new State".[61] He adds that this has

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[59] See chapter 6, below.

[60] G Nettheim "Reconciliation and the Constitution" (1999) 22 UNSWLJ 604 at 625.

[61] *Ibid.*

not yet occurred in Australia, and asks whether it is "feasible at this stage in our history to achieve a similarly belated Constitutional recognition of the position and the rights of Indigenous Australians?"[62] Answering that question is essentially the project of this thesis.

It is evident that from the time of the British claim to Australian territory indigenous people, for the most part, suffered a lower legal status than that of the colonists. This status became bureaucratically entrenched by the policy of protectionism, which began in the mid-19th century and continued well into the 20th.[63] Indigenous people were treated as mere objects of the law and were deprived of the full benefits of the rule of law. The meaning and scope of the rule of law is discussed at some length in chapter 6. The law, at least formally, no longer presumes that indigenous people are of a lower status. The transformation of the indigenous people from being objects of the law to subjects of the law is a profound one. The transformation was not marked by a singular event, as it occurred gradually and fitfully over time. The error in *Mabo (No.2)* is that the Court did not recognise or acknowledge this legal transformation in a constitutional sense; indeed the majority effectively denied its occurrence.

The Court gave with the one hand (by finding that the common law recognises native title) and took with the other (by finding that the Crown may extinguish that title).[64] The reason it did so relates in part to deep contradictions that lie at the heart of the colonial law. On the one hand Deane and Gaudron JJ said that Privy Council cases made

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[62] *Ibid.*

[63] See chapter 3, below.

[64] According to Brennan J in *Mabo (No.2) supra,* note 23at 63

> It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power. The sovereign power may or may not be exercised with solicitude for the welfare of indigenous inhabitants but, in the case of common law countries, the courts cannot review the merits, as distinct from the legality, of the exercise of sovereign power.

plain that the "Crown was not, as between the native inhabitants and itself, lawfully entitled to effect a unilateral extinguishment of common law native title against the wishes of the native occupants".[65] But on the other they said that:

> Like other legal rights, including rights of property, the rights conferred by common law native title and the title itself can be dealt with, expropriated or extinguished by valid Commonwealth, State or Territorial legislation operating within the State or Territory in which the land in question is situated. To put the matter differently, the rights are not entrenched in the sense that they are, by reason of their nature, beyond the reach of legislative power.[66]

Viewed as isolated acts, the Crown clearly has the power to extinguish and alter fundamental rights, including the right to the peaceful and lawful occupation and ownership of property. Modern society could not function if this were not the case. However, the Crown is not entitled to affect fundamental rights in an arbitrary way. The Australian constitutional system is based on the presumption that the people are subjects of the law and not merely its objects. The arbitrary and capricious extinguishment of property rights by the legislature or administration would amount to treating the people as mere objects, rather than subjects of the law. It is something the law has not done to non-indigenous people in any sustained or systematic way, if it has ever done so. Such conduct is unimaginable, and if done would profoundly undermine the foundational assumptions that the people are the subjects of the law and not merely its objects. The taking of land with respect to any single indigenous tribal group or individuals might not

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[65] *Mabo (No.2) ibid* at pp.91-92.

[66] *Mabo (No.2) ibid* at pp.110-111. They added at p.111 however that "The ordinary rules of statutory interpretation require, however, that clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation".

reveal any arbitrariness. But when legislative and administrative conduct is viewed over a number of decades a clear pattern of behaviour emerges, which involves the systematic and arbitrary removal of lands from indigenous people. It is this arbitrariness that exceeds the bounds of the rule of law. It is the singling out of particular groups in the community for systematic and arbitrary deprival of their rights that breaches the rule of law. It was this systematic conduct that was objectionable in the apartheid regime in South Africa. So despite the fact that the legislature has the power to extinguish title and abolish and modify fundamental rights, it must do so in a way that is not arbitrary.

The meaning of arbitrariness was discussed in *Mabo (No 1)*.[67] The issue in the case was whether the *Queensland Coast Islands Declaratory Act 1985* (the "Declaratory Act") breached the RDA. Section 3 of the Declaratory Act stated that upon the Torres Strait Islands becoming part of Queensland, "the islands were vested in the Crown in right of Queensland freed from all other rights", and section 5 stated that no compensation was payable "in respect of any right, interest or claim alleged to have existed prior to the annexation of the islands to Queensland". The Court considered whether the Act breached section 10 of the RDA, which states that:

> (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or

[67] *Mabo (No.1) v Queensland* (1988) 166 CLR 186.

ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention (ie the *International Convention on the Elimination of All Forms of Racial Discrimination*) .

Article 5 requires that parties to the Convention ensure that national laws guarantee the right of everyone, without racial distinction, to equality before the law, including the non-discriminatory right to own property. In interpreting the meaning and operation of Section 10, Brennan J, Toohey and Gaudron JJ referred to Article 17 of the *Universal Declaration of Human Rights 1948,* which included the statements that "1. Everyone has the right to own property alone as well as in association with others" and "2. No one shall be arbitrarily deprived of his property".[68] They also referred to the definition in Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (1984)[69] of "arbitrarily", which it says "has been interpreted to mean not only 'illegally' but also 'unjustly'".[70] Brennan, Toohey and Gaudron JJ found that the Declaratory Act arbitrarily deprived the claimants of their rights to property. Thus, an inquiry into whether the extinguishment of native title is valid under the RDA involves a question as to whether or not it is arbitrary. Answering this requires an inquiry into the legality and the justice of the extinguishment. It is argued in this thesis that it is unconstitutional for Australian governments to arbitrarily deprive indigenous people of their fundamental rights, including their right to land. Therefore the powers of State and Territory governments are constrained in the same way, whether the RDA is in operation or not.

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[68] *Ibid* at 217.

[69] Vol.1, p 122, fn 40.

[70] See *Mabo (No.1) supra* note 67 per Brennan, Toohey and Gaudron JJ at 217.

That is, if the RDA were to be repealed, the State and Territory governments would be in much the same position regarding their power to deal with native title. This is because the rule of law requires that citizens not be arbitrarily deprived of their rights by government. The rule of law is a foundation stone upon which the federal and state constitutions are built.[71] Although the rule of law is not expressly mentioned, it nevertheless stands as an implied term of the constitution.

The discussion so far regarding the constitutional protection of indigenous rights has been couched in negative terms. That is, as a right to be protected against the arbitrary exercise of power by the state. Canada and New Zealand offer the possibility of constitutional principles that promote a more positive, creative and dynamic relationship between the government and indigenous people. The New Zealand courts, for instance, recognise that a "contemporary relationship" exists between the government and the Maori for the protection and promotion of the Maori's interests as a people.[72] The Canadian Supreme Court has found that the government owes an obligation to protect and promote the interests of indigenous people which derive from an "historic relationship".[73] The Court in *Sparrow* recognised that the obligation in part requires the legislature to "uphold the honour of the Crown" to ensure legislation is "in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples".[74]

The New Zealand courts have found that the Crown owes certain obligations to protect and promote the interests of the Maori under the Treaty of Waitangi. The Treaty recognises the distinctiveness of the

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[71] See chapter 6, below.

[72] *R v Sprarrow* (1990) 70 DLR (4th) 385 per Dickson CJC and La Forest J at 410.

[73] *Ibid* at 408 per Dickson CJC and La Forest J.

[74] *Ibid* at 410.

Maori as a people because it "signified a partnership between races".[75] Although the Treaty is a focal point for developing the obligation, it should not be assumed that it is the sole basis for the obligation. The Treaty is expressed in very brief and ambiguous terms and was long considered by the courts to have no legal effect.[76] For that reason Cooke P cautioned that the Treaty "has to be seen as embryo rather than a fully developed and integrated set of ideas".[77] The fact that the Treaty is not the sole basis for the principle that an obligation is owed to the Maori was made clear by Cooke P when he said that New Zealand common law developments "are part of a widespread international recognition that the rights of indigenous people are entitled to some effective protection and advancement".[78] As a consequence, the courts ensure that legislation is not inconsistent with the principles of the Treaty of Waitangi. That essentially comes down to the question of "what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that [its] powers. . .are not used inconsistently with the principles of the Treaty".[79]

Section 35 of the Canadian Constitution states in subsection (1) that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Note that section 35 does not itself create aboriginal rights, it recognises existing rights and provides constitutional protection against their arbitrary removal or modification. Thus the rights themselves are not sourced in the Constitution, they arise from aboriginal laws and customs, the common

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[75] Per Cooke P in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 663.

[76] See for example *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72.

[77] *New Zealand Maori Council v Attorney-General*, *supra* note 75 at 663.

[78] *Te Runanga o Wharekauri Rekohu Inc v Attorney General* [1993] 2 NZLR 301, per Cooke P at 306.

[79] Per Cooke P in *New Zealand Maori Council v Attorney-General*, *supra* note 75 at 663-64.

law and the colonial law. The Australian common law and colonial law, however, have much in common with Canada. Much of the western portion of Canada was settled at the same time Australian territory was settled, and both were British colonies. Because aboriginal rights derive from sources outside their constitutional system, the Canadian jurisprudence on section 35 offers insights and persuasive authority for the development of the common law and constitutional law principles in Australia.[80] Whether section 35 ultimately leads to establishing an effective and enduring reconciliation process, however, is yet to be seen.

The Canadian Supreme Court has established a "justificatory standard" under section 35 for governments to meet for legislation that affects aboriginal rights.[81] The standard provides a useful basis for protecting aboriginal rights, though Professor McNeil criticises it for not providing constitutional space to allow aboriginal laws to develop. He argues that if federal and provincial governments were prohibited from regulating hunting and fishing on aboriginal land, aboriginal laws would fill the legislative vacuum to regulate the activity and protect endangered species.[82] Some commentators believe that Canada's constitutional recognition and affirmation of aboriginal and treaty rights under section 35 of their Constitution confirms the common law rights of aborigines to autonomy. Professor Slattery describes the unique character of aboriginal Canadians as "constitutional entities". This description appears to arise from the historical circumstances of the European acquisition of aboriginal territory rather than the

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[80] Note that the Canadian situation differs from Australia in that section 15 of the Canadian Constitution provides express protection of the right to equality. This is discussed further in chapter 7, below.

[81] B Slattery "First Nations and the Constitution: A Question of Trust" (1992) 71 The Canadian Bar Rev 261 at 279.

[82] K McNeil "Envisaging Constitutional Space for Aboriginal Governments" 19 Queen's Law Jour 95.

constitutional recognition of existing rights.[83] That is, aboriginal rights derive from sources outside the Constitution itself. Consequently:

> Aboriginal nations are constitutional entities rather than ethnic or racial groups. Although a First Nation, like a Province, may happen to be composed mainly of people of a certain stock, its status does not stem from its racial or ethnic make up but from its political autonomy.[84]

The observations of Lamer CJC of the Canadian Supreme Court in *R v Van der Peet* are also apposite in this context:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35 (1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples, *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status. More specifically, what s.35 (1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose.[85]

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[83] B Slattery "First Nations and the Constitution: A question of trust" *supra* note 81 at 273. See also Professor Kent McNeil who notes that the aboriginal right to self government is "inherent, stemming from the fact that Aboriginal peoples were self-governing nations prior to the colonisation of Canada by Europeans, it does not have to be recognised by the Canadian Constitution". (K McNeil, "Envisaging Constitutional Space for Aboriginal Government" *supra* note 82 at footnote 152.

[84] B Slattery, *ibid*.

[85] [1996] 2 SCR 507 at pp. 533-9, italics in original.

4. Conclusion

Canadian jurisprudence offers possibilities for the Australian constitution to not only protect indigenous people from the arbitrary exercise of government power, it offers scope for the constitution to promote a dynamic relationship between the government and the indigenous people. This offers scope for indigenous communities to flourish within the domestic nation. Possibilities include enabling indigenous communities to function as self governing entities within the larger domestic nation. Lambert JA, in the British Columbia Court of Appeal decision of *Delgamuukw v British Columbia,* commented that aborigines should have a right to "to regulate the internal relationships within their own society and culture in accordance with their own customs, traditions and practices".[86] He did not see that self regulation or self government was in "opposition to the sovereign power, it is an aid to the sovereign power and a necessary adjunct to the realization and exercise of communal rights".[87] He added that:

> I think aboriginal rights of self-government and self-regulation are, in their origin and nature, the same as other aboriginal rights. They rest on the customs, traditions, and practices which formed an integral part of the distinctive culture of the aboriginal people in question as an organized society at the time of sovereignty.[88]

Gaining explicit constitutional recognition of aboriginal rights, as is the case in Canada, and indeed gaining recognition of the right to self-government and self-regulation fulfil the larger ambitions of the reconciliation project. It would appear, however, to extend beyond the reach of proponents of reconciliation within the Australian constitutional framework, at least for the foreseeable future. Although

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[86] *Ibid* at 727.

[87] *Ibid.*

[88] *Ibid* at 728.

developments in New Zealand and Canada offer signposts for Australian developments, this thesis will focus on what might be achievable in advancing reconciliation in a constitutional context the more immediate term.

Chapter 3

Natural and Positive Law Influences on the Law Affecting Australia's Indigenous People

> As the basis of the theory is false and unacceptable in our society, there is a choice of legal principle to be made in the present case.
>
> Sir Gerard Brennan[1]

1. Introduction

Of the multitude of philosophical influences on Anglo-Australian law, the natural law and positive law influences are probably the most enduring. They inform the present debate about the law affecting indigenous people and are evident in the decision of *Mabo v The Commonwealth (No.2)* ("*Mabo (No.2)*")[2]. This chapter traces the influences of the two philosophies on the historical development of Australia's law with regard to the indigenous peoples. Their influences in *Mabo (No.2)* will be considered, the point being made that positivism dominated the development of the law to an extent which repressed adequate legal debate about the morality of the law affecting indigenous people. The legacy is a legal discourse which struggles to articulate the way in which the indigenous legal systems relate to the dominant non-indigenous system.

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1 *Mabo v Queensland (No.2)* (1992) 175 CLR 1 at 40.

2 Mabo (No.2), *ibid.*

The failure of the courts to adequately apply moral reasoning during the latter part of the 19th century and for much of the 20th has had, it is speculated, a profoundly detrimental effect on indigenous people. The law stood mute while serious injustices were caused them. It is one matter for the courts to inadequately or erroneously apply moral dimensions to the development and interpretation of the law, it is another, and more serious matter to simply abandon moral values. The lingering influence of positivism is an impediment to the reconciliation process because of its narrow conceptions of sovereignty (which deny the possibility of indigenous self governing systems), and its extremely broad conceptions of parliaments almost unfettered power to enact legislation. Another outcome of the positivist influence was the total denial of the entitlement of indigenous people to be respected as a distinct people with their own system of laws. Benthamite, and Austinian positivism, which so greatly influenced the Anglo-Australian law at critical stages of its development, claimed and continues to claim that there can only be a singular source of ultimate law-making authority, suggesting intolerance of alternative legal systems within the dominant system. This claim does not adequately account for the complex nature of "sovereignty" with regard to the law making process. Positivism does, however, offer a convenient basis for denying indigenous people any form of self government or "sub-sovereign" status of the kind recognised by the US Supreme Court in 1831 when it ruled that American Indians were members of "domestic dependent nations".[3]

Reconsidering the historical development of the law regarding indigenous people in the light of positive and natural law influences offers a way of better articulating the relationship between the dominant and indigenous legal systems in Australia, and offers a basis for advancing reconciliation. This chapter attempts to offer some insights into the nature and effect of these philosophical influences.

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[3] *Cherokee Nation v Georgia* (1831) 30 US (5 Pet) 1 at 17.

Degree of influence

It is important in this discussion to keep the degree of the influence of the positive law and natural law philosophies on the legal system in perspective. Their influence on the courts was often not an explicit or dominant factor in shaping judgments. It more often than not acted as the backdrop, or provided the harmony, to other more potent forces, including pragmatism and politics (in the broader sense). It is also erroneous to assume that during the early decades of colonisation the law developed in a systematic way or that the law and administration were the kind of distinct institutions they are today. This can be illustrated with the law and administrative practices regarding the categorisation of conquered, ceded and settled colonies. These were well known at the time of the acquisition of New South Wales.[4] But it is wrong to assume that a colony was categorised and administered according to the systematic application of logic and legal principle. Indeed one of the (valid) positivist criticisms of the common law was its lack of internal discipline and systematic development and form. The British acquired some peopled lands and considered them to be settled and acquired others which they considered conquered. The reasons for the distinctions are best explained by the dictates of policy and administrative convenience, than those of reason or logic.[5] As an example, the New Zealand's north island was treated as

> a conquest following its purported cession by Maori chieftains in the Treaty of Waitangi of 1840. On the other hand, the South Island was proclaimed to be part of Britain's dominions as though it was unoccupied, partly it would seem because of the threat of a possible

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[4] See K McNeil *Common Law Aboriginal Title* (Clarendon Press, Oxford 1989) at pp.110-16.

[5] See AC Castles *An Australian Legal History* (Law Book Co, Sydney 1982) at 15 and McNeil *ibid* at pp.117-32.

French move for settlement on the South Island which might take place before similar treaties could be made with the Maoris.[6]

So as to add further colour and dimension to our modern perception of 18th century law, it is worth recalling that many legal developments concerning the acquisition of colonial territory related to the feuds between the monarch and parliament about who was entitled to the exercise of various powers.[7] Thus few, if any, of the significant British cases about the acquisition of colonial territory involved an indigenous litigant. The question whether a colony was conquered or settled usually determined whether the monarchy or the British Parliament had authority over the colony.[8] Over time, even this fundamental question became increasingly obscured. With shifts in the power balance between the sovereign and parliament came subtle shifts of emphasis in the relevant legal decisions, but the courts failed to explicitly acknowledge the power shift. The monarch notionally maintained more or less the same powers over conquered and ceded territory as existed in the middle ages. The courts, meanwhile, maintained the fiction of colonial acquisition by medieval means (that is, on the fields of battle) despite the reality that most colonies were acquired by far more complex means. In Australia, for example, territory was acquired in some parts of the country after protracted guerrilla warfare with the Aboriginal people of the region. In other regions the Aborigines moved on to avoid conflict, were slaughtered or died of disease. And yet in other places the Aborigines and pastoralists co-existed, and indeed the Aborigines became essential to the economic development of the region.[9] British administrative practice, then, tended not to categorise colonies for the purpose of applying British law in any

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[6] Castles, *ibid* at 15

[7] See Castles, *ibid* at pp.3-17.

[8] See Mabo (No. 2) *supra* note 1 per Deane and Gaudron JJ at pp.82-83 and K McNeil *supra* note 4 at 113 fn 23.

[9] See generally *Aborigines and Settlers: The Australian experience, 1788-1939* H Reynolds, ed (Cassell Australia, Melbourne 1972).

logically consistent way. But the categorisation may have informed administrative practice in some way.

The development of the law regarding the acquisition of territory was not distinct from administrative practice. In reality the law developed as much from administrative and legal practices of the times as from statutes and case law.[10] Consequently, laws and administrative practices tended to develop upon the basis of pragmatism, expediency and political opportunism rather than upon obedience to doctrine or legal or other principle. In Britain during the 18th century there was not the stricter delineation of judicial, administrative and legislative procedures that now exists. According to RK Webb a "key concept in eighteenth century culture - whether in theology, morals, poetry, or physics - was balance".[11] Despite pragmatism, expediency and opportunism, the law and administrative practice was significantly shaped by a view of the world that was influenced by natural law and positive law philosophies, as will be illustrated in this chapter.

2. Defining terms: natural law / positivism

"Natural law" and "positive law" philosophies are so rich in history that they have attained a complexity that eludes easy definition. Sadurski, for instance, has noted that "[a]ny attempt at defining 'legal positivism' appears a hopeless enterprise. There are no two legal theorists who

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[10] See B Slattery "The Hidden Constitution: Aboriginal rights in Canada" (1984) 32 Amer. Jour. Comparative Law 361at 367, "These principles [of Colonial Law] were often generated by opinions given by the Crown law officers on colonial matters and by official practice influenced by those opinions...[I]t would not be a great exaggeration to say that the courts superintended the development of the common law, but did not create it themselves".

[11] RK Webb, *Modern England* (Harper & Row, New York 1980) 2nd ed at 47.

would agree about an understanding of the term".[12] Much the same can be said of defining natural law. A working definition is none the less required to understand the way these important philosophical movements have affected the Anglo-Australian law affecting indigenous people.

(a) "Natural law"

Natural law has a long antecedence, dating at least to the Greek and Roman empires. Justinian's Digest (or Pandects) of 533 recognised three main types of law, the *ius civile*, the *ius gentium* and the *ius naturale*. The *ius civile* being the legislation or customary law of a state. The distinction between the *ius gentium* and the *ius naturale* was not altogether clear, but they were distinguished on the issue of slavery. Under the *ius naturale* "all men are born free and equal, but slavery is permitted according to the *ius gentium*".[13] It was not doubted that there is a higher law than the law of the state.[14] From the Roman period until about the 18th century it was assumed that the positive law gave effect to the natural law. That is, the positive law simply made the terms of the natural law explicit and enforceable.

> Freeman offers a useful definition of natural law:
>
> . . .what has remained constant [in the long history of the natural law] is an assertion that there are objective moral principles which depend upon the nature of the universe and which can be discovered by reason. These principles constitute the natural law. This is valid of necessity because the rules governing correct human conduct are logically connected with immanent truths concerning human nature.

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12. W Sadurski "Marxism and Legal Positivism: A case study on the impact of ideology upon legal theory" in *Essays in Legal Theory* DJ Galligan (ed) (Melbourne Uni Press, Melbourne 1984) at 193.

13. GH Sabine *A History of Political Theory* (Holt, Rinehart and Winston, New York 1937) at 170.

14 *Ibid.*

> Natural law is believed to be a rational foundation for moral judgment.[15]

Finnis defines natural law as a set of general moral standards, which require, more particularly, that the rule of law be obeyed and that human rights be respected.[16] He admits that the term "moral" has uncertain connotation and so offers the term "practical reasonableness" as a reference point for judging the features of a legal order.[17] So in its broadest sense, natural law is "the set of principles of practical reasonableness in ordering human life and human community".[18] It is natural law that explains the obligatory force of positive laws (rather than any sociological explanation), and why some (alleged positive laws) are defective (ie non-laws) because they fail to conform to the natural law.[19]

In case we are tempted to dismiss natural law as vague religiosity, Fuller informs us that:

> These natural laws have nothing to do with any 'brooding omnipresence in the skies'. Nor have they the slightest affinity with any such proposition as that the practice of contraception is a violation of God's law. They remain entirely terrestrial in origin and application. They are not 'higher' laws; if any metaphor of elevation is appropriate they should be called 'lower' laws.. . .Though these natural laws touch one of the most vital of human activities they obviously do not exhaust the whole of man's moral life. They have nothing so say on such topics as polygamy, the study of Marx, the

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[15] MDA Freeman *Lloyd's Introduction to Jurisprudence* (6th ed) (Sweet and Maxwell, London 1994) at 80.

[16] Finnis *Natural Law and Natural Rights* (Clarendon Press, Oxford 1980) at 23.

[17] *Ibid* at 15.

[18] *Ibid* at 280.

[19] *Ibid* at pp.23-24.

worship of God, progressive income tax, or the subjugation of women.[20]

Fuller is, of course, wrong on the last point. Given its long and complex history, natural law has been applied to justify principles and conduct we would consider wrong and immoral today. The Greeks and Romans, for example, saw no natural law objection to slavery and natural law principles were relied on to justify slavery in the United States. Thomas Hobbes could plausibly be categorised as a member of the natural law school, but his philosophy has been used to justify despotism.[21]

(b) "Positivism"

Hart defined positivism as used in contemporary Anglo-American literature as designating: "(1) that laws are commands of human beings; (2) that there is no necessary connexion between law and morals, or law as it is and law as it ought to be".[22] Of interest here, is the minor role assigned to the law regarding the application of moral judgement. This clearly distinguishes positivists from natural lawyers. Sadurski elaborates that:

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[20] LL Fuller *The Morality of Law* (Yale Uni Press, Yale 1964) at 96.

[21] Thomas Hobbes (1588-1679) assisted the positivist cause by arguing the need to disregard explicit moral concern on the basis of his bleak view of human morality. The state of nature (which the natural law imagined as some kind of garden of Eden before the apple was bitten) was for Hobbes "solitary, poore, nasty, brutish, and short". (T Hobbes *Leviathan* (1651) (R Tuck ed) (Cambridge Uni Press, Cambridge 1991) at 89. See also SJ Anaya, SJ Anaya "Indigenous Peoples in International Law" (Oxford Uni Press, New York 1996) at pp.13-15). He argued for the need to surrender our original chaotic state of freedom to a leader who was obliged to deliver social order. Because of the paramount social benefit attained through the imposition of social order, the leader was not constrained in the exercise of power by explicit moral limits.

[22.] HLA Hart "Positivism and the Separation of Law and Morals" reprinted in R Dworkin (ed) *The Philosophy of Law* (Clarendon Press, Oxford 1961) at 18. Hart mentions another 3 criteria in his definition, but Sadurski, *supra* note 12 at 193-4 argues that they are contentious and not accepted by some significant positivists, and therefore have been excluded.

> The second aspect of legal positivism is the separation of law and morals in the sense that there is no necessary connection between law as it is and law as it ought to be. More precisely, our assertions about law as it is (that is, when we determine what is the valid law of the country) are in no way affected by our value-judgments about law as it ought to be. The existence and validity of law is independent of its goodness; the content of law is not a relevant criterion of identification of a set of valid legal rules.[23]

Hart clarifies, however, that this does not mean that positivists are hostile to "historical inquiries, sociological inquiries, and the critical appraisal of law in terms of moral social aims, functions, &c", it is just that it is considered to be a separate inquiry from that of legal validity.[24]

The second aspect is related to the first (that laws are commands of human beings). John Austin (1790-1859) claimed that law is a species of command which proceeds from a sovereign. Hart agreed, stating that the sovereign "makes laws for his subjects and makes it from a position outside any law. There are, and can be, no legal limits on his law-creating power".[25] He believed the limits on sovereign power, to the extent they exist at all, derive not from the law but from deferring to popular opinion or moral conviction.[26] A point on which Hart differs from Austin is that the latter believed that a command requires a sanction (punishment), whereas Hart believed that many people will comply with a command regardless of the sanction. Most consider, for example, that a road law stating which side of the road vehicles must travel provides

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[23] Sadurski, *ibid* at 194. According to J Austin in *The Providence of Jurisprudence Determined* ed HLA Hart (George Weidenfeld and Nicolson Ltd, London 1954) at 126:

> The *science of jurisprudence* (or, simply and briefly *jurisprudence*) is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness.

[24] HLA Hart *The Concept of Law* (Clarendon Press, Oxford 1981) at 199.

[25] *Ibid* at 64-65.

[26] *Ibid* at 65.

necessary order to what would otherwise be dangerous chaos, and therefore obey it whether or not a sanction exists.

Hart properly maintains that positivism is concerned with rule validity, and so if parliamentary sovereignty is the master rule, then it must be applied to determine legal validity. The problem with this is that it offers an internal closed system method of analysis of validity. That is, the master rule is stated (parliamentary sovereignty), but positivism does not offer an adequate external mechanism for judging whether the asserted rule is itself valid. Who says that parliament is supreme? The positivists simply offer evidence of general compliance with the rule by the courts and the community to prove its validity. This incapacitates adequate inquiry into the reasons for the master rule and external questioning of its validity and purpose.

Another problem raised by positivist analysis is that it offers a rather simplistic concept of the source of law making authority. A positivist searches for a supreme person or body that creates laws. Austin defined the positive law as the commands of "persons exercising supreme and subordinate government, in independent nations, or independent political societies".[27] An elaborated positivist analysis would allow that laws are made by a number of bodies, namely parliament and (with parliamentary authority) local government authorities, and may even accept the limited law making power of courts in developing the common law. But the emphasis would be upon locating the supreme law making authority - which in Australia would be parliament(s). It is that body which can ultimately withdraw law making authority from other lesser bodies (like local government) or overturn judicially made laws by enacting contrary statutes. Hence the doctrine of parliamentary supremacy, with all its oversimplified majesty, relies heavily upon the positive law doctrine. The reality is that the English doctrine of parliamentary sovereignty is in the

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[27] Austin, *supra* note 23 at 9.

long history of English law a relative novelty. As McIlwain recalls for the reader:

> To those who believed in a fundamental law immutable, the present-day doctrine of legislative sovereignty seemed new and contrary to the spirit of English institutions [in the 17th century]. In the constitutional struggle of Charles I's reign the doctrine of parliamentary sovereignty came to men. . . . 'with all the force of a discovery'. It lent itself to the view of the more extreme on both the parliamentary and the royalist side, and its influence over men's minds since the days of Milton and Hobbes has become so complete that historians have well-nigh forgotten that any other theory ever existed.[28]

The High Court has recently declared parliamentary supremacy dead. In *Lange v Australian Broadcasting Corporation*[29] the Court in a single judgment stated that:

> The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature. It placed upon the federal judicature the responsibility of deciding the limits of the respective powers of State and Commonwealth governments.[30]

Whether this is a fair statement or not, positivists would struggle to say, although they might criticise the High Court for having the temerity to overrule the master rule. The supreme judicial body, the High Court, has said that the master rule does not apply, and therefore if another master rule declares that *Marbury v Maddison* style judicial review is correct and the supreme judicial body is the ultimate body for determining constitutional validity, and the question of whether the

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[28] CH McIlwain *The High Court of Parliament* (Yale Uni Press, New Haven 1910) at 109.

[29] (1997) 189 CLR 520.

[30] *Ibid* at 564.

master rule of parliamentary supremacy applies is a constitutional question, then the High Court must be correct. But this analysis essentially involves, in a practical sense, a conflict of master rules. If the constitution is paramount, and the supreme judicial body the ultimate arbiter of what the constitution allows, then this must in practical terms confer a degree of ultimate law-making (political) power to the supreme judicial body. The positivist analysis would either not recognise this reality or provide an inadequate means of resolving the conflict of master rules.

Yet a further problem with positivism is its requirement of verifiable "commands" which relegate the less verifiable "morality" to the fringes, on much the same basis that an economist may rely on verifiable measures of value by using, for example, money as the measure. Although economists admit that many things of value exist that cannot be measured with money, the trap is that the verifiable is assumed to account for the full scope of "reality". The only things that are seen or included are the verifiable. Thus, the impression of greater reliability and objectiveness can be achieved, when in fact it is a distorted and proscribed view of reality.

For positivists, then, laws are not legally invalid for being harsh, immoral or unfair because those issues of value, and value judgements lack sufficient objectivity.[31] But what does "morality" mean in this context? The term is not used in this chapter to refer to any specific form of morality. Rather, it is used to differentiate between a theory that makes overt reference to *some form of morality* (the natural law) as opposed to a theory that makes no such overt claim (the positive law). Consequently, it is not possible, or necessary, in this context to compare or evaluate one overt claim of morality against another. Despite the fact that the positive law claims morality not to be a matter of legal inquiry, it

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[31] Freeman *Lloyd's Introduction to Jurisprudence supra* at note 15 pp.205-6. SJ Anaya, *supra* note 39 at pp.22-23.

cannot avoid some implicit sense that there were moral boundaries to the unbridled exercise of power. Indeed without the boundaries the rule of law would be indistinguishable from the rule of force. In reality, of course, relations between Aborigines and non-Aborigines were often governed by the rule of force.[32]

Although positive law does not explicitly offer a concept of morality that challenges the natural law's, there is nevertheless a need to have some sense of the natural law's understanding of morality. It understands that morality, in the legal context, acts as a constraint on the otherwise unfettered exercise of law making power. Early natural lawyers saw that there were fundamental naturalistic laws of God or nature common to all legal systems that constrained the unbridled exercise of law making power. Murder and the forceful and unjustified taking of a person's property are examples.[33] A law would not, for instance, legalise murder because doing so would breach a more fundamental law. The natural law is, of course, a European conception which assumed that all peoples shared its fundamental ideas of morality. The claim is clearly unsustainable, particularly if notions of property entitlements of various peoples throughout the world are considered. Despite its hegemonic quality, the natural law offers a rationale for

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[32] See D Neal, *The Rule of Law in a Penal Colony: Law and power in early New South Wales* (Cambridge Uni Press, Cambridge 1991) at 78-9. See generally H Reynolds *Frontier* (Allen and Unwin, Sydney 1987) and *The Other Side of the Frontier: Aboriginal resistance to the European invasion of Australia* (Penguin, Melbourne 1982). See also Richard Falk in "The Rights of Peoples (In Particular Indigenous Peoples)" in *The Rights of Peoples* ed J. Crawford (Clarendon Press, Oxford 1992) at 19, where he said:

> The jurisprudential starting point of the rights of peoples is a direct assault upon positivist and neo-positivist views of international law as dependent upon State practice and acknowledgment. In this regard, the rights of peoples can be associated with pre-positivist conceptions of natural law which at the very birth of international law were invoked by Vitoria and others on behalf of Indians being cruelly victimized by Spanish conquistadores.

[33] See Finnis, *supra* note 16 at pp. 281-90. For critics see HLA Hart *The Concept of Law* (Clarendon Press, Oxford 1981) chapters 8 and 9; H Kelsen "The Function of a Constitution" (trans I Stewart) in R Tur and W Twining *Essays on Kelsen* (Clarendon Press, Oxford 1986) at pp.112-15.

constraining the despotic exercise of power.[34] In the context of colonial acquisition, it maintains that indigenous people are to be respected as a people equal in status to non-indigenous people**.** The early natural law's hegemonic ambitions have now to some extent been realised. The international community now accepts that certain fundamental and universal standards of moral behaviour apply, regardless of national laws. Specifically, crimes against humanity are defined and recognised as unlawful, and domestic laws that claim to legitimise them are of no effect.

Positivism's separation of laws from morality weakened the capacity of the courts to decide the law within the context of moral criteria. In a more general sense, the lack of an explicit moral foundation deprived positivists of the capacity to judge as unlawful the actions of the fascist states before the second world war. Consequently it fell from favour in the eyes of the international community after the war.[35] The international community then created international covenants and other instruments which made conspicuous claims to morality: the use of force was unlawful except in self defence, colonialism was wrongful and laws could not validly undermine fundamental human rights. Although the new concerns for morality revived the natural law's influence, the natural law had changed during the years of positivist domination; for one thing it has lost all its religion.[36] It now appeals to universal humanist values that require equal respect to be given to fellow human beings regardless of their race, sex and creed.

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[34] P Parkinson, "Tradition and Change in Australian Law" (Law Book Co, Sydney 1994) at pp. 43-46, 57-59 and 114-119.

[35] Hart's attempt at answering this criticism appears in "The Concept of Law" *supra* note 33 at pp.203-7.

[36] See E Kamenka in "Human Rights, Peoples Rights" in J Crawford ed *The Rights of Peoples* (Clarendon Press, Oxford 1992) 127 at 128 where he notes in the case of human rights: "The concept of human rights is no longer tied to belief in God or natural law in its classical sense. But it still seeks or claims a form of endorsement that transcends or pretends to transcend specific historical institutions and traditions, legal systems, governments, or national and even regional communities".

3. Natural law influences at time of colonial acquisition

When Britain acquired Australian territory, the law had the capacity to recognise Aborigines as a distinct people. Caution needs to be exercised, however, in drawing distinct principles about the law applying to Aborigines at the time of colonial acquisition, for reasons explained earlier in the section dealing with the degree of influence of the natural and positive laws. However, natural law influences are discernible in the early colonial law which offered the possibility of legal protection to Aborigines without necessarily depriving them of recognition and respect as a distinct people or continuing rights to possession of their lands.[37] How was it, then, that the law could countenance the continuance of Aboriginal law making authority and respect their entitlement to remain in possession of their lands? The answer is found in the (natural law influenced) development of international law. The common law of the time could also countenance the same recognition, partly because of Blackstone's influence. There is in any event an interrelationship between international law and common law on the application of British laws to a colony, as the majority confirmed in *Mabo (No.2)*.[38]

(a) Natural law influences on the development of international law

International law was in its formative stages of development at the time of the acquisition of eastern Australia. Hugo Grotius (1583-1645), the person often credited with being the father of international law[39], had

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[37] Admittedly the promise of legal protection was often not provided in practice. See D Neal *supra* at pp.78-79.

[38] *Mabo 2, supra* note 1 per Brennan J at 44. See also Deane and Gaudron JJ at 78 who stated that "the assertion by the Crown of an exercise of that prerogative to establish a new Colony by 'settlement' was an act of State whose primary operation lay not in the municipal arena but in international politics or law".

[39] See SJ Anaya "Indigenous Peoples in International Law" (Oxford Uni Press, New York 1996) at 10
and Freeman *supra* at pp.99-100.

published his major work *De Jure Belli ac Pacis* (1625) less than 170 years before, and the concept of nationhood itself was barely 140 years old.[40] By modern reckoning, these are considerable periods of time, but if the slow pace of communication, travel and spread of ideas is allowed for, it constituted a relatively short period. In addition, international institutions did not exist for the codification or monitoring of international laws.

Despite the formative stage of the international law, the question of acquisition of colonial territories was a matter of legal, political and moral concern. The Spanish scholars Franscisco de Vitoria (1486-1546), Francisco Suarez (1548-1617) and Bartolome de Las Casas (1474-1566), who preceded Grotius, were a major influence on the developing law. The Swiss jurist Emerich de Vattel (1714-69) and the English academic Sir William Blackstone, whose *Commentaries on the Laws of England* included sections dealing with the acquisition of colonial territories, were also highly influential. These writers would today be described as falling within the natural law school. Grotius, Blackstone and others did not distinguish between the natural law and positive law, principally because they considered that the natural law had positive binding force over law makers (monarchs) and law subjects.[41] Thus the natural law was

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[40] The modern concept of nationhood can be dated to the Peace of Westphalia Treaty 1648 which ended the 30 Year War in Europe. Political leaders had problems exercising powers within their territory. The Treaty established that a state has the authority to exercise power within national borders free from external interference. See "Democracy, Sovereignty and Intervention" LW Goodman (1993) 9 Am University Journal of International Law and Policy 27.

[41] See GC Marks "Indigenous Peoples in International Law: The significance of Francisco de Vitoria and Bartolome de Las Casas" (1990) 13 Australian Year Book of International Law 1 who cautions against relying on the authority of the Spanish School to add weight to indigenous claims because its proponents did not "share the same assumptions and conceptual framework as modern scholars", *ibid* at pp.8 and 16. See also JS Davidson "The Rights of Indigenous Peoples in Early International Law" (1994) 5 Canterbury LR 391 at 392 where he says: "The Spanish publicists were first and foremost theologians whose juridical premises were based upon a mixture of Roman law, positive domestic law and Aristotelian philosophy. The whole, however, was subordinated to the doctrine of natural law as elaborated by Saint Thomas Aquinas. The task of the early writers was therefore to declare what was just or unjust by reference to the higher principles of natural law."

considered to be "as real and binding as positive law",[42] but simply had a different source of authority to the positive law. Thus, for example, the law rendering murder a crime would be seen to have positive force by way of statute or common law rule but gains its moral (legal) force from the natural law.[43]

Although the natural law scholars had a profound influence on the emerging international law, it would be wrong to suggest that their influence was uncontested. This can be illustrated by the debate at Vallodolid, Spain in 1550-51 which was convened by Charles V and held before a Council of 14 jurists and theologians to resolve questions about the legal and moral validity of Spain's claim to the Americas. Arguments were put by two of Spain's leading lawyers, de Sepulveda and Las Casas. De Sepulveda argued that Spain had an unqualified right to the territory because the Indians barely rated as human[44] and Las Casas argued strongly for the Indians.[45]

The natural law proponent Grotius is partly (and rather ironically) responsible for furthering the positivist cause. Although essentially a natural law proponent, he secularised the law, which undermined God's ultimate (natural) law making authority. Once secularised, the positivists were able to claim that the only limits on law making powers were those imposed by mortals. Another major international law theorist before the British acquisition of Australia, apart from Grotius, was the Swiss jurist Vattel (1714-69). He published his highly influential *Droit des Gens ou Principles de la Loi naturelle appliques aux affaires des Nations et des Souverains* in 1758. According to Koskenniemi, the book was a largely

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[42] Marks *ibid* at 20.

[43] See Finnis, *supra* note 16 at pp.281-3.

[44] See Davidson, *supra* note 41 at 413.

[45] Las Casas was a cleric and publicist who had first hand experience of the life of Indians. He provided a written version of his defense at Vallodolid in *In Defence of the Indians* (1552) Poole S (trans) (Northern Illinois University Press 1974). See also GC Marks *supra* note 41 at pp.22-25 and JS Davidson, *ibid* at 410-20.

natural law treatise which was "by far the most influential book on international law in the 19th century".[46] Vattel is often credited with formulating the culturally imperialistic distinction between "cultivated" and "uncultivated" territories.[47] He insisted that the native people in the newly claimed territories were not "conquered" as they were wandering tribes roaming over land and therefore had no legal possession of the land. This view found its way into the Australian jurisprudence prompting Blackburn J to find in *Milirripum v Nabalco* that the Aborigines had no proprietary interest in their land and thus could gain no legal remedy for its taking.[48] Interestingly Blackstone refuted Vattel's conclusions on this point. He acknowledged that Locke, Titius and Barbeyrac amongst others considered that title to land could only be gained by possession of land combined with bodily labour in the land.[49] But he believed that this amounted to a "dispute that favours too much of nice and scholastic refinement"[50] and concluded that,

> occupancy is the thing by which the title was in fact originally gained; every man seising to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.[51]

Given the swirl of influences upon the developing international law, what can be generalised about its state at the time of acquisition? The answer probably loses accuracy if it is pushed beyond a certain level of generalisation. It is clear, however, that the Spanish had closely

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[46] M Koskenniemi *International Law* (Dartmouth, Aldershot, 1992) at xii.

[47] See M Gumbert, *Neither Justice Nor Reason*, (Uni. of Queensland Press, St. Lucia 1984) at 27. This line of argument also appears in Vol. III Kent's "Commentaries on American Law" at 387.

[48] (1971) 17 FLR 141 at pp.262-74.

[49] *Ibid* at 8.

[50] W Blackstone "Commentaries on the Laws of England" 2nd ed. Book II (Clarendon Press, Oxford 1767) at 8.

[51] *Ibid* at pp.8&9.

considered the issue and developed a lode of jurisprudential and theological thought that insisted that the Indians were to be respected as a people. Vitoria refuted the proposition that Spain was entitled to take Indian lands in the Americas because the Indians were not Christians. This was the basis used for taking lands during the crusades and was often argued to be the basis for taking Indian lands.[52] Vitoria's writings predate Grotius, and therefore do not contain the modern perspectives and assumptions about sovereignty. But Grotius, in developing the concept of national sovereignty, is consistent with Vitoria about giving equal respect to Indian entitlement to their lands. He considered that European powers claiming territory on the basis that the indigenous government was different from the Roman form (a practice developed from the Romans) was impermissible.[53] He also rejected the argument that title by discovery was permissible for occupied territories "even though the occupant may be wicked, may hold wrong views about God or may be dull of wit. For discovery applies to those things which belong to no one".[54]

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[52] A similar basis existed in English law. See *Calvin's case* (1608) 77 ER 377 in which the court stated at 398, that "if a Christian king should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue;...". Lord Mansfield in *Campbell v. Hall* (1774) 98 ER 1045 appeared to disapprove of this statement holding that this was "the absurd exception as to pagans" and he observed that the principle "in all probability arose from the mad enthusiasm of the Croisades".

[53] "The Law of War and Peace" Kelsey trans. (1925) at 120, referred to by J.H. Clinebell and J. Thomson, "Sovereignty and Self-determination: The rights of native Americans under International Law" (1978) 27 Buffalo Law Rev 669 at 680.

[54] *Ibid* at 550. This view was consistent with the earlier papal Bull issued by Pope Paul III in 1537 which said in part that the Indians "are by no means to be deprived to their liberty or the possession of their property". See C Gibson, *The Spanish Tradition in America* (University of South Carolina Press, Columbia 1968) at 105. This edict was more honoured by its breach by the Spanish Catholic colonisers in the Americas. This may in part have been due to the highly discredited state of the Vatican at that time. Pope Paul III formerly Cardinal Alessandro Farnese, the brother of Pope Alexander VI's (the Borgia Pope) mistress, attempted reformation of the church after the scandalous excesses of the Church which had endured for centuries. Both the papacy and the clergy were held in extremely low regard even by members of the church. The Lutheran protestant movement began their break from the Catholic Church some fifteen years before the Bull was issued. See BW Tuchman, *The March of Folly* (Abacus, London 1984) at pp.59-154.

Vitoria concluded that the Indians "had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners".[55] One of the implications of this was that Spanish discovery did not provide Spain with jurisdiction over the Indians, but the Indians could voluntarily subject themselves to Spanish jurisdiction and share the spoils of any wars with other Indian tribes.[56] He also rejected the proposition that Spanish jurisdiction and possessory title to America was gained by "right of discovery".[57] He argued that discovery only applied to deserted lands and that America was not without owners.[58] But he did provide some grounds for Spanish occupation. The Spanish had the right to peaceful trade and commerce with the Indians, which they could forcibly protect, and to propagate Christianity. They could also protect converts to Christianity and the innocent victims of breaches of the natural law (including for example the victims of ritual sacrifice). Vitoria's principles are, therefore, premised on the assumption that Indian laws and entitlements to land continue after colonisation and to a greater or lesser extent co-exist with those of the coloniser.

(b) An analysis of Blackstone's influence

The Spanish jurisprudence and the writings of Grotius obviously informed Blackstone's writings. His Commentaries proved popular when first published in 1765 and would have been known to the British

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[55] *De Indis et de Ivre Belli Relectiones* E Nys ed J Bate trans in JB Scott *The Classics of International Law* (1917) at 120.

[56] See Marks, *supra* note 41 at pp.43-46.

[57] Vitoria, *De Indis et de Jure Belli Reflectiones* (1st ed 1557, 1696) reprinted in Scott JB (ed) *Classics of International Law* (1964) (Bate J trans) at 139. See also Marks, *supra* note 41 at 41.

[58] See Marks *supra* note 41 at 41.

authorities when writing the instructions to Cook and Phillip.[59] The Commentaries were particularly popular in North America despite his views on natural rights being castigated by Bentham as "nonsense upon stilts".[60] Blackstone has, nevertheless, often been quoted in the case law and has played a major role in influencing the common law regarding the acquisition of colonial territories.

That is not to say that his application of natural law principles to the law of colonial acquisition was unproblematic, in fact his analysis was contradictory. In Book II of his *Commentaries* he infers that the seizing of peopled lands and driving out the natives is unlawful,[61] but a few pages earlier he refers to biblical authority as justification for colonising peopled territories through conquest.[62] His justification for conquest does not square with his principles regarding the acquisition of property which were based on the natural law. In Book II he stated that:

> Property, both in lands and moveables, being thus originally acquired by the first taker, which amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by

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[59] W Blackstone *Commentaries on the Laws of England.* The first volume of the first edition of the *Commentaries* was published in 1765 and ultimately attempted to summarise the laws of England in four volumes.

[60] See *Anarchical Fallacies*, Works, vol 2 at 501.

[61] He observed that the territory was acquired either by treaties or by "conquest and driving out the natives (with what natural justice I shall not at present enquire)...". (W Blackstone "Commentaries on the Laws of England", 2nd ed. Book I (Clarendon Press, Oxford 1766) at 107. See also W. Blackstone Book II, *supra* at 7.) In Book II of his *Commentaries*, in the section dealing with the rights of things, he made the following concession:

> But how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.(Blackstone, Book II *ibid*, at 7.)

[62] Blackstone, Book II *supra* at pp.5-6.

> the principles of universal law, till such time as he does some other act which shews an intention to abandon it.[63]

This is a classic statement of possessory rights which has a long natural law heritage, and was supported, for instance, by the Roman jurists.[64] They regarded continuous use and occupation as constituting possession under the natural law which was immune from challenge.[65] Feudalism departed from the principle by imposing the royal grant, which superseded simple possession as the root of title in many jurisdictions.[66] However, the common law, although ultimately grounded in feudal tenures, maintained consistency with the natural law principle by retaining possession as the essential basis for the proof of ownership.[67]

Blackstone added, consistent with natural law principles, that when property was obtained through possession it could only be transferred with the possessor's consent and legal transfer.[68] Any other system of laws, he claimed, would cause property to be "confined to the most strong or the most cunning"[69] and would amount to a "transgression of the law of society, which is a kind of secondary law of nature".[70]

How could it be that the law of nature prohibited the violent and forceful acquisition of domestic property when it condoned the forceful acquisition of overseas property? Blackstone recognised that the overseas possessions in America were "already peopled" and the people were

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[63] Blackstone, Book II *supra* at 9.

[64] G.I. Bennett, "Aboriginal Title in the Common Law: A stony path through feudal doctrine" (1978) 27 Buffalo Law Rev 617 at 619.

[65] *Ibid.*

[66] *Ibid.*

[67] AJ Bradbrook, SV MacCallum and AP Moore *Australian Real Property Law* (Law Book Co, Sydney 1991) at pp.48-49.

[68] Blackstone, Book II *supra* at pp.9-11.

[69] Blackstone, Book I *supra* at 145.

[70] *Ibid.*

"innocent and defenceless". Their difference in "language, in religion, in customs, in government or in colour" gave no justification for the use of force.[71] So what justification was there for the forceful taking of their land? In providing a rationale, Blackstone at first attempted to remain faithful to the natural law by confining his discussion to unpeopled lands:

> Upon the same principle was founded the right of migration, or sending colonies to find out new habitants; which was practised as well by the Phoenicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of *desart uninhabited countries*, it kept strictly within the limits of the law of nature.[72]

The justification for taking peopled lands required Blackstone to depart from the natural law and make positivist assertions. He justified the taking on the basis that the right is "founded upon the law of nature, *or at least upon that of nations*".[73] He also referred, as we have seen, to biblical authority as a basis for entitling European powers to acquire territory, which in the case of peopled lands, would be by conquest.[74]

Blackstone's account of the law, for all its contradictory appeals to natural law and biblical authority, does at least seek moral foundations, and to that extent allows recognition of the possessory titles of indigenous people and legal recognition of their distinctive character as a people. It enables legal debate about the property and other entitlements of the indigenous people, which offers greater potential for the just development of the law that does simply disregarding their moral and legal claim. It took natural law influences, for example, to

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[71] To this extent Blackstone was consistent with Grotius.

[72] W. Blackstone, Book II, *supra* at 7, emphasis added.

[73] Blackstone, Book I, *supra*, at pp.106-7.

[74] Blackstone, Book II *supra* at pp. 5-6.

lead to the US Supreme Court to recognise in 1831 the American Indians as "domestic dependent nations".[75]

(c) Natural law influences during early Australian colonisation

The early colonial law and administrative practice regarding Australian Aborigines occasionally recognised and debated the entitlements of Aborigines to live by their own laws, subject to the English law. The attention given to the legal status of Aboriginal laws, then, was sporadic, but with regard to their interests in land, was non-existent. This latter point was noted by Deane and Gaudron JJ in *Mabo (No.2)* who speculated that:

> the most likely explanation of the absence of specific reference to native interests in land is that it was simply assumed either that the land needs of the penal establishment could be satisfied without impairing any existing interests (if there were any) of the Aboriginal inhabitants in specific land or that any difficulties which did arise could be resolved on the spot with the assent or acquiescence of the Aboriginals. . .[76]

The British seemed more focused on establishing a penal outpost to deal with the surging population of incarcerated Britons than on establishing a colony that could grow to become a nation. Consequently the coherent application of legal rules and principles to the colony seemed to be considered unnecessary or inappropriate. As Neal observes:

> New South Wales was a peculiar society. As the nineteenth-century colonial officer and scholar Merivale wrote in 1861, '[t]he penal colonies [ie New South Wales and Tasmania] provide the first instance (and a very necessary one, no doubt) of settlements founded by Englishmen without any constitution whatsoever. . . .This is a

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[75] *Cherokee Nation v Georgia* (1831) 30 US (5 Pet) 1 at 17.

[76.] Mabo (No. 2) *supra* note 1 per Deane and Gaudron JJ at 98.

> remarkable novelty in British policy.'. . .In New South Wales there was a governor, but no legislature, no trial by jury and a bastardised court structure. The governor had more power than any other colonial governor, and more power in New South Wales than any king in England since at least the time of James I. This was a framework consistent with England's major purpose for the colony, the punishment of prisoners.[77]

Despite the cursory attention given to the legal status of Aborigines, early administrative practice does indicate a concern to protect them and respect their prior rights of occupancy. Governor Phillip's instructions on establishing the first British colony in Australian is of interest on this point:

> You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all *our subjects* to live in amity and kindness with *them*. And if any of *our subjects* shall wantonly destroy *them*, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.[78]

Rath J noted in *R v Wedge*[79] the distinction made between "our subjects" and "the natives", but regarded it as insignificant because "there may well have been both uncertainty and ambivalence in the official

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[77] D Neal *supra* at 32. See also Mabo (No.2) *supra* note 1 per Deane and Gaudron JJ at 99 where they said: "In any event, while those subsequent acts [of the Crown] were increasingly inconsistent with the existence of any valid Aboriginal claims to land within the Colony, they cannot properly be seen as evincing an intention to extinguish any Aboriginal interest of any kind presumptively recognised by the common law".

[78] Governor Phillip's *Instructions* 25 April, 1787 "Historical Records of Australia" Series 1, Vol 1 pp. 13-14, emphasis added.

[79] (1976) 1 NSWLR 581.

attitude" towards the Aborigines.[80] He asserted, nonetheless, that "in law the 'natives' were in the King's territory, and under his sovereignty".[81] But dismissing the plain words of the instructions as merely resulting from uncertainty and ambivalence is unconvincing given the substantial experience of the British in colonisation and dealing with native people. In any event, even if the Aborigines were subject to the sovereignty of the King, that still begs the question as to its legal consequence for Aboriginal people.

British authorities intended providing Aborigines with the protection of British law.[82] That is, they were to be availed of access to British justice if they were injured by the settlers (this was so in theory, but often not in practice).[83] If an Aborigine offended the British law, for example by harming a settler, the Aborigine would be prosecuted under British law and if a settler harmed an Aborigine, he or she would be prosecuted.[84] It is sometimes assumed that providing Aborigines the protection of the English law, and punishing them for breaching it, of itself denied them the continuing operation of their own laws. Certainly under a positivist analysis this would be so, unless the sovereign (the Imperial Parliament)

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[80] *Ibid* at 585.

[81] *Ibid*.

[82] See R Hughes *The Fatal Shore* (Collins Harvill, London 1987) at 273 where he said the "Royal Instructions to every governor of Australia, from Arthur Phillip in 1788 to Thomas Brisbane in 1822, always repeated the same themes. The Aborigines must not be molested. Anyone who 'wantonly' killed them, or gave them 'any necessary interruption in the exercise of their several occupations', must be punished".

[83] Castles, *supra* note 5 at 520-21.

[84] British administrative practice is consistent with the view that British laws operated to protect Aborigines and regulate their conduct if they interfered with the settlers without obliterating Aboriginal laws and customs, for example, is the following civil instructions given by Colonial Secretary Lord Glenelg to William Lonsdale, the Police Magistrate for the Port Phillip District, in September 1836:

> Should the conduct of the natives be violent or dishonest, you will endeavour to restrain them by the gentlest means, informing them that they must consider themselves subject to the Laws of England, *which being put in force for their protection*, must equally operate for their restraint or punishment *if they offend the whites*. Historical Records of Victoria, Foundation series Vol.1 (Vict Govt Printing Office, Melbourne 1981) at 53, emphasis added.

expressly permitted the operation of indigenous laws. But if we assume that positivism had not pervaded the legal discourse during the first few decades of colonisation, it is possible to see that providing them the protection of the English law did not deny them the continued operation of Aboriginal laws *inter se.* This is confirmed by an 1829 case in which an Aborigine killed another Aborigine near the Domain in Sydney. The New South Wales Supreme Court held that applying English law would be unjust.[85] In 1841 Willis J formed the opinion in *R v Bon Jon*[86] that Aborigines were not British subjects in the unqualified condition, so that disputes between them were not to be dealt with by the British courts.[87] Again the case involved an Aborigine charged with killing another Aborigine.

The *Bon Jon* and Domain case decisions were made when there was vigorous debate in the colony about whether colonial laws applied to Aborigines. Even the 1836 case of *R v Murrell*[88], which is cited as authority for the non-recognition of Aboriginal laws, does not assert that the British claim of sovereignty of itself invalidated Aboriginal laws. The court did rule that the Aborigines had no sovereignty, but it claimed this was because the Aborigines "were not in such a position with regard to strength as to be

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[85] See Castles, *supra* note 5 at 526. He also refers (at 526) to a case in 1826 in which the Supreme Court ruled that an Aborigine charged with attempted murder could not be tried under English law. See also *R v Farrell, Dingle and Woodward* (1831) 1 Legge 5 where it was held that there could be special circumstances when local conditions in a colony seemed to dictate that variations should be made in the normally accepted pattern of applying English law to a colony.

[86] Supreme Court of New South Wales, per Willis J, *Port Phillip Gazette*, 18 September, 1841.

[87] Note the comments of Chief Justice Pedder in Van Dieman's Land who discussed in detail whether the Aborigines were to be treated as British felons or warring enemies. He apparently favoured the latter view. Castles, *supra* note 5 at 520. See also Reynolds *Frontier supra* at 136 where he quotes Governor King's memo to his successor Bligh that King had "ever considered them [the Aborigines] the real proprietors of the soil".

[88] (1836) 1 Legge 72.

considered free and independent tribes".[89] Harring notes in this context that

> does not prove that Aborigines are entitled to recognition of their sovereignty through a reinterpretation of the *Murrell* case. Rather, it proves that the issue of Aboriginal sovereignty and the recognition of Aboriginal law were a part of the discourse of Aboriginal status of 1830s and 1840s Australia.[90]

This discourse had natural law foundations which were extinguished by the rise of positive law influences.

The early debates also involved questioning whether English law applied to Aborigines outside the effective limits of a colony. Not that the debates were necessarily motivated by a concern for the interests of the Aborigines. For example, after the Coorong massacre of 1840 in which Aborigines killed 26 survivors of a shipwreck in South Australia, Cooper J advised that English law could not be applied to the Aborigines because they were on land that had not been settled and had never submitted themselves to English dominion.[91] Consequently the Commissioner of Police was directed to bring summary justice upon the Aborigines. After a rudimentary trial two Aborigines were executed.[92] Officials in Britain understandably objected to this because it subjected the Aborigines to a legal process foreign to their own which failed to follow its own requirements for due process.[93]

What is clear then is that it was intended from the start that British laws would apply for the protection of Aborigines and to punish them if

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[89] *Murrell, supra* at 73.

[90] Harring "The Killing Time: a history of Aboriginal Resistance in Colonial Australia" (1994) Ottawa Law Review 385 at 403.

[91] Castles, *ibid* at pp.524-25.

[92] *Ibid* at 525.

[93] *Ibid.*

they offended non-Aborigines. But there is no clear evidence in the first few decades of settlement that the British considered that Aboriginal laws were nullified by the claim of sovereignty. Freed of the notion that the British claim of sovereignty itself extinguished Aboriginal laws, it is possible to perceive the principle that "[a]t the moment of its settlement the colonists brought the common law of England with them"[94] as a flexible principle for applying English law for the benefit and protection of the settlers, and not as one that necessarily implies that the laws of the indigenous people were nullified by the mere fact of its introduction to a colony.[95]

4. The rise of the positivist influence

Within a few decades of British acquisition, the natural law's influence waned as Anglo-Australian jurisprudence became entranced by the positive law and its claim to dispassionate scientism and objectivity. David Hume (1711-1776) led an early attack on natural law by claiming that a theory of moral obligation could not be derived from empirical fact. Jeremy Bentham (1748-1832) followed up by castigating the English

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[94] Per Stephen CJ in *Attorney-General v Brown* (1847) 1 Legge 312 at 318; K McNeil supra note 12 at pp.114-15. See also W Blackstone "Commentaries on the Laws of England", 2nd ed. Book I (Clarendon Press, Oxford 1766) at pp.106-8 where he said:

> For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of the infant colony.

[95] For a Canadian perspective on this issue, see *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 per Wallace JA at 568 where he said that:

> the acquisition of sovereignty by the British Crown did not, in itself, extinguish the right of the aboriginal people to continue their traditional customs, practices and use of the tribal land in a manner integral to that indigenous way of life. Rather, it recognized the historical aboriginal presence and title and served to protect aboriginal customs and practices and the traditional relationship the aboriginal people had with the lands they occupied and used.

common law system for its lack of a coherent system, which he argued invited judicial arbitrariness leading to uncertainty and insecurity.[96] He advocated the science of legislation which would involve the creation of a complete legal code that made the law clear, explicit and predictable. John Austin (1790-1859) agreed that the law required scientific rigour. He separated law from morality in a project designed to reject the mystic qualities of the law to ensure the creation and enforcement of objectively verifiable laws.[97] The consequence of this was to denude the law in Australia of a moral language for more than a century. Removing ethical considerations from the law may not, however, have been Austin's ultimate intention. Harris notes that it was "intrinsic to Austin's design to show the relation of positive law to definite moral norms", but he lacked the means to achieve it.[98]

The common law did, however, benefit from the project to have it systemised. It was due in part to the influences of Bentham and Austin that legal academics attempted during the 19th century to order the law along coherent lines through text books on contract, trusts and so on.[99] The text books offered not only a means for providing a degree of coherence to the law, they also provided an effective means for spreading the positivist gospel, thereby profoundly affecting the development of the common law in Australia and other places until present times. Austin's influence is not without irony. He produced by 1832 a penetrating analysis of "judiciary law"[100] which still has a profound impact on the Australian legal system, yet his lectures at University College, London (where he held the Chair in Jurisprudence from 1827-1832) were so

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96. Rumble, "John Austin, Judicial Legislation and Legal Positivism" (1977) 13 UWALJ 77 at pp.96-97. See also Parkinson, *supra* at pp.52-53.

97 See generally SJ Anaya *supra* note 39 at pp.19-23.

98 Harris, review of two books on John (and Sarah) Austin (1989) 48 Cambridge Law Rev 340 at 342.

99 Parkinson, *supra* at 209-10.

100 Rumble, *supra* at 78.

impenetrable that he was left to lecture to an empty room.[101] This was a matter of financial concern to him because he was paid on the basis of student numbers.

Austin's separation of legal and moral judgement had its impact on the jurisprudence regarding the law affecting Australia's indigenous people. That is not to say that the law prior to Austin was necessarily beneficial to indigenous interests, but at least it offered the basis for challenging the devastating impact of "protectionist" policies and laws from around the mid-19th to the mid-20th centuries. The positive law offered an intellectual basis, or justification, for the law failing to concern itself with the injustices perpetrated on the indigenous people. In *Attorney-General v Brown*[102] for example, the court, when discussing whether the British claim of sovereignty provided the Crown with possessory title simply ignored the possibility of Aboriginal possessory title. It flatly asserted that "there is no *other* proprietor" of the Crown "wastelands".[103] Indeed, it was made clear that any moral questions about the acquisition of colonies were for the Crown alone:

> But, in a newly discovered country, settled by British subjects, the occupancy of the Crown, with respect to the waste lands of that country, is no fiction. If, in one sense, those lands be the patrimony of the nation, the Sovereign is the representative, and the executive authority of the nation; the 'moral personality' by whom the nation acts, and in whom for such purposes its power resides.[104]

Limiting the capacity of the courts to question the moral (and hence legal) validity of the forceful taking of indigenous lands and imposing upon them a foreign legal system without recognising the validity of their

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101 Harris, *supra* at 340.

102 (1847) 2 Supreme Court Reports (NSW) - appendix p.30.

103 *Attorney-General v Brown, ibid* at 33.

104 *Attorney-General v Brown, ibid* at 35.

systems of laws well suited the squatters and land claimants. The natural law would have been considered by them to be a nagging inconvenience. Respecting the rights of indigenous landholders retarded impulses quickened by avarice. The concerns of the courts in *Bon Jon* and the Domain case and Alfred Stephen, the defence counsel in *Murrell* who attacked the *terra nullius* theory, were rarely heard in courtrooms after 1841. The law proceeded to dismiss any notion that indigenous laws had survived colonisation or that indigenous people had any legitimate claim to their lands. The fact that the rule of law had been replaced with the rule of force was either unnoticed or (by inference) denied by the courts. After all, if Aborigines had no recognisable laws or rights to land, how could it be said they were forcefully deprived of what they did not own. This neat logic found its way much later into cases like *Milirrilpum v Nabalco* and *Coe v The Commonwealth.*

The 1847 decision of *Attorney-General v Brown* was followed by *Cooper v Stuart*[105], a case dealing with the rule against perpetuities, which held that Australia was an uninhabited country before settlement and therefore all the laws of England relevant to the colony were in force. The consequence of this for Aborigines was presumably considered irrelevant. In *R v Cobby*[106] the question of the legality of Aboriginal marriages was considered. The New South Wales Court of Appeal ruled that:

> We may recognise a marriage in a civilized country, but we can hardly do the same in the case of the marriages of these aborigines, who have no laws of which we can take cognizance.[107]

A refreshing exception to these cases is *ex parte West*[108] which dealt with a writ of habeas corpus requiring a squatter to produce in court an

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105 (1889) 10 NSWLR 173.

106 (1883) 4 NSWLR 355.

107 *Ibid* at 356.

108 (1861) 2 Legge 1475.

Aboriginal boy, Tommy, who was stolen from his tribe. The judge charged that

> It was a moral wrong - an outrage - an act of gross cruelty which no man of common feeling could hear described without an expression of strong indignation. . .These people were British subjects, and if held responsible for crime on the one hand, should be protected from outrage on the other.[109]

Positivist influences on concept of sovereignty

The international law's capacity to recognise the indigenous people as having prior and continuing rights to their land was, as we have seen, not accepted by the positivist influenced common law. The reason for this relates to positivist conceptions of law making authority. The case for recognition of indigenous laws faces two serious difficulties under the positivist analysis. First, positive laws derive from a sovereign. According to Austin, a sovereign has the following characteristic:

> The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons.[110]

Because indigenous people in Australia form a minority they fall outside of the bulk of society and therefore their habits of obedience are irrelevant in determining the sovereign.

The second difficulty, under Austinian analysis, is that the indigenous people were categorised as living in "the state of nature" and as such

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[109] *Ibid* at 1476.

[110.] J Austin *The Province of Jurisprudence Determined* ed HLA Hart (George Weidenfeld and Nicholson, 1954) at 193.

> cannot impose the law in the character of sovereign, and cannot impose the law in pursuance of a legal right. Consequently their laws are not "positive law but a rule of positive morality".[111]

This line of analysis has proven remarkably resilient over time, as can be seen from Gibbs CJ's comments in the 1979 decision of *Coe v Commonwealth* where he concluded that "there is no aboriginal nation, if by that expression is meant a people organized as a separate State or exercising *any* degree of sovereignty".[112] This conclusion was drawn, presumably, from his analysis earlier in the judgment which suggested that Aborigines had failed the European standard of civilisation or having settled laws:

> For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony established by conquest or cession, in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European standards, had no civilized inhabitants or settled law. Australia has always been regarded as belonging to the latter class.[113]

Judicial intolerance of any form of indigenous "sovereignty" is also evident in the High Court cases of *Coe v Commonwealth (No.2)* ("Coe 2")[114] and *Walker v New South Wales* ("Walker")[115], although it should be noted

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111 *Ibid* at 138.

112 (1979) 53 ALJR 403 at 409, emphasis added.

113 *Ibid* at 408. Note Murphy J *contra* in the same case at 412:

> Although the Privy Council referred in *Cooper v Stuart* to peaceful annexation, the aborigines did not give up their lands peacefully; they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide. The statement by the Privy Council may be regarded either as having been made in ignorance or was a convenient falsehood to justify the taking of aborigines' land.

114 (1993) 68 ALJR 110

115 (1994) 69 ALJR 111.

that both these cases were heard by a single judge dealing with procedural matters. According to Mason CJ in Coe 2:

> *Mabo (No.2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty which embraced the notion that they are a 'domestic dependent nation' entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law.[116]

He repeated his view in Walker.[117] The apparent consequence of Mason CJ's assertions is that sovereignty denies the possibility of any form of Aboriginal government other than that provided for by statute. The clear implication is that parliamentary sovereignty, consistent with the positivist analysis, is absolute and intolerant of non-parliamentary forms of government except that provided for by statute, for example local government. He refuted any notion of relative sovereignty including a limited kind of sovereignty embraced by the notion that Aborigines are entitled to some form of self government. The question these rulings raise is whether it is possible for Australian jurisprudence, freed of positivist constraints, to recognise forms of relative sovereignty, and more particularly, relative forms which accommodate forms of indigenous self government? In answering this we need to consider the (positivist) logic of singular or absolute sovereignty.

Under the standard positivist analysis laws derive from a sovereign with absolute law-making authority. Consistent with this analysis, the

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116 (1993) 68 ALJR 110 at 115.

117 (1994) 69 ALJR 111 at 112.

"Crown" in Australia is regarded as a single, but somehow internally divisible, entity. Thus the Crown can be referred to as the Crown in the right of the Commonwealth or in the right of Western Australia so as to maintain the fiction of a singular sovereign entity. A further proposition is that parliament is the supreme law making authority, and as such cannot limit its future law making capacity.[118] This latter proposition is, however, ameliorated by the debatable proposition that parliament can entrench some provisions in legislation. The theory does, however, recognise that parliament is not the only law making authority as the courts can make laws, subject to parliamentary override, and bodies granted law making authority by parliament (for example, local government) can make laws.

There are a number of problems with these simple propositions. The first is that the singular omnipotent Crown has a surreal quality that fails to adequately explain Australia's existence as an independent nation. As a theory it is contradictory because on the one hand parliament is omnipotent and thus has unlimited law making authority. But on the other hand proponents of the theory are forced to concede that it is constrained by certain conventions and political forces. This concession is ultimately fatal to the claim of omnipotence. The contradiction can be illustrated by the following example. Under the theory, the State and Federal Parliaments have gained their law making authority from the British "Crown" - which is the Queen and her (Imperial) Parliament. The Queen, by convention, will always act on the advice of her Ministers who in turn are answerable to Parliament. So effectively, the grant of law making authority derives from the Imperial Parliament, which cannot bind its future law making authority. Thus, the law making authority granted to the State and Federal governments can be revoked, despite the

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[118] See Austin *supra* note 110 at 253 where he said "the power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of *legal* limitation. . .Supreme power limited by positive law is a flat contradiction in terms".

passage of the *Australia Act* 1986. So legally Australia is not (and presumably can never be, without a revolution) an independent nation, because it is subject to the superior law making body - the British Parliament. The political fact that Australia is independent does not make the legal claim that it is not any more plausible.

It might be argued that since the *Australia Act*, Australian law making authority is no longer sourced in Britain. Against this it may be noted that the High Court unanimously held as recently as 1988 (and after the *Australia Act*) that "within the limits of the grant [from the Imperial Parliament], a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself".[119] That is, it is expressly acknowledged that the law making authority of Australian parliaments derives from the Imperial Parliament. This theoretical position, therefore, fails to recognise that Australia is an independent nation that does not rely on the permission or good will of the Imperial Parliament to continue as such. Thus the omnipotent Imperial Parliament which has granted law making power to the Australian parliaments is not really omnipotent because it cannot revoke its grant of power. But the theory consciously refuses to acknowledge this by failing to translate any political, moral and other constraints on the plenary law making power of Parliament into a legal constraint.

The absolute sovereignty theory also maintains that Parliament's power is plenary,[120] meaning "full; complete; entire; absolute; unqualified".[121] Again, this proposition recognises no moral limits on Parliament's power, and as Professor Brian Slattery aptly puts it, the

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119 *Union Steamship v King* (1988) 166 CLR 1 at 10. But see Brennan J in *Mabo (No.2) supra* note 1 who said at 29 that "since the *Australia Act* 1986 (Cwth) came into operation, the law of this country is entirely free of Imperial control". This, of course, is a more realistic statement of the law.

120 *Ibid*.

121 Concise Macquarie Dictionary (Doubleday, Sydney 1986).

"doctrine of the omnipotence of Parliament should be recognised for what it was: the child of a marriage of convenience between parliamentary self-aggrandisement and imperial ambition, sanctified by legal positivism".[122]

The implausibility of the notion of absolute parliamentary sovereignty is heightened when considered in the context of national sovereignty. It is tempting to believe, on a positivist analysis, that national sovereignty is absolute. The reality is that under international law, nations governed by a single parliament, let alone federations, have only relative sovereignty. The idea of national sovereignty developed in the middle ages to oppose the claims for temporal power by the Emperors of the Holy Roman Empire which were resented by local rulers.[123] Local rulers asserted absolute dominion over their territories, recognising no other power as affecting their right to rule.[124] However when a ruler entered into relations with other rulers, he or she agreed to be governed by mutually agreed rules regulating the relationship. As Seidl-Hohenveldern reasons:

> If a State was to be allowed disregard these rules of international law, in view of its claim to be the master of its own destiny, there would no longer be any reliable basis for the inter-State relations required by the fact of the interdependence of the several sovereign States.[125]

Just as a nation is not the absolute master of its destiny in the international community, an Australian parliament is not the absolute master of its destiny in the domestic community.

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[122] B. Slattery "First Nations and the Constitution: A Question of Trust" (1992) 71 The Canadian Bar Rev 261 at 278.

[123] Historically the meaning of sovereignty has oscillated, see Steinberger "Sovereignty" in Max Planck Institute for Comparative Public Law and International Law Encyclopaedia for Public International Law Vol.10 (North Holland, Amsterdam 1987) at 408.

[124] I. Seidl-Hohenveldern "International Economic Law" (Martinus Nijhoff Publishers, Dordrecht, 1989) at 21.

[125] *Ibid* at 22.

The relative nature of sovereignty provides it with the capacity to accommodate and co-exist with indigenous laws and law making. Thus, if sovereignty is not perceived as absolute, it loses its all or nothing character.[126] That is, it becomes possible to accommodate some relative form of indigenous sovereignty without damaging the existing legal and constitutional system. Putting the same proposition more directly, it is possible for constitutional space to exist to enable the operation of co-existent indigenous laws and law making powers.[127]

The idea of relative sovereignty placing restraints on absolute parliamentary law making powers to enable the operation of indigenous law making authority is not a novel common law concept. The Canadian Supreme Court observed in *R v Sparrow*[128] that aboriginal rights are "not absolute"[129] and are to be considered in the context of a "society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated".[130] The Court also acknowledged that just as aboriginal rights are not absolute, the government's obligation to aboriginals imports "some restraint on the exercise of sovereign power".[131]

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126 See *Delgamuukw v British Columbia* supra note 60 per Macfarlane JA at 546 where he said:

> During the course of these proceedings it became apparent that there are two schools of thought. The first is an "all or nothing approach", which says that the Indian nations were here first, that they have exclusive ownership and control of all the land and resources and may deal with them as they see fit. The second is a co-existence approach, which says that the Indian interest and other interests can co-exist to a large extent, and that consultation and reconciliation is the process by which the Indian culture can be preserved and by which other Canadians may be assured that their interests, developed over 125 years of nationhood, can also be respected....I favour the second approach.

127 K McNeil "Envisaging Constitutional Space for Aboriginal Governments" 19 Queen's Law Jour 95.

128 (1990) 70 DLR (4th) 385.

129 *Ibid* at 409.

130 *Ibid* at 410.

131 *Ibid* at 409.

The positivist orthodoxy that sovereignty is absolute and therefore inimical to any form of indigenous law making authority is, it is argued, no longer sustainable. The positivist claim admits to no legal limitation on the exercise of sovereign power. Thus, in theory at least, this permits the exercise of arbitrary and immoral laws. This contention contrasts with the international community's view, expressed in international conventions and other instruments, that law making power is subject to moral (and consequently, legal) limits.

5. Positivist and natural law influences in *Mabo (No.2)*

The majority in *Mabo (No.2)* held that indigenous peoples' title to land ("native title") survived the British claim to Australian territory. The approach and assumptions made by the majority in recognising native title was consistent with natural law principles. That is, it was argued or assumed that indigenous people were entitled to respect as a people, and that they were not to be taken to be inferior in character or race. Consequently their prior and continued occupation of their land was recognisable by the common law as a form of land title. This approach, although not articulated this way by the Court, was consistent with the universal natural law principle articulated by Blackstone that those first in possession of chattels or land are entitled to maintain peaceful possession of their chattels or land until they voluntarily transfer or surrender it to another party. The majority reasoning, however, becomes confused and inconsistent on the issue of extinguishment, as will be shown below.

The influence of natural law principles, by way of international law, is most evident in the judgment of Brennan J.:

> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of

> the international community accord in this respect with the contemporary values of the Australian people.[132]

He added that:

> . . . no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.[133]

Deane and Gaudron JJ applied a moral perspective to the law regarding the acquisition of Australian territory when they observed that:

> The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.[134]

Brennan J specifically overruled the reasoning of earlier cases, including *Cooper v Stuart*, which had effectively refuted the existence of native title on the basis that indigenous people had either an "absence of law" or "barbarian" laws.[135] Thus he refused to accept the reasoning of prior cases that relied on the belief that indigenous people were inferior. More specifically he rejected those cases because:

> The theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to

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132. *Mabo (No.2), supra* note 1 at 42.

133 *Ibid* at 30.

134 *Ibid* at 109.

135 *Ibid* per Brennan J at 39.

> be made in the present case. This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher "in the scale of social organization" than the Australian Aborigines whose claims were "utterly disregarded" by the existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not.[136]

Brennan J's rejection of a theory which assumes the indigenous people to be inferior marks an outcome of the debate at Vallodolid, Spain in 1550-51 which favours the arguments of Las Casas, as opposed to those of de Sepulveda: a case of justice delayed (and denied) for over four centuries!

In terms of the legal outcome of those sentiments, the majority found that native title survived British acquisition. The Court also found, subject to the *Racial Discrimination Act,* that the Crown can extinguish title. Brennan J begins his analysis of the extinguishment of native title with the broad statement that:

> Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power. The sovereign power may or may not be exercised with solicitude for the welfare of indigenous inhabitants but, in the case of common law countries, the courts cannot review the merits, as distinct from the legality, of the exercise of sovereign power.[137]

The statement that the common law courts cannot review the merits (read in this context "morality") of the exercise of power as distinct from

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136 *Ibid* at 40.

137 *Ibid* at 63.

the legality, is one positivists would approve.[138] The majority judgments all agree that the Federal Government validly enacted the *Racial Discrimination Act* and that it prevents (and has prevented since its enactment in 1975) State and Territory governments from extinguishing native title in a racially discriminatory manner.

The majority reasoning about the power to extinguish native title in the absence of the *Racial Discrimination Act* is, however, confused and contradictory. The majority all agree that the "Crown" has the power to extinguish the title, and that the common law presumes the legislature does not intend to extinguish the title unless it exhibits a clear and plain intention to do so. The majority differ on the rationale and implications of this presumption. Brennan J states that the common law presumption in relation to Crown grants is that it will only be rebutted by an express *statutory* intention to impair the grant. He then proceeds to argue that as a native title is not a Crown grant, the usual presumption does not apply.[139] He adds, however, that a separate presumption applies for native title because of the "seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land".[140] The presumption requires a clear and plain intention to extinguish the native interest by "the Legislature or by the Executive".[141] On this reasoning the presumption favouring Crown grants is stronger than the presumption for native title. For Crown grants it merely requires a clear and plain intention by statute to extinguish the granted title, but for native title it requires a clear and plain intention by either a statute or

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138 Brennan J does qualify this broad statement in the following way:

> However, under the constitutional law of this country, the legality (and hence the validity) of an exercise of a sovereign power depends on the authority vested in the organ of government purporting to exercise it: municipal constitutional law determines the scope of authority to exercise a sovereign power over matters governed by municipal law, including rights and interests in land. *Ibid* at 63.

139 *Ibid* at 64.

140 *Ibid.*

141 *Ibid.*

an administrative instrument.[142] The hidden assumption is that native title is more vulnerable to extinguishment because it is inferior to the Crown grant.

Deane and Gaudron JJ also apply an analysis which suggests native title is inferior to the non-indigenous fee simple title. Their analysis begins with a statement of the common law, as follows:

> The ordinary rules of statutory interpretation require, however, that clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation. Thus, general waste lands (or Crown lands) legislation is not to be construed, in the absence of clear and unambiguous words, as intended to apply in a way which will extinguish or diminish rights under common law native title.[143]

They do not distinguish between native title holders and other title holders for the application of the presumption, suggesting that clear and plain administrative instruments designed to extinguish native title are insufficient, unless supported by clear and plain legislation to do so. But they then proceed to describe native title as "personal rights susceptible to extinguishment by inconsistent grant by the Crown".[144] It is unclear whether the inconsistent grant must derive from clear and plain legislation authorising the grant of title which will extinguish native title, but they mention the "vulnerability" of native title to extinguishment, suggesting that it is weaker than, for example, fee simple title:

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142 For a comprehensive analysis of the power of the executive to extinguish and a critique of the judgments in *Mabo (No.2)* on this point, see K McNeil "Racial Discrimination and Unilateral Extinguishment of Native Title" (1996) 1 Australian Indigenous Law Review 181.

143 Mabo 2, *supra* note 1 at 111.

144 *Ibid* 112.

> The vulnerability [of native title] persists to the extent that it flows from the nature of the rights as personal.[145]

Again the effect of the analysis is to treat native title as different and effectively weaker than the fee simple. This is not an inevitable way of analysing the law regarding extinguishment. There is US authority which describes native title as being by analogy as "sacred" as the fee simple title.[146]

Natural law principles, then, inform and influence the majority judgments in finding that the British acquisition of Australian territory was not of itself sufficient to extinguish native title, and that the common law had the capacity to recognise the traditional interests in land of the indigenous people. This is essentially because of two natural law assumptions: the first, that native people are to be respected as a people and second, their right of prior possession and occupation provides them a prior right to their land and possessions. The application of these natural law assumptions, however, is not clearly and consistently applied by Brennan, Deane and Gaudron JJ in their analysis of extinguishment. Their analysis effectively treats native title as being inferior to non-indigenous title. The reason for this, when there was common law authority available which would have allowed for equal treatment, is unclear.

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145 *Ibid.*

146 See *Mitchel v US* (1835) 9 Pet. 711 at 746 per Baldwin J who said "it is enough to consider it as a settled principle that their [the Indians'] right of occupancy is considered as sacred as the fee-simple of the whites". See also *US v Santa Fe Railroad* (1941) 314 US 339 at 345, *US v Alcea Band of Tillamooks* (1946) 329 US 40 at 45. See also J Hurley "The Crown's Fiduciary Duty and Indian Title: *Guerin v The Queen*" (1985) 30 Magill LJ 559 at 575 where he says that "Both by practice and by its legislation . . .the British Crown recognized Indian title was a property interest in land identical to a fee simple in all respects save that, by virtue of the doctrine of Crown pre-emption, such title could only be alienated to the Crown. See also P Cumming and N Mickenberg "Native Rights in Canada" (2nd ed) (Indian Eskimo Assn of Canada, Toronto 1972) at 41 where it is said that "Indian title should be viewed as having all the incidents of a fee simple estate". But see *contra* KM Lysyk who states in "The Indian Title Question in Canada" (1973) 51 Canadian Bar Rev 450 at 473 that the US

6. Conclusion

Positivism has had a sustained influence on Anglo-Australian jurisprudence. The common law has benefited from its influence to the extent that it prompted a more systematic ordering of the law than had previously existed. However, something was lost in the process, namely the law's capacity to develop in a way that provided it with a sufficiently developed moral dimension - this was particularly detrimental to indigenous people. The law offered little assistance, or aided the process, when injustices were served upon the indigenous people. The law developed a jurisprudence that failed to recognise them as a distinct people of equal standing to non-indigenous people. It also developed a concept of parliamentary sovereignty that paid no regard to the interests of indigenous people.

Natural law influences, which existed at the time of colonial acquisition, re-emerged in the High Court decision of *Mabo (No.2)*. But the process of articulating and developing the law along natural law influenced lines with its regard to morality is far from complete. The positivist influence remains strong in the post *Mabo (No.2)* cases of *Coe(No.2)* and *Walker*. Hopefully, *Mabo (No.2)* marks the beginning and not the end of a morally based jurisprudence for indigenous Australians.

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decisions "pertain to the policy of recognising and vindicating the Indian title, not to its content".

PART 2:

THE CASE FOR THE RECONITION OF INDIGENOUS RIGHTS UNDER THE CONSTITUTION

Part 2 explores whether the Constitution is capable of protecting and promoting Indigenous rights. This exploration is in line with the reconciliation objective mentioned in Part 1 of establishing mechanisms to ensure that past wrongs are not repeated.

The first two chapters of this Part explore the possibility of Constitutional protection and promotion of Indigenous rights in relation to an express Constitutional provision, namely the race power - section 51(xxvi). The final two chapters of this Part explore the possibilities for protection of fundamental rights (including the fundamental rights of Indigenous people) by applying implied protections of rights under the Constitution.

Chapter 4

Avoiding the Hindmarsh Island Bridge Disaster: Interpreting the race power

> I should never have allowed the gates of the town to be opened to people who assert that there are higher considerations than those of decency.
>
> JM Coetzee *Waiting for the Barbarians*

1. Introduction

South Africa's Truth and Reconciliation Commission raised difficult and painful questions about the complicity of the courts with the Apartheid regime. After examining the Commission's hearings on the involvement of the courts, Dyzenhaus concluded that the dominance of the plain fact approach to interpretation by the courts "greased the wheels of racial segregation and they allowed the security arm of government to suppress political opposition to that policy unhindered by judicial review".[1] Racial issues are often troubling for courts. They raise uncomfortable questions about the very moral and legal foundations upon which a society is built. They also raise difficult issues about when and to what extent the courts should subject racial laws to the

[1] Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* ((Oxford, Clarendon Press 1991), at 214.

restraining hand of judicial review. These issues arose before the High Court in the Hindmarsh Island Bridge Case ('*Kartinyeri*').[2]

In *Kartinyeri* the Court was for the first time required to *directly* deal with the meaning and scope of the race power under the Constitution – s 51(xxvi).[3] This chapter and the following chapter undertake a close examination of *Kartinyeri* because it is the only case to date that directly deals with the race power. The power is clearly an important one regarding any exploration of the possibilities for protecting and promoting the interests of indigenous people under the Constitution. On its face, the race power provides for discrimination against indigenous people on the basis of their race. It therefore offers the possibility of being a provision that undermines reconciliation rather than advancing it. This chapter provides a critical analysis of the reasoning in *Kartinyeri* and examines whether s 51(xxvi) can (or should) be interpreted to advance the interests of indigenous people rather than undermining them.

The High Court was (not for the first time) directly confronted with the troubling issue of race in *Kartinyeri*. When required to decide what powers the Federal Government could exercise over racial groups under s 51(xxvi), the majority retreated into the plain fact and extreme textualist interpretation approaches. Their reasoning and approach has a haunting resonance with that of the Apartheid courts. The majority read the Constitutional text devoid of its social, historical and even Constitutional context. This allowed Gummow and Hayne JJ to conclude, for instance, that so long as a federal law discriminated on

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[2] (1998) 195 CLR 337 ('*Kartinyeri*') References will be made below to the paragraph numbers, which are the same in both the CLR and the internet versions of the case.

[3] The issue has previously arisen as a secondary issue. See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, per Gibbs CJ at 186, per Stephen J at 209-210, and per Murphy J at 242; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1, per Gibbs CJ at 110 and per Murphy J at 203; *Gerhardy v Brown* (1985) 159 CLR 70 at per Brennan J at 138 and per Deane J at 273; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 per Gaudron J at 56; *Native Title Act Case* (1995) 183 CLR 373 at 461; *Kruger v The Commonwealth* (1997) 71 ALJR 991 at 1035.

the grounds of race, it would be a valid enactment.[4] No issue of human decency or justice appeared relevant. They did, however, mention in passing the possible restraint of the rule of law, but offered no clear explanation of what this meant.[5]

The constitutional issue at stake in *Kartinyeri* was whether the *Hindmarsh Island Bridge Act* 1997 (the 'Bridge Act') was a valid exercise of constitutional power. The Act prevented the relevant Minister from making a declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (the 'Heritage Protection Act') to preserve and protect any significant Aboriginal site that might be within the Hindmarsh bridge area. The Aboriginal applicants claimed that the non-issuance of a Ministerial declaration would allow the desecration of sites of Aboriginal significance during the building of a proposed bridge to the island. They also claimed the Bridge Act was unconstitutional because it was contrary to s 51(xxvi). Under s 51(xxvi) the Federal Parliament has the power to make laws for the peace, order, and good government of the Commonwealth with respect to the "people of any race for whom it is deemed necessary to make special laws".

A central question in the case was the meaning and scope of s 51(xxvi). Brennan CJ and McHugh J retreated into textualism and the technical (mis)use of interpretation rules to avoid squarely facing that central question. Gummow and Hayne JJ used textualism to close their minds to any real inquiry into the history and context of the race power. This left their interpretation of the power dangerously unanchored. Such a textualist reading of so important a grant of power may well encourage courts in the future to walk away from their responsibility to review race laws to ensure they do not unduly trespass on the fundamental rights and interests of racial minorities. The 20th

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[4] *Kartinyeri, supra* note 2 at para 86.

[5] *Ibid* at para 89.

century, at least, is replete with examples, in Australia and overseas, of legislatures enacting laws leading to the inhumane abuse of racial groups.[6] Gummow and Hayne JJ ignored this history, insisting upon a textualist interpretation which finds such history to be irrelevant. In any event the textualist claim that s 51(xxvi) is unambiguous (and it is therefore unnecessary to inquire into its context and history) is implausible because the meaning of the term "race" itself is highly contested.[7]

This chapter, then, is critical of the textualist devices used by Brennan CJ and McHugh J to raise formalist rules to avoid an inquiry of substance into the meaning and scope of s 51(xxvi). It is also critical, as just mentioned, of the textualism of Gummow and Hayne JJ. In offering this critique, Part 2 of this chapter reminds us of the various interpretation methods available to a court. These are originalism (which is sometimes referred to as founding intention), extreme originalism, textualism (or literalism)[8], extreme textualism, and progressivism (or living force).[9]

Part 3 examines at some length Brennan CJ and McHugh J's judgment. They employed an array of technical and formalist arguments to subvert the focus on issues of substance, which is central to constitutional interpretation. This part is somewhat more laboured than I would have preferred because the arguments they put have a superficial appeal. They need, however, to be responded to in case their arguments are taken seriously. One suspects that their purpose for

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[6] See chapter 5, which also appears as J Malbon "The Race Power Under the Constitution: Altered meanings" (1999) 21 Sydney Law Review 80 at 100.

[7] *Ibid* at pp.83-85.

[8] According to Kirk, a close relative of textualism is legalism or "interpretivism". See J Kirk, "Constitutional Interpretation and a Theory of Evolutionary Originalism" (1999) 27 FLR 323 at 235.

[9] J Williams and J Bradsen "The Perils of Inclusion: The Constitution and the Race Power" (1997) 19 Adel LR 95 at 97.

avoiding a substantive inquiry was because they felt that the *Kartinyeri* case did not offer a fact scenario appropriate for developing the jurisprudence for the constitutional power grant. Remember, this case involved considerable public controversy about Aboriginal claims that sacred sites existed in the bridge area, leading to the Federal Government arranging for two inquiries into the claims, the outcomes of which were successfully challenged in the courts, and the South Australian Government establishing a Royal Commission.[10] The case itself followed hard on the heels of the controversial *Mabo (No.2)*[11] and *Wik*[12] decisions, which led to considerable public controversy, and some State Premiers and the Deputy Prime Minister being highly critical of the High Court judges. In some cases the criticism of the judges was quite personal.[13]

Part 4 examines the textualism of Gummow and Hayne JJ and contrasts this with the reasoning of Gaudron J and Kirby J. Gaudron J applied a mix of interpretation methods that allowed her to maintain fidelity to the text of s 51(xxvi) whilst also being alive to its history and social context. As a result she was able to find that Parliament has power to enact a special law regarding a racial group's racial differences or circumstances providing Parliament reasonably forms a political judgment that the law is necessary to deal with the group's differences or circumstances.[14] Kirby J applied interpretation methods that

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[10] See the account of the background to the case given by Kirby J, *supra* note 2 at paras 105-108.

[11] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[12] *Wik Peoples v Queensland* (1996) 187 CLR 1.

[13] See GD Meyers and S Potter "Mabo-Through the Eyes of the Media-The Wik Decision" (Murdoch Uni School of Law Indigenous Land, Rights, Governance and Environmental Management Project, 1999). See in particular p.99 where it is mentioned that the Deputy Prime Minister, Mr Tim Fischer "initiated his campaign against the High Court even before the Wik decision, accusing the judges of delaying their decision. Accusations were made of judicial activism".

[14] *Kartinyeri, supra* note 2 at para 39.

allowed him to explore the historical and social context of the provision. By doing so he was alive to the dangers inherent in a reading of s 51(xxvi) that enables Parliament to enact racial legislation with impunity.

This chapter approves of the way in which Kirby J placed s 51(xxvi) within its historical and social context. The problem with his judgment, however, is that it runs too freely from the text. Kirby J turns to the original intent behind the 1967 referendum which amended s 51(xxvi), and finds that the intention was to ensure that the Federal Government would enact laws for the benefit of Aborigines.[15] The difficulty with his conclusion, as correctly identified by Gaudron J, is that the text of s 51(xxvi) makes no mention of Aborigines – indeed the irony is that the previous specific mention of Aborigines was removed.[16] This suggests that the amendment is designed to provide the Federal Government with the same power to make laws for Aborigines as for any other race.[17] This in turn suggests that the intention evident in the Yes case for the 1967 referendum and the Parliamentary debates for the Bill proposing the referendum that the Commonwealth gain the power to make beneficial laws for Aborigines also applies to other, non-Aboriginal, "races". The debates and the Yes case, however, referred only to Aborigines and were silent regarding other races. These points were ignored by Kirby J.

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[15] Per Kirby J, *supra* note 2 at paras 142-147 and 152.

[16] Per Gaudron J, *supra* note 2 at para 29.

[17] It might be argued that s 51(xxvi) applies to everyone, as we are all members of a racial group. This would lead to the absurd result that the Federal Government could pass a law on any subject matter so long as it applied to a person of any race, even if the legislation made no racial distinctions, or had no relation to the issue of race. This argument was rejected by Gibbs CJ in *Koowarta* when he said "It is true that in some contexts the word 'any' can be understood as having the effect of 'all', but it would be self-contradictory to say that a law which applies to the people of all races is a special law. It is not possible to construe par. (xxvi) as if it read simply 'The people of all races'." *Koowarta, supra* note 3 at pp.186-87.

The conclusion drawn in this chapter is that the majority in *Kartinyeri* make a worrying retreat into textualism, leaving the jurisprudence of the race power in a dangerously vulnerable state. Textualism provides a path for judges to retreat from judicial review. It would be particularly concerning if the Court took that easy path where the majority of the population were intent, via the instrument of Parliament, upon inflicting unjust and arbitrary abuses upon the rights and interests of minorities. Whichever way the judges go, they cannot make their decisions free of moral considerations – although textualism allows them to pretend they can. An obligation ultimately lies upon them to judicially review challenged racial legislation under s 51(xxvi) to ensure it does not exceed the bounds of human decency.

There is a glimmer of light, ironically enough, amongst the dark textualism of Gummow and Hayne JJ. They offer in a couple of apparently innocuous paragraphs the grounds for developing a robust jurisprudence capable of protecting the fundamental rights and interests of minorities. They said the Parliament could enact racial laws providing they were not in manifest abuse of their power to enact the laws. Mention of a manifest abuse test was earlier made in *Koowarta* and the *Native Title Case*, but left unexplained.[18] Gummow and Hayne JJ elaborated briefly in *Kartinyeri* that the test is based upon the common law presumption that statutes do not intend to interfere with common law rights, freedoms and immunities.[19] They also said that the Constitution assumes the rule of law as its basis.[20] They offered no further elaboration. Part 4 of this chapter briefly explores the potential of their test, along with Gaudron J's elaboration of her understanding of the manifest abuse test, to offer a robust protection of the fundamental

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[18] *Koowarta v Bjelke-Petersen*, *supra* note 3 at pp.186, 245 and 261; *Native Title Act Case supra* note 3 at 460-461.

[19] *Supra,* note 2 at para 89.

[20] *Ibid.*

rights and interests of minorities against the unjust and arbitrary exercise of power. Part 4 also sees scope for the further development of fundamental common law principles arising from Kirby J's view that the common law may have regard to international law principles of universal and basic human rights.[21] *Kartinyeri* thus acts as a cautionary tale regarding the use of textualism, but it also offers some hope for the protection of fundamental rights of racial minorities in Australia.

2. Interpretation methods and canons

Constitutional interpretation involves reasoning processes that in many respects are the same as for statutory interpretation.[22] The Constitution is after all a statute.[23] There are however differences.[24] The Constitution, as Isaacs J observed, was "made, not for a single occasion, but for the continued life and progress of the community".[25] Additionally, "many words and phrases of the Constitution are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they should apply to whatever facts and

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[21] *Ibid* at para 116.

[22] In *Tasmania v Commonwealth* (1904) 1 CLR 329 at 338 the Court said that the "same rules of interpretation apply [to interpreting the Constitution] that apply to any other written document".

[23] See *McGinty v Western Australia* (1996) 186 CLR 140 per McHugh J at 230 where he said

> But since the people have agreed to be governed by a constitution enacted by a British statute, it is surely right to conclude that its meaning must be determined by the ordinary techniques of statutory interpretation and by no other means.

[24] See Windeyer J in *Payroll Tax* (1971) 122 CLR 353 at 394 who described the Constitution as "a statute of a special kind". See also Kirk, *supra* note 8 at para 3.4

[25] *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 413.

circumstances succeeding generations thought they covered".[26] Despite the differences between interpreting a statute and interpreting the Constitution, the Court applies interpretation methods common to both.

It is reasonably well accepted that the High Court applies three interpretation methods to interpreting the Constitution and other statutes: originalism (alternatively referred to as founding intention), textualism (or literalism) and progressivism (or living force).[27] At various stages in its history the Court has tended to prefer one method of constitutional interpretation to another. Between 1903 and *Engineers*[28] in 1920 it emphasised originalism, from 1920 until *Cole v Whitfield*[29] it emphasised textualism and from 1988 until relatively recently it has swung back to originalism, although there have been dissenters along the way.[30] Progressivism has crept in from time to time, notably in a number of High Court judgments during the 1990s.[31] In more recent times the Court has on occasion evoked the ghost of textualism. This is evident in *Kartinyeri,* of course, and in *Wakim*.[32] It is worth noting here that a judge usually does not confine himself or herself to a singular interpretation method during his or her career on the bench, and often does not do so in any particular judgment.[33]

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[26] Per McHugh J in *Re Wakim; Ex parte Darvall* [1999] HCA 27 www.hcourt.gov.au at para 44; (1999) 198 CLR 511.

[27] See J Williams and J Bradsen, *supra* note 9 at 8.

[28] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[29] (1988) 165 CLR 360.

[30] See A Reilly "Reading the Race Power: A hermeneutic analysis" (1999) 23 MULR 476 at pp.478-9.

[31] See below at page 119. See also M Kirby "Constitutional Interpretation and Original Intent: A form of ancestor worship?" (2000) 24 MULR 1.

[32] *Supra*, note 26.

[33] See Williams and Bradsen, *supra* note 9 at page 97 where they say that "In recent cases members of the High Court have invoked all three [interpretation] approaches. [ie originalism, textualism and progressivism] Thus it can be concluded that no approach has proved itself to be exclusive of another".

Two other interpretation methods can be added to the three generally accepted categories mentioned, and they are extreme originalism and extreme textualism, which are explained below. The various interpretation methods, and indicators for determining which method is being applied in a judgment, can be summarised as follows:

(a) Originalism

An originalist attempts to find the meaning of the text at the time of its enactment.[34] There is some debate as to whether this requires finding the drafters' subjective intention, or finding the meaning of the text as it could be objectively understood at the time of its enactment.[35] The better view appears to be that the drafter's subjective state of mind is irrelevant, and is probably not discernible anyway.[36]

Originalism has been criticised for providing too much scope for judges to choose selectively from the vast quantities of materials available enabling them to reach conclusions that reflect their personal values. Leventhal J castigated originalism as akin to entering a cocktail party and "looking over a crowd and picking out your friends".[37]

Indicators of a judge applying originalism include the judge referring to legislative or constitutional history, the Constitutional

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[34] *Ibid* at 98.

[35] *Ibid* at 97.

[36] *Ibid* at pp.97-98. See also See McHugh J in *Wakim, supra* note 26 at para 40 where he says:

> The starting point for a principled interpretation of the Constitution is the search for the intention of its makers. That does not mean a search for their subjective beliefs, hopes or expectations. Constitutional interpretation is not a search for the mental states of those who made, or for that matter approved or enacted, the Constitution. The intention of its makers can only be deduced from the words that they used in the historical context in which they used them.

See also Kirby J in *Kartinyeri, supra* note 2 at para 132.

[37] See PM Wald "Some Observations on the Use of Legislative History in the 1981 Supreme Court Term" (1983) Iowa Law Rev 195 at 214 (quoting Leventhal).

Debates, committee reports, second reading speeches and other extrinsic sources.[38] It can also be identified where a judge states she is attempting to discern the "legislative purpose" of a statute to assist with finding the intended meaning of text.[39]

(b) Extreme originalism

According to Sunstein there are two forms of originalism, hard (ie extremist) and soft (ie non-extremist):[40]

> Hard originalism, which is the more famous, is unacceptable. For the hard originalist, we are trying to do something like go back in a time machine and ask the Framers very specific questions about how we ought to resolve very particular problems.[41]...Soft originalism is a valuable project...For the soft originalist it matters very much what history shows; but the soft originalist will take the Framers' understanding at a certain level of abstraction or generality.[42]... The origin of constitutional doctrine is not principally in the understandings of the founders, but rather in the rules developed by the Supreme Court over generations and generations.[43]

Sunstein describes Bork's views in his book *The Tempting of America* as hard originalist.[44] In his book Bork says:

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[38] For a more complete list of sources that judges may refer to when interpreting Commonwealth statutes, refer to *Acts Interpretation Act 1901* (Cwlth) s 15AB.

[39] See RJ Pierce Jr "The Supreme Court's New Hypertextualism: An invitation to cacophony and incoherence in the administrative state" (1995) 95 Columbia LR 748 at 750.

[40] CR Sunstein "Five Theses on Originalism" 19 Harvard Jour of Law and Public Policy 311 at 312.

[41] *Ibid* at 312.

[42] *Ibid* at 313.

[43] *Ibid* at 314.

[44] *Ibid* at 312.

> All that counts is how the words in the Constitution would have been understood at the time [of its drafting]. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.[45]

It appears that it is Bork's narrowing of interpretation down to discovering the meaning of constitutional words as they were understood at the time of drafting and ignoring the jurisprudence subsequently developed around those words that distinguishes him as an extreme (or hard) originalist.

Indicators of extreme originalism include a judge only referring to sources disclosing the meaning of words at the time they were enacted and refusing to take account of judicial opinions or other materials or opinions about the meaning of the text, particularly in the light of post-enactment experience and opinions.

(c) Textualism

A textualist seeks to find the ordinary and natural meaning of provisions as revealed by their words, or text. Textualists dislike referring to legislative history and extrinsic materials. According to Merrill, textualism "tends to approach problems of statutory interpretation like a puzzle, the answer to which is found by developing the most persuasive account of all the public sources (dictionaries, other provisions of the statute, other statutes) that bear on ordinary meaning".[46]

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[45] RH Bork *The Tempting of America: The political seduction of the law* (Free Press, New York 1990) at 144.

[46] TW Merrill "Textualism and the Future of the *Chevron* Doctrine" (1994) 72 Washington University Law Quarterly 351 at 354.

Criticisms of textualism include that it offers a vehicle for the application of a judge's personal values in the guise of interpreting objective meaning. According to Merrill "the textualist interpreter does not *find* the meaning of the statute so much as *construct* meaning".[47] Justice Scalia has, with unintended irony, castigated originalism as enabling judges to pursue their own desires under the guise or delusion of pursuing unexpressed legislative intents, while at the same time arguing for the reasonable person standard for judging the textual meaning of constitutional provisions.[48] As we well know, the intentions, beliefs and foresight of the fictitious reasonable person are plumbed by the judge – without calling witnesses or evidence of any kind. Textualism has also been criticised for not being able to live up to its claim of objectivism because it enables different judges to refer to different dictionaries, judicial opinions or interpretation canons to find a different "plain meaning" to the same terms.[49] Thus, textualism can be readily manipulated to enable interpretations of text which are consistent with personally held judicial values.

Indicators of textualism include the judge referring to dictionary definitions, rules of grammar and interpretation canons to find the "objective" meaning of words.[50] The use of dictionaries is not a decisive indicator, but if the judge emphasises the language of the provision and its textual construction together with the use of interpretation canons to discern textual meaning, these combined indicate a textualist approach.

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[47] *Ibid* at 372.

[48] See JS Schacter "The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: implications for the legislative history debate" (1998) Stanford Law Rev 1 at 3.

[49] Pierce, *supra* note 39 at 765.

[50] *Ibid* at 750.

A textualist may also refer to other judicial opinion, and the usage of the term in question in a particular area of law.[51]

(d) Extreme Textualism

Extreme textualists adopt the same reasoning devices as the textualists, but will tend to dismiss any other interpretation method as being inappropriate. That is, they will tend to claim that textualism is the only appropriate method for discerning the meaning of legislation. Extreme textualists will also find linguistic precision where it does not exist and routinely attribute "plain meaning" to statutory language that most observers would characterise as ambiguous or internally inconsistent.[52] As Pierce points out, once an extreme textualist has divined the "plain meaning" she can ignore the legislature's intention that the term have a different meaning, that the plain meaning creates internal conflict with other provisions of the legislation or renders other provisions meaningless, that it will undermine agency efforts to further the legislative purpose as stated in the legislation, and the fact that agencies and the public relied on a contrary understanding of the term for decades.[53]

Scalia J argues that textualism is a doctrine of judicial restraint.[54] In fact the opposite is more likely to be the case. Merrill concludes, after making an empirical study of US Supreme Court decisions, that once a court grows comfortable with textualism – in which it becomes an autonomous interpreter that is not required to refer to extrinsic sources – "its creativity in matters of statutory interpretation begins to expand apace, exemplified perhaps most clearly by the proliferating use

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[51] *Ibid* at pp.726.

[52] *Ibid* at 752.

[53] *Ibid* at 763.

[54] A Scalia "Judicial Deference to Administrative Interpretation of Law" (1989) Duke LJ 511 at 521.

of canons".[55] Indeed, having fewer tools to work with, "the textualist becomes more imaginative in resolving questions of statutory interpretation".[56] And so rather than being a doctrine of restraint, textualism offers a means for greater judicial discretion for imposing judicially devised interpretative outcomes.

(e) Progressivism

Progressivism requires interpreting the Constitution in a way that represents the will and intentions of contemporary Australians.[57] It requires taking "full account of contemporary social and political circumstances and perceptions",[58] and incorporates evolutionary standards.[59] As examples of the application of this interpretation method, the High Court has found that although the founders would have intended s 80 of the Constitution (which requires trial by jury) to have meant male only juries, that meaning was inconsistent with the modern understanding.[60] The Court has also held that although the founders would have intended that adult suffrage only applied to adult men, it is now a term that must include adult women.[61]

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[55] *Supra* note 46 at 373.

[56] *Ibid.*

[57] *Theophanous v Herald & Weekly Times Ltd* (1993) 182 CLR 104 per Deane J at 173. However, see Haig Patapan's excellent critique of this approach and his questioning of the explicit and implicit claim by the Court that it is in a position to judge and give effect to shifting community values. H Patapan "Politics of Interpretation" (2000) 22 Sydney Law Review 247 at pp.263-66 and pp.267-68.

[58] *Theophanous, ibid* at 174.

[59] *Cheatle v R* (1993) 177 CLR 541. See generally Williams and Bradsen, *supra* note 9 at pp.102-05.

[60] *Cheatle v R, ibid.*

[61] *McGinty v Western Australia supra* note 23 per Toohey J at 200-01. See also McHugh J's rationale for progressivism in *Wakim, supra* note 26 at para 44:

> Indeed, many words and phrases of the Constitution are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they

The application of progressivism can be identified where a judge refers to contemporary standards as a measure of the meaning of a term. It includes taking judicial notice of current community standards and opinions.[62]

3. Brennan CJ and McHugh J's application of an interpretation canon in *Kartinyeri*

Brennan CJ and McHugh J's judgment appears first in *Kartinyeri*. They deployed a number of interpretation devices to avoid deciding the central issue, namely the meaning and purpose of the race power. Their essential task was to decide whether the *Hindmarsh Island Bridge Act* 1997 (Cwlth) (the 'Bridge Act') was constitutionally valid. In essence this required them "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former".[63] This involves a two stepped process: first, identifying the scope of the constitutional provision which grants power; second, identifying the character of the challenged statute to decide whether its subject-matter falls within the scope of the power grant.

Brennan CJ and McHugh J avoided the first step leaving a critical issue in an unnecessarily uncertain state. This omission was all the more significant as this was the first case before the court in which the challenged legislation relied solely on s 51(xxvi) for validity.[64] Consequently, they faltered in taking the second step. They ruled the Bridge Act valid on the basis of reasoning that relied on matters of form

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should apply to whatever facts and circumstances succeeding generations thought they covered.

[62] For a discussion on this see Patapan, *supra* note 57 at pp.263-71.

[63] *United States v Butler* 297 US 1 (1936) per Roberts J at 62.

[64] See *supra* note 3.

rather than substance. They claimed that the "only effect of the Bridge Act is partially to repeal the Heritage Protection Act".[65] This reduction of the Act to a single operation has resonance with the extreme textualist device of finding that challenged terms in a statute have a plain, unambiguous, singular and certain meaning. This enables the textualist to avoid inquiries into the history and statutory context of the terms. Similarly, finding the Bridge Act had a single operation allowed Brennan CJ and McHugh J to avoid examining the scope of s 51(xxvi) and avoid making a substantive inquiry into the rights, duties and privileges the Act affected.

(a) A strange turn of logic: The use and abuse of the Amending Rule

Let us return to the first claim made in this part – that Brennan CJ and McHugh J avoided deciding the meaning and scope of s 51(xxvi). On this point they were quite explicit. They said it was unnecessary and misleading for them to determine the nature and scope of s 51(xxvi) because:

> Once it is accepted that s 51(xxvi) is the power that supports Pt II of the Heritage Protection Act, an examination of the nature of the power conferred by s 51(xxvi) for the purpose of determining the validity of the Bridge Act is, in our respectful opinion, not only unnecessary but misleading. It is misleading because such an examination must proceed on either of two false assumptions: first, that a power to make a law under s 51 does not extend to the repeal of the law and, second, that a law which does no more than repeal a law may not possess the same character as the law repealed. It is not possible, in our opinion, to state the nature of the power conferred by s 51(xxvi) with judicial authority in a case

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[65] *Kartinyeri, supra* note 2 at para 11.

where such a statement can be made only on an assumption that is false.[66]

Ironically, the criticisms they made of the false assumptions themselves relied on the creation of false dichotomies. First, they suggested that a challenge to the Bridge Act must be based on the false assumption that a power to make a law under s 51 does not extend to the repeal of the law. It is possible, however, to accept that an Act that partially or wholly repeals another is unconstitutional without accepting the proposition that the power to make a law does not include the power to repeal the law.[67] Putting that more positively, even if the power to make a law includes the power to repeal it, this does not mean that a law must be valid *merely because* it is effecting a partial or total repeal. There is no doubt that the provisions granting power in the Constitution to enact legislation impliedly include the power to repeal and amend the legislation. This implication derives from a common law interpretation rule, which can be conveniently called "the amending rule".

Brennan CJ and McHugh J pointed out that the rule has had a long life.[68] In the case of ordinary statutes it implies that the power to

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[66] *Kartinyeri, supra* note 2 at para 20. See also para 7 and para 8 where they say consideration of the operation and effect of the Bridge Act "can be ascertained only by reference to the Heritage Protection Act, the operation of which it is expressed to affect".

[67] See Brennan CJ and McHugh J *ibid* at paragraph 15 where they say:

> To the extent that a law repeals a valid law, the repealing law is supported by the head of power which supports the law repealed unless there be some constitutional limitation on the power to effect the repeal in question. Similarly, a law which amends a valid law by modifying its operation will be supported unless there be some constitutional limitation on the power to effect the amendment. Thus in *Air Caledonie International v The Commonwealth*, the attempt to amend the *Migration Act* 1958 (Cth) by the *Migration Amendment Act* 1987 (Cth) failed because the amendment purported to insert a taxing provision in the principal Act contrary to s 55 of the Constitution.

[68] *Kartinyeri, supra* note 2 at para 12 where they refer to Sir Edward Coke's *Institutes of the Laws of England*, 36 (quoted from the 1797 edition) and *Blackstone's Commentaries*, 9th ed (1783), Bk 1 at 160.

make subordinate legislation under an Act includes the power to amend or repeal the subordinate legislation. In the case of the Constitution, it implies that constitutional power grants include the Parliamentary power to amend or repeal legislation under the power grant. In the case of statutes, the common law rule has been given statutory effect by Interpretation legislation. The first legislation to give legislative effect to the rule was the English Interpretation Act 1889 ss 37 and 39. It seems that prior to the enactment the power to amend and repeal had to be implied by common law rule or be expressly granted by statute.[69] The English Interpretation Act's expression of the amending rule is replicated in section 33(3) the Commonwealth *Acts Interpretation Act*.[70]

(i) The Amending Rule should not limit judicial review

The amending rule is a useful utility, otherwise every power grant would have to tediously include words to the effect that "this power includes the power to amend, repeal or partially repeal any [subordinate] legislation under this [power grant/Act]". But this useful rule should not be misused to avoid inquiries of substance regarding any issue of ultra vires or constitutionality. The amending rule is given only limited operation under the Interpretation Acts, and arguably also has either an equally limited operation in a constitutional context, or an even more limited operation, given the emphasis on issues of substance rather

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[69] SGG Edgar *Craies on Statute Law* (7th ed) (Sweet and Maxwell, London 1971) at 296.

[70] Section 33(3) states: "Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be constructed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument". In Acts prior to 1890 which authorise the making of rules, regulations or by-laws, a power of rescission or variation must, it would seem, have been given expressly or by necessary implication in order to authorise any alteration of the rules, etc. . .

than form. According to *Craies on Statute Law*[71] the result of the amending rule

> is to permit revocation of many kinds of rules and by-law without reference to Parliament. But the revoking instrument and any substituted rules are as much subject to judicial examination as the original rules.

Thus, the amending rule should not be invoked to limit judicial review of a repealing or amending Act. The amending or repealing Act should be reviewed in the same way as the principal Act. Putting the amending rule in a slightly different way, it should operate to deny a challenge to an Act's validity on the basis it is an amending or repealing Act and that the Constitution (or statute) makes no express mention of the power to amend or repeal the Act. The rule should therefore have a limited operation and should not inhibit any inquiry of substance into the nature of the rights, duties, powers and privileges which an amending or repealing Act changes, regulates or abolishes.

(ii) Characterising the amending Act

The second false assumption Brennan CJ and McHugh J mentioned in the quote above is that a challenge to the Bridge Act's validity must be based on the assumption that a law which does no more than repeal a law may not possess the same character as the law repealed. Care needs to be taken with this statement. Remember first that the Bridge Act did not simply repeal the Heritage Protection Act, rather it effected a "partial repeal".[72] So it was not a simple case of an Act simply repealing a statute outright. Second, it is wrong (as a matter of logic) to turn (what I believe to be a correct statement), namely statement (A) that a law that partially repeals a principal Act *may* in some cases not have

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[71] *Craies on Statute Law, supra* note 69 at 296.

[72] Per Brennan CJ and McHugh J in *Kartinyeri, supra* note 2 at para 9.

the same character as the principal Act; into statement (B) that statement (A) proceeds on the false assumption that a partially repealing law *cannot* have the same character as the principal Act.

Putting it another way, if I say that Betty, a child of blue eyed parents, does not have blue eyes, I am not proceeding on the false assumption that no children of blue eyed parents can have blue eyes. Certainly most partially repealing laws will have the same character as the principal Act they repeal, but not all will. It will take an inquiry into the substantive effect and operation of the principal Act after its partial repeal to find out whether or not it still retains a character that falls within the power grant. The inquiry would be into the rights, duties and privileges that the partially repealing law creates, changes, abolishes or regulates.

(b) A restricted characterisation of the Bridge Act

Having avoided making a decision about the nature and scope of s 51(xxvi), Brennan CJ and McHugh J set about the second task, namely to determine the character of the Bridge Act. They began by restating the characterisation test,[73] which is neatly described by Mason CJ in *Cunliffe v The Commonwealth*:

> There is authority for the proposition that, for the purpose of determining whether a law can be described as one "with respect to" a particular head of legislative power, the character of that law is to be determined by reference to its direct legal operation according to its terms. Thus, the character of the law is to be ascertained by reference to the nature of the rights, duties and privileges which it creates, changes, abolishes or regulates.[74] But

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[73] *Kartinyeri, supra* note 2 at para 7. See also Gummow and Hayne JJ at para 58.

[74] *Bank of N.S.W. v. The Commonwealth* ("the Bank Nationalization Case") (1948) 76 CLR 1 at 187 per Latham CJ; *Fairfax v. Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 per Kitto J, 16 per Taylor J; *Actors and Announcers Equity Association v.*

> this is not to deny the validity of a law which exhibits in its practical operation a substantial or sufficient connection with the relevant head of power.[75]

Brennan CJ and McHugh J characterised the Bridge Act as only having the effect of reducing the operation of the Heritage Protection Act.[76] This was insisted upon a number of times. At paragraph 17 they said that as "the Bridge Act has no effect or operation other than reducing the ambit of the Heritage Protection Act, s 51(xxvi) supports it", and at paragraph 19 they added that the "only effect of the Bridge Act is partially to exclude the operation of the Heritage Protection Act in relation to the Hindmarsh Bridge area". Gummow and Hayne JJ did not, however, share their restrictive characterisation of the Bridge Act. Gummow and Hayne JJ found that the Bridge Act "withdraws from the Minister the powers otherwise conferred by s 10 (and 12) of the Heritage Protection Act" and "removes from the Minister the power to take any action in respect of applications" under the Heritage Protection Act.[77] It also "changes what otherwise would be the continued operation of the Heritage Protection Act";[78] removes the plaintiffs' procedural rights;[79] "curtails the operation of another law of the Commonwealth [ie the Heritage Protection Act], not the enjoyment of any substantive common law rights";[80] "limits in a particular respect the declaration-making

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Fontana Films Pty. Ltd. (1982) 150 CLR 169 at 184 per Gibbs CJ, 201-202 per Mason J.

[75] (1994) 182 CLR 272 per Mason CJ at 294.

[76] Gaudron J appeared to agree with that characterisation by stating that the Bridge Act limited the field of operation of the Heritage Protection Act. *Kartinyeri, supra* note 2 at para 48.

[77] *Kartinyeri, ibid* at para 65, see also para 71.

[78] *Ibid* at para 68.

[79] *Ibid* at para 71.

[80] *Ibid* at para 72.

authority of the Minister under the Heritage Protection Act";[81] "removes any privilege conferred by the Heritage Protection Act upon Aboriginals or Aboriginal groups who applied or might apply seeking such declaration in respect of areas or objects in the Hindmarsh Island bridge area or the pit area";[82] and "imposes a disadvantage, of the nature identified above".[83]

How, exactly, did Brennan CJ and McHugh J characterise the Bridge Act as being within power? In answer it should first be noted that their "characterisation" of the Act was in fact no characterisation at all. They simply described the *procedural operation* of the Bridge Act – ie that it partially repealed the Heritage Protection Act. Second, it should be noted that they assumed, without giving any reasons, that the Heritage Protection Act was within power.[84] They then raised themselves on the shoulders of that assumption to claim that the partial repeal of the Heritage Protection Act must be within power. By doing this they avoided having to make any pronouncement on the scope of the race power. Third, they insisted that the Bridge Act had the effect of partially repealing, or *reducing*, the operation of the Heritage Protection Act.[85] They had to insist on this to avoid a claim that the Bridge Act was in fact *expanding* the operation of the Heritage Protection Act.

The significance of the final point can be illustrated this way. If, for example, the Heritage Protection Act allowed for the forced removal of Aboriginal people from certain sites, subject to compensation and appeal rights, and a subsequent Act repealed the provisions providing

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[81] *Ibid*.

[82] *Ibid*.

[83] *Ibid* at para 84.

[84] *Kartinyeri, supra* note 2 at para 11.

[85] *Ibid*.

for compensation and appeal rights, then it is plausible that the character of the Heritage Protection Act would be changed. So if, for example, the Court ruled that s 51(xxvi) only permits laws that positively discriminate in favour of Aborigines,[86] then it would be necessary to decide whether the partial repeal results in a positively or negatively discriminatory law. So the expansionist/reductionist dichotomy is in fact meaningless unless we first know what the meaning and scope is of the race power. It is only then that we can decide whether the partially repealed Act is of a character that falls within the race power.

(c) Conclusion

The reasons why Brennan CJ and McHugh J went to such lengths to avoid an examination of the meaning and scope of s 51(xxvi) can only be speculated upon.[87] What they did, however, was to deploy a device, which has a resonance with the extreme textualism. An extreme textualist will routinely deny that the text has any inherent ambiguity or inconsistency, so that the textualist is not faced with the task of referring to extrinsic material or historical and social context to resolve the ambiguity or inconsistency. The text is reduced to a singular "plain meaning" to avoid contextual inquires. Similarly, Brennan CJ and McHugh J reduced the Bridge Act to a singular, mechanistic role, ie to partially amend the Heritage Protection Act. By reducing the Bridge Act

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[86] Which Brennan J proposed was the situation in *The Tasmanian Dam Case* (1983) 158 CLR 1 at 242. See also Deane J at 273. I put the argument about s 51(xxvi) requiring laws that positively discriminate and the Bridge Act negatively discriminating, not because I necessarily agree with it, but to illustrate the problem with the expansion/reduction dichotomy regarding the validity of amending Acts.

[87] They may have felt that the case did not offer a fact scenario for building the jurisprudence. There was a considerable amount of controversy surrounding the case, leading to a Royal Commission into the claims of the Ngarrindjeri people, of whom the applicants were members, that the bridge area was a sacred site. The matter had come before the courts a number of times and a number of federal government initiated inquires were also made into the matter. See Kirby J, *Kartinyeri, supra* note 2 at paras 105-109.

to this singular character, they then claimed that it was unnecessary to inquire into its impact upon the rights and interests of the applicants. Their fixation on form over substance brought them dangerously close to the morally void universe of narrow positivism, which the Australian courts have regularly visited for much of the 20th, and late 19th centuries.[88]

4. Interpreting the meaning and scope of s 51(xxvi)

The other judgments in *Kartinyeri*, unlike Brennan CJ and McHugh J's judgment, did interpret the meaning and scope of the race power. Gummow and Hayne JJ took a textualist route, whilst Gaudron J placed emphasis on the fact that the words "for whom it is deemed necessary to make special laws" in s 51(xxvi) limit the scope of Parliamentary power.[89] She reached her conclusions by applying textualist and originalist interpretation methods. Kirby J made originalist references to the intentions of the authors of the race power and the 1967 amendment to conclude that the provision only permits laws that benefit Aboriginal people. He also reinforced his conclusion by referring to a presumption that the Constitution was adopted and accepted by the people of Australia on the basis that it is not intended to violate fundamental human rights and human dignity.[90] This parallels Gummow and Hayne JJ's reference to the common law presumption that statutes do not intend to interfere with common law rights, freedoms and immunities, which is discussed further below.[91]

Each of the judgments will now be considered in turn.

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[88] See chapter 3, which also appears as J Malbon "Natural and Positive Law Influences on the Law Affecting Australia's Indigenous People" (1997) 3 Aust Jour Legal History 1 at pp.25-38.

[89] *Kartinyeri, supra* note 2 at para 34.

[90] *Kartinyeri, ibid* at para 166.

(a) The Reasoning of Gummow and Hayne JJ: A retreat into textualism

Gummow and Hayne JJ took a textualist approach bordering on the extreme textualist. They raised doubts about the need to consider the constitutional history of s 51(xxvi)[92] and emphasised that the text of s 51(xxvi) controls its meaning.[93] To the extent they considered any constitutional history, it was limited to the 1967 amendment, and even then they disputed the claim that the referendum was aimed at providing the Commonwealth the power to enact only beneficial laws for Aborigines. The referendum led to the alteration of s 51(xxvi) so as to remove the following words that are struck through from the provision: "The people of any race~~, other than the aboriginal race in any State,~~ for whom it is deemed necessary to make special laws". Gummow and Hayne JJ stated that the referendum was about federalism and mentioned briefly that the Commonwealth did not pursue the option of repealing s 51(xxvi) altogether. They referred to the official 'yes' case for the 1967 referendum that was put to the electors by the Parliament[94] and concluded that it "emphasised considerations of federalism" and did "not speak of other limitations upon the nature of the special laws beyond confirming that they might apply to the people of the Aboriginal race 'wherever they may live' rather than be limited to the Territories".[95] They added that the amendment to the Constitution was proposed after

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[91] *Ibid* at para 89.

[92] *Ibid* at para 91.

[93] *Ibid* at para 90.

[94] Commonwealth Electoral Office, "Referendums to be held on Saturday, 27th May, 1967" (1967). Parliament was required under the *Referendum (Constitution Alteration) Act* 1906 (Cth), s 6A(1) (since replaced by the *Referendum (Machinery Provisions) Act* 1984 (Cth), ss 11(1) and (2)) to prepare a yes case only "there having been no opposition within the Parliament to the proposed alterations to the Constitution, it was necessary, in the procedures which followed, to prepare only the argument in favour of the proposed law to be distributed in pamphlet form to the electors. See Kirby J *Kartinyeri*, *ibid* at para 253.

[95] *Kartinyeri*, *ibid* at para 93.

learned advice that a complete repeal of s 51(xxvi) would be preferable to "any amendment intended to extend to the Aboriginals 'its possible benefits'".[96]

Their conclusion only tells half the story. The document setting out the yes case is not particularly lengthy, yet Gummow and Hayne JJ failed to mention its stated aim that the proposed amendment would remove the widely held belief that the unamended s 51(xxvi) discriminates in some ways against Aborigines.[97] Kirby J, on the other hand, makes a thorough examination of the history of the amendment and concludes that there was a clear desire by the Parliamentarians proposing the amendment to the electors to enable the Commonwealth to enact laws for the benefit of Aboriginal people.[98] Even a relatively limited examination of the history of the 1967 referendum reveals that it was about more than just federalism. It was also about improving the poor state in which many Aborigines were living as the result of decades of neglect and discrimination by State governments.

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[96] *Ibid.*

[97] Commonwealth Electoral Office, "Referendums to be held on Saturday, 27th May, 1967" (1967) at 11.

[98] Kirby J noted at para 147 that:

> the leaders of all of the major Australian political parties issued statements supporting the amendment to par (xxvi) and the repeal of s 127. The Prime Minister (Mr Holt), in his statement said that it was not acceptable to the Australian people that the national Parliament 'should not have power to make special laws for the people of the Aboriginal race, *where that is in their best interests*'. For the Federal Opposition, Mr Whitlam stated that the then provisions of the Constitution were 'discriminatory'. He pointed out the need to assist Aboriginal communities in the realms of housing, education and health, and stated that the Commonwealth must 'accept that responsibility on behalf of Aboriginals'. It was also vital, he argued, to remove the excuse 'for Australia's failure to adopt many international conventions affecting the welfare of Aborigines'. For the Australian Country Party, its Deputy Leader, Mr Anthony, explained that the amendment to the Constitution 'would give the Commonwealth Government, for the first time, power to make special laws *for the benefit of* the Aboriginal people throughout Australia'. For the Australian Democratic Labor Party, Senator Gair titled his statement 'End Discrimination -

Decontextualising the words of s 51(xxvi)

Gummow and Hayne JJ applied textualism with a rigour that allowed them to dice up the words and phrases of s 51(xxvi) and interpret each of them almost as if they were independent of each other. Recall the provision provides the Federal Parliament the power to make laws with respect to the "people of any race for whom it is deemed necessary to make special laws". Gummow and Hayne JJ claimed that the "requirement that the Bridge Act be 'special' [under s 51(xxvi)] does not relate to the matter of necessity".[99] They relied on dicta from the *Native Title Case* for this proposition.[100] However, the context in which the Court made that statement in the *Native Title Case* was to make it clear that it was for Parliament, and not the courts, to deem it necessary to make a special law. Consequently in the *Native Title Case* emphasis was placed on the fact that "the special quality of a law must be ascertained by reference to its differential operation upon the people of a particular race, not by reference to the circumstances which led the Parliament to deem it necessary to enact the law".[101] The point of emphasis being made was that the Court did not understand s 51(xxvi) as evoking a "judicial evaluation of the needs of the people of a race or of the threats or problems that confronted them in order to determine whether the law was, or could be deemed to be, 'necessary'".[102] That would obviously invite the Court to substitute its own political evaluation for that of Parliament's. The Court did allow that it may have some supervisory jurisdiction to examine the question of necessity against the possibility of a manifest abuse of the races power, but

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Vote "Yes"' and explained that his Party had 'adopted the slogan "Vote Yes for Aboriginal Rights"'.

[99] *Ibid* at para 83.

[100] *Native Title Act Case supra* note 3 at 460-461 citing *Koowarta v Bjelke-Petersen*, *supra* note 3 at pp.186, 245 and 261.

[101] *Supra* note 3 at pp.460-61.

[102] *Ibid* at 460.

decided not to further consider the possibility as it was not relevant to the matter before them.

Gummow and Hayne JJ effectively used the Court's concern in the *Native Title Case* about avoiding making political judgments to substantially narrow any scope for judicial review. They reasoned that so long as the law treats people differently on the basis of race it is *ipso facto* valid, Parliament's decision-making process regarding the enactment of the law being for the most part irrelevant for the purposes of judicial review. This point is underlined by Gummow and Hayne JJ's emphasis on the term "special law" as granting power to enact racial laws, and not as offering grounds for challenging the validity of such legislation:

> the requirement of differential operation, spelled out from the use of the phrase 'special laws', is a criterion of validity not a cause of invalidity. It is 'of the essence of' a law supported by s 51(xxvi) 'that it discriminates between the people of the race for whom the special laws are made and other people'.[103]

Thus, they claimed, s 51(xxvi) grants Parliament the power to enact special laws, that is racial laws. They are laws that treat people differently because of their race, and it does not matter whether that law is beneficial or otherwise. Presumably such laws as the racist laws of South Africa during apartheid, the Third Reich, the United States before the Civil Rights Act or of the Australian States regarding Aborigines and Torres Strait Islanders would all fall within their description of valid special laws. Any concerns one may have about the frightening potential of this interpretation is dismissed by Gummow and Hayne JJ with the statement that:

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[103] *Kartinyeri, supra* note 2 at para 86, ; quoting from *Koowarta v Bjelke-Petersen supra* note 3 at 261.

> Extreme examples, given particularly the lessons of history (including that of this country), may be imagined. But such apprehensions cannot, in accordance with received doctrine, control what otherwise is the meaning to be given today to heads of federal legislative power.[104]

The "manifest abuse" test

Gummow and Hayne JJ did however offer one ground for judicial review, namely the manifest abuse test. But they left it far from clear as to how much of a restraint on Parliamentary power the test provides. They stated that the term "deemed necessary" restrains Parliament from acting in "manifest abuse" of its power of judgment to deem it necessary to enact the law.[105] This raises the question; in what circumstances would Parliament be acting in manifest abuse of its powers of judgment? In answer, they suggest that the manifest abuse test somehow relates to the common law's presumption that statutes do not intend to interfere with common law rights, freedoms and immunities.[106] The presumption may, however, be rebutted if the legislative intention to interfere with the rights is "clearly manifested by unmistakable and unambiguous language".[107] Second, Gummow and Hayne JJ reminded us that the Court can judicially review legislation on the basis of the *Marbury v Madison* doctrine.[108] This point turns on itself because there must first be some basis in the Constitution for judicial review. Finally, they quote Dixon J as saying that the

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[104] *Ibid* at para 87.

[105] *Ibid* at para 82.

[106] *Ibid* at para 89.

[107] *Ibid*.

[108] *Ibid*.

Constitution assumes the rule of law as its basis.[109] They admitted that the implications of this have not been considered by the Court and provide no further enlightenment on the statement.

The upshot of this is that the manifest abuse test appears to rest on some vague and unarticulated notion of the rule of law. Kirby J believed it to be a weak test. He raised concerns about the "inherent stability" of the test, stating that by "the time a stage of 'manifest abuse' and 'outrage' is reached, courts have generally lost the capacity to influence or check such [racist] laws".[110] It is possible, however, that Gummow and Hayne JJ's manifest abuse test is the harbinger of a test providing substantial protection of common law rights; however, they offered no further enlightenment on their understanding of the scope and applicability of the test. However, to flag possibilities I will explore in the next chapter, their test does have profound potential to ensure the protection of the interests of racial minorities. As a starting point it can be noted that the Constitution is a statute – admittedly of a special kind – that was enacted by Westminster after the approval of the electors in the various Australian colonies in 1899-1900. Gummow and Hayne JJ's manifest abuse test incorporates the presumption that statutes do not intend to interfere with common law rights, freedoms and immunities.[111] As the Constitution is a statute, it follows that s 51(xxvi) should be read with the presumption that there is no intention to interfere with common law rights, unless the provision expressly, and unambiguously states otherwise. No such intention to interfere with common law rights is expressed in s 51(xxvi). Even if we refer to the Constitutional debates to divine the intentions of the founding fathers, we gain no clear indication of an intention to undermine common law rights, although admittedly the provision was included at a time when

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[109] *Ibid*.

[110] *Ibid* at para 163.

[111] *Ibid* at para 89.

there was a strong belief in racial superiority.[112] In any event the intention behind the 1967 amendment was for a power that enabled laws to benefit Aborigines, and no mention was made of interfering with common law rights.[113] Despite the underlying intentions of the provision's authors, the intention to undermine common law rights must be clearly expressed in the words of the provision itself to rebut the presumption, and no such intention is expressed in the words of s 51(xxvi).[114]

The common law is organic and its principles regarding rights, freedoms and immunities are capable of continual development. It may well be capable of adopting and adapting international law developments regarding fundamental human rights. Brennan J stated in *Mabo (No.2)* that the "common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights".[115] In *Kartinyeri* Kirby J stated that the common law forbids violations of fundamental human rights and human dignity, and that in "the contemporary context it is appropriate to measure the prohibition by having regard to international law as it expresses universal and basic rights. Where there is ambiguity in the common law or a statute, it is legitimate to have regard to international law".[116]

Further, and by way of added emphasis, Gummow and Hayne JJ add, regarding the manifest abuse test, that the Constitution is framed in accordance with the rule of law. There is a deal of debate about the

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[112] Chapter 5, and J Malbon "The Race Power Under the Australian Constitution" *supra* note 6 at pp.92-98.

[113] See Kirby J, *supra* note 2 at paras 142-147 and 152.

[114] *Coco v The Queen* (1994) 179 CLR 427 at 437.

[115] *Supra,* note 11 at 42.

[116] *Kartinyeri*, *supra* note 2 at para 166.

extent and meaning of the rule of law, but it assumes as a minimum compliance with due process (as opposed to the arbitrary exercise of power) and equality of treatment before the law.[117] The common law tradition regarding the rule of law well precedes modern democracy to at least the 13th Century and Magna Carta,[118] and includes principles laid down in the Bill of Rights of 1689 regarding prohibitions against excessive bail and penalties, and cruel and unusual punishments.

As Gummow and Hayne JJ mentioned, the principle of *Marbury v Madison* places a duty on the courts to ensure the legislature complies with the Constitution. This does not mean that the Courts can substitute their political judgement for that of Parliament about what legislation ought to be enacted, but the Courts are obliged to ensure, to the extent that proposed legislation affects common law rights, that Parliament acts on a rational basis. Gaudron J confirmed this proposition in *Kartinyeri* when she said that "a law which deals differently with the people of a particular race and which is not reasonably capable of being viewed as appropriate and adapted to a difference of the kind indicated has no rational basis and is, thus, a 'manifest abuse of the races power'".[119] Therefore, on the basis of the elaboration of the manifest abuse test just outlined, legislation enacted under the race power must not interfere with common law rights, freedoms and immunities, and the rule of law. The common law is not stagnant, and is capable of developing along the lines of fundamental international human rights principles. And Parliament must ensure

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[117] See P Parkinson *Tradition and Change in Australian Law* 2nd ed (Law Book Co, Sydney 2001) 96-98.

[118] See D Clark "The Icon of Liberty: The status and role of *Magna Carta* in Australian and New Zealand Law" (2000) 24 MULR 866 Clark mentions that the *Magna Carta* has been evoked in various cases regarding principles of sentencing, the right to trial according to law, prohibitions on arbitrary detention, the separation of powers, and the prohibition against cruel and unusual punishment. See part iv of his chapter.

[119] *Kartinyeri*, *supra* note 2 at para 42.

that any law that differentiates on the basis of race does so on some rational basis.

Again, it is a matter of speculation as to how effective Gummow and Hayne JJ intended their manifest abuse test to be. Their extreme textualism, however, builds their interpretation of s 51(xxvi) upon a highly unstable foundation. Textualism offers the illusion of stability. Because the text is unchanging it might be thought that the meaning of the text is unchanging. In reality, our understanding of text is socially and historically contingent. The term "race", for example, has undergone tremendous transformation during the 20th century – a point ignored by Gummow and Hayne JJ.[120] In addition, as the textualist judge has fewer sources external to the text, such as extrinsic materials, to restrain his or her views about the meaning of the text, the judge has greater scope to impose judicially derived interpretive outcomes.

(b) Gaudron J – A minimalist amendment

Gaudron J applied a mix of non-extremist textualist, non-extremist originalist and progressivist approaches to interpreting s 51(xxvi). Her textualism led her to conclude that the provision does not simply apply for the benefit of Aboriginal people, as Kirby J concluded. She applied originalism to focus primarily on the intentions underlying the 1967 referendum, but concluded the intentions expressed at the time were subject to the explicit words of the text of s 51(xxvi). Here she noted the sharp disjuncture between the stated purpose behind the 1967 referendum and the words of s 51(xxvi). As Gaudron J noted, the provision makes no mention of Aborigines (in fact the mention of them was removed), nor does it say anything about a requirement that laws be non-detrimental.[121] So although the purpose of the legislature in

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[120] See generally Malbon, *supra* note 6.

[121] *Kartineryi*, *supra* note 2 at para 29.

proposing the amendment to the electorate for their approval at a referendum was to enable the Commonwealth to enact laws for the benefit of Aborigines, s 51(xxvi) does not make any mention of that requirement. In addition the words of the provision do not suggest that Parliament's power to make laws regarding people of the "Aboriginal race" differs in any way from its power regarding other races. The Parliamentary and other debates in 1967 are silent on the issue of the intended scope of an amended s 51(xxvi) regarding non-Aboriginal racial groups. It seems that the matter was not given much, if any, consideration at the time.

An interpreter is therefore left with the plain words of s 51(xxvi), which support Gaudron J's conclusion that:

> The 1967 amendment was one that might fairly be described in today's terms as a "minimalist amendment". As a matter of language and syntax, it did no more than remove the then existing exception or limitation on Commonwealth power with respect to the people of the Aboriginal race. And unless something other than language and syntax is to be taken into account, it operated to place them in precisely the same constitutional position as the people of other races.[122]

And that position was established when the Constitution was written and enacted at the turn of the 19th and 20th centuries. There is little doubt that some, at least, of the Constitution's founders intended that the race power would enable the Federal Government to enact laws that members of affected racial groups would consider to be detrimental.[123] However, as Gaudron J found, the words "for whom it is deemed necessary to make special laws" in s 51(xxvi) "must be given some

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[122] *Ibid* at para 29.

[123] See chapter 5 and J Malbon "The Race Power Under the Australian Constitution" *supra* note 6 at pp.87-94.

operation. And they can only operate to impose some limit on what would otherwise be the scope of s 51(xxvi)".[124] As Gaudron J puts it:

> The criterion for the exercise of power under s 51(xxvi) is that it be deemed necessary - not expedient or appropriate - to make a law which provides differently for the people of a particular race or, if it is a law of general application, one which deals with something of "special significance or importance to the people of [that] particular race"[125]. Clearly, it is for the Parliament to deem it necessary to make a law of that kind. To form a view as to that necessity, however, there must be some difference pertaining to the people of the race involved or their circumstances or, at least, some material upon which the Parliament might reasonably form a political judgment that there is a difference of that kind.[126]

Gaudron J added that two things follow from this criteria. The first is "that s 51(xxvi) does not authorise special laws affecting rights and obligations in areas in which there is no relevant difference between the people of the race to whom the law is directed and the people of other races".[127] Second, "the law must be reasonably capable of being viewed as appropriate and adapted to the difference asserted".[128] Using this test it is conceivable that the Federal Parliament would have had the power to enact the "protectionist" legislation that was enacted by the States in the 19th century and for much of the 20th century if at the time s 51(xxvi) was first enacted it included the power over Aborigines as it does now. The protectionist legislation of the States confined many

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[124] *Kartinyeri*, *supra* note 2 at para 34.

[125] *Native Title Act Case* (1995) 183 CLR 373 at 461.

[126] *Kartinyeri*, *supra* note 2 at para 39. See also Kirby J at para 155 where he said "The test of necessity in par (xxvi) is a strong one. It is to be distinguished from advisability, expedience or advantage. Its presence in par (xxvi) indicates that a particular *need* might enliven the *necessity* to make a special law."

[127] *Ibid* at para 41.

[128] *Ibid*.

Aboriginal and Torres Strait Islander people to reserves, restricted their right to marry, led to the forced removal of their children and imposed numerous other restrictions on their fundamental human rights.[129] The widely held belief when the Constitution came into force was that some races were biologically and intellectually superior to others. Given the predominance of that belief, Parliament might have reasonably formed the political judgement earlier in the 20th century that the inferior Aboriginal races needed special legislation to "protect" them.[130]

Experiences of the 20th century, as Kirby J pointed out, discredited the widely held belief in racial superiority. So, in the early part of the 20th century it was believed that Aborigines were racially inferior. The relevant difference between Aborigines and non-Aborigines was believed to be their biological and intellectual inferiority, which (if the Federal Government had the power over Aborigines) would have meant that protectionist legislation would be viewed as appropriate to the difference asserted. However, on Gaudron J's reasoning, the Federal Parliament presently has no power to enact protectionist legislation because belief in racial superiority is now discredited. The general belief now is that Aborigines, relative to the non-Aboriginal population, suffer poor health and education standards and high imprisonment rates because of a long history of systemic discrimination, and not because of any inherently inferior racial characteristics.[131] Thus, there is no relevant racial difference justifying protectionist or negatively discriminatory legislation.[132] There is, however, justification for legislation discriminating in favour of Aborigines to the extent that it overcomes the social disadvantages which have been created by the long history of systemic negative discrimination.

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[129] Chapter 5 and Malbon *supra* note 6 at 102.

[130] *Ibid* at pp.87-89.

[131] *Ibid* at pp.108-09.

Gaudron J applied progressivism to interpreting s 51(xxvi) to the extent that she concluded that it had a temporal operation. She stated that the scope of s 51(xxvi)

> necessarily varies according to circumstances as they exist from time to time. In this respect the power conferred by par (xxvi) is not unlike the power conferred by s 51(vi) to legislate with respect to defence[133]. And as with the defence power, a law that is authorised by reference to circumstances existing at one time may lose its constitutional support if circumstances change.[134]

(c) Kirby J – Putting the words in social and historical context

Kirby J applied both non-extremist originalism and progressivism, so as to allow him to contextualise the meaning and scope of s 51(xxvi).[135] He undertook an extensive analysis of the history regarding the adoption and amendment of the provision, and considered the intentions underlying the original drafting and the amendment. He concluded, particularly from the intentions underlying the 1967 amendment, that the provision was designed for the benefit of Aborigines. In applying progressivism, he referred to an interpretative principle which requires the Court, when faced with an ambiguous provision, to adopt a meaning that conforms to the principles of universal and fundamental rights

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[132] *Ibid* at 110-12.

[133] See with respect to the changing scope of the defence power, *Farey v Burvett* (1916) 21 CLR 433 at 441-443 per Griffith CJ, 453-455 per Isaacs J; *Andrews v Howell* (1941) 65 CLR 255 at 278 per Dixon J, 287 per McTiernan J; *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 161-163 per Williams J; *Victorian Chamber of Manufactures v The Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 347 at 399-400 per Williams J; *Stenhouse v Coleman* (1944) 69 CLR 457 at 471-472 per Dixon J; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 195, 197, 199 per Dixon J, 207 per McTiernan J, 222-223, 227 per Williams J, 253-255 per Fullagar J, 273-274 per Kitto J; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 596-597 per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 484 per Brennan and Toohey JJ.

[134] *Kartinyeri, supra* note 2 at para 43.

[135] See for example his historical analysis from paras 133-47; and para 154.

rather than one that departs from those principles.[136] He suggested that these principles are contemporary in nature, and that in defining them it is appropriate to have regard to current international law principles to the extent they refer to universal and basic rights.[137] Kirby J's progressivism also led him to conclude that the requirement under s 51(xxvi) that laws be deemed "necessary" and be "special" sets a criterion of limitation that must be given meaning according to the understanding of the Constitution as read today.[138] The terms "necessary" and "special" are not to be understood as it might have been in 1901, he said, as such "a static notion of constitutional interpretation completely misunderstands the function which is being performed".[139]

Kirby J concluded from his originalist analysis of s 51(xxvi), that the provision does not permit laws that are detrimental to, and adversely discriminatory against, people of the Aboriginal race of Australia by reference to their race.[140] He relied heavily on the stated purpose of the 1967 amendment to draw that conclusion.[141] Kirby J's beneficial test is not, however, as robust as it may first appear. In whose opinion, for instance, does the law benefit the people affected by it? Presumably that judgement should be left to Parliament. The State

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[136] *Kartinyeri*, *ibid* at para 166.

[137] *Ibid.*

[138] *Ibid* at para 155.

[139] *Ibid* at para 156.

[140] *Ibid* at para 176.

[141] It is interesting to note that Kirby J has disclaimed himself as an originalist. In an article "Constitutional Interpretation and Original Intent: A form of ancestor worship?" (2000) 24 MULR 1 he said at p.8 that "I want to add a few words as to why history and original intent provide poor guides for the task and why it is incumbent on us to construe the Constitution as a living document so that (as far as its words and structure permit) it serves effectively the governmental needs of contemporary Australians". Yet Kirby J makes prolific use of history and reference to extrinsic material to identify the original intention of the founders when drafting the Constitution and the views of the Parliamentarians who enacted the legislation to put the 1967 referendum to the Australian electors.

Parliaments in the past enacted legislation that seriously undermined the most basic and fundamental rights of indigenous people on the basis that it was for their protection. Parliament would no doubt have argued that the forced removal of Aboriginal children from their mothers was a beneficial law. The problem with the beneficial test is that the most draconian laws can be enacted with the (plausible) claim that they benefit the people they affect.

5. Conclusion

Kartinyeri offers frightening potential if it is the harbinger for a narrow and extreme textualist reading of the race power. This may well allow judges to retreat from their responsibility to interpret the power in a way that gives effect to the entitlement of all people in Australia, regardless of their race, to the protection and the rule of law. The Constitution reflects the enduring ambitions of the Australian people, both at the time of federation and since that time, for a just and fair society. The Constitution was also enacted by the Parliament of Westminster in 1900 on the assumption that it entitles all people within Australia to the benefits and entitlements of the rule of law and the enjoyment of fundamental common law rights. The courts have the duty to ensure those enduring values of the people are not undermined. There are times when the immediate and temporary impulse of the people, via Parliament, is to inflict an arbitrary and unjust exercise of power upon a racial group. This impulse must, however, give way to the larger ambitions of the people for an inclusive and democratic society that respects the fundamental rights of all the people. The courts have the final responsibility for ensuring the enduring ambitions of the people are not undermined by temporary demands for the denigration of the fundamental rights and entitlements of a racial minority. And it is a failure of the duty for the courts to avoid judicial review by hiding behind a textualist wall.

Kartinyeri also offers the possibility for the development of a robust jurisprudence that offers the grounds for giving effect to the enduring ambitions of the people for a just and fair society. Such jurisprudence would make it less likely that the courts will in the future tolerate a recurrence of the wrongs the law has inflicted upon our indigenous people and other racial groups in the past. It will also lessen the chances of the courts greasing the wheels of racial segregation, as happened in South Africa.

Chapter 5

The Race Power under the Australian Constitution: altered meanings

> There are many words which have been made to suffer constant misuse; but there is none which suffers more abundantly, or with sadder consequences, than the word Race.
>
> Ernst Barker[1]

1. Introduction

The meaning and scope of the race power - s 51(xxvi) - is unsettled. In the sole case in which the High Court was required to directly consider the issue, *Kartinyeri v The Commonwealth*[2] (the "*Kartinyeri*"), it was unable to reach a majority view on the provision's meaning, and the tests that should be applied for deciding statutory validly under the provision.[3] This chapter considers the meaning and scope of the provision in the context of the decision. It argues that a critical term for understanding s 51(xxvi)'s meaning is 'race', which appears in the provision.

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[1] E Barker "National Character" quoted by I Hannaford "Race: The history of an idea in the West" (Woodrow Wilson Centre Press and Johns Hopkins University Press, Washington 1996) at an unnumbered preliminary page.

[2] *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

[3] The meaning of the provision has also been considered in passing in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, per Gibbs CJ at 186, per Stephen J at 209-210, and per Murphy J at 242; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1, per Gibbs CJ at 110 and per Murphy J at 203; *Gerhardy v Brown* (1985) 159 CLR 70 at 138 and per Deane J at 273; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 per Gaudron J at 56; *Native Title Act Case* (1995) 183 CLR 373 at 461; *Kruger v The Commonwealth* (1997) 71 ALJR 991 at 1035.

This chapter also argues that the literalist method for constitutional interpretation is inadequate to the task of interpreting s 51(xxvi) because of the complex nature of the term 'race'. Literalists may too readily assume that the term has a readily discernible plain and natural meaning. But the term's apparent plainness is deceptive. Its complexity and truer meaning can only be appreciated in its social and historical context. For that reason, an inquiry into the meaning of the race power requires considering the historical circumstances of the creation of the provision and the meaning that was attached to race. The term race then needs to be compared with the historical context of the provision's amendment in 1967, and with the meaning attributed to the term today.

Once the meaning of 'race' is considered, the meaning of s 51(xxvi) itself can be better understood. It is then necessary to devise a test for determining the validity of statutes relying on s 51(xxvi) as a source of power. The test needs to maintain fidelity to the express words of s 51(xxvi) while giving effect to its underlying meaning. A number of the members of the Court in *Kartinyeri* proposed tests for determining constitutional validity. It is submitted that the one that best achieves the competing objectives of textual fidelity and giving effect to underlying meaning is that proposed by Gaudron J. Her test has an antecedence in the US and Canadian equal protection jurisprudence. Although s 51(xxvi) is not an equal protection clause, it parallels the equal protection requirements by requiring (it is argued) a rational connection between the process of deeming a group of people a race and the legislative measures regarding the group. In other words, the characteristics that are purported to define a group as a race must be the rational subject of legislative attention. This proposition is more fully canvassed in Part 6.

Part 2 considers the various methods the High Court has adopted in interpreting the Constitution and argues that a literalist approach is unsuited for interpreting s 51(xxvi). It is argued instead, in Part 3, that

the broader historical circumstances of the creation and evolution of the provision must be considered. Part 4 proceeds to consider the historical circumstances of the creation of the race power, and the general meaning that was attached to the term race at federation. Part 5 compares the meaning of the term at federation with that given in 1967 when the race power was amended, and the current meaning given to race. Finally, Part 6 considers the appropriate test for applying s 51(xxvi).

2. Constitutional interpretation

As we saw in the previous chapter, a discussion on the interpretation of s 51(xxvi) requires some common understanding of the appropriate method for interpreting constitutional provisions. Also, as mentioned in the previous chapter, the High Court has employed a number of methods for Constitutional interpretation.[4] Williams and Bradsen argue that the Court has adopted three methods for interpretation: original intent, textualism and 'living force', and that the Court has not settled on one method at the exclusion of the others.[5] The difference between the various interpretation methods is not limited to issues of emphasis, they also differ on the bounds of relevant evidence in searching for intent. A literalist will generally permit less evidence for determining author intent than an originalist. A literalist will be reluctant to look beyond the written text of the Constitution and judgments that have considered the written text. An originalist is generally keen to look beyond the text to historical and other circumstances surrounding the writing of the text. These boundaries are not as fixed as may first appear, and will often vary with the

[4] J Williams and J Bradsen "The Perils of Inclusion: The Constitution and the Race Power" (1997) 19 Adel LR 95 at 97.

[5] J Williams and J Bradsen, *ibid*. See also WA Wilson, "Trials and Try-ons: modes of interpretation" (1992) 13 Statute Law Review 1.

circumstances. For example, procedural provisions like the one dealing with the retirement age for High Court judges[6], are less likely to involve the need to proceed particularly far from the bounds of the text regardless of which interpretation method is applied. Broader and more obscure provisions, like the race power, are likely to require relying on more than the text for discovering the underlying intention for the text. This may explain to some extent why the High Court has used the various interpretation methods interchangeably without rigorously sticking to any one method.

How then should s 51(xxvi) be interpreted? In *Kartinyeri*, members of the Court, unsurprisingly, differ on the appropriate interpretation method.[7] Gummow and Hayne JJ tend towards a literalist approach while Gaudron J and Kirby J each rely less on literalism. Gaudron J reads s 51(xxvi) in broad contextual terms, while Kirby J is prepared to consider the historical context in which the provision was created and amended.[8] Brennan CJ and McHugh J avoid directly confronting the issue of constitutional interpretation as they consider it is not at issue.

Gummow and Hayne JJ, in inclining towards a literalist approach, emphasise that the constitutional text must always be controlling.[9] Kirby J also emphasises the significance of the constitutional text by stating that the 'text is the law'[10], but does not see that paying due homage to the text should detract from examining the historical circumstances of the creation of the text.[11] Gummow and Hayne JJ underline their literalist tendencies by expressing doubts about the

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[6] Section 72 of the Constitution.

[7] *Kartineryi*, *supra* note 2.

[8] See *Kartinyeri*, *ibid* per Kirby J at paras 132-147 and paras 159-165.

[9] *Ibid* at para 90.

[10] *Ibid* at para 132.

[11] *Ibid* at para 132.

necessity for considering the circumstances of the enactment of the 1967 referendum legislation for determining the meaning of the amended race power.[12]

Literalists are reluctant to proceed beyond the bounds of the text because they consider that "the Constitution is to be interpreted by reading its words according to their natural sense and in documentary context, and then giving to them their full effect".[13] Literalists assume that author intent can generally be revealed in the plain words the author chooses to express his or her intent. One problem with this is that it assumes that the author and interpreter will broadly share the same world view. That is, in a general sense, that a shared view exists between the author and the interpreter as to what the relevant words mean. This assumption, however, becomes more problematic with time. The more distant the time between writing and interpretation, the greater the risk of a changed world view between author and interpreter leading to increased chances for 'misinterpretation'. That is, the founders' assumptions about the meaning of their written words in the Constitution may well not be shared by an interpreter some century or so later. It will be argued in this chapter that the race power is particularly prone to different assumed meanings by the authors and interpreters because the term 'race' has transformed in meaning, partly as a result of the traumatic experiences of the 20th century regarding race, and advancements in the pure and social sciences.

The problems arising from applying a literalist approach to s 51(xxvi) can be demonstrated by searching for the plain and natural meaning of 'race'. The term derives from the French 'rasse' and Italian 'razza', which together with the Spanish and Portuguese 'raza' probably

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[12] *Ibid* at para 91.

[13] G Craven "Cracks in the Facade of Literalism: Is there an engineer in the house?" (1992) 18 MULR 540 at 541.

derive from the Arabic 'rá's' meaning head, beginning, origin.[14] According to the Oxford English Dictionary, the term has been in regular use at least since the 16th century, and has been used to connote an extraordinary range of meanings, including 'A group of persons, animals, or plants connected by common descent or origin', 'A limited group of persons descended from a common ancestor; a house, family, kindred', 'A tribe, nation, or people, regarded as common stock', 'A group of several tribes or peoples, regarded as forming a distinct ethnical stock', and 'One of the great divisions of mankind, having certain physical peculiarities in common'.[15] A final definition offered by the Dictionary is particularly wide, as it encompasses 'A group or class of persons, animals, or things, having some common feature or features'. A subset meaning attributed to this definition is 'A set or class of persons' for which the dictionary attributes usage of the term to a number of authors over the centuries who at various times have referred to a race of idle people, the race of learned men, the race of poets and the two races of men: the men who borrow and the men who lend.[16]

The extraordinary diversity of the term 'race' in Australian usage is confirmed by the *Macquarie Dictionary* which offers the following definition:

> **1.** a group of persons connected by common descent. **2.** a population so connected. **3.** *Ethnology* a subdivision of stock, characterised by a more or less unique combination of physical traits which are transmitted in descent. **4.** the state of belonging to a certain ethnic stock. **5.** *Zoology* a variety; a subspecies. **6.** a

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[14] E Klein *A Comprehensive Etymological Dictionary of the English Language* (Elsevier Publishing Co, Amsterdam 1971) under term 'race'.

[15] *The Oxford English Dictionary* 2nd ed (Clarendon Press, Oxford 1989) at 69.

[16] *Ibid.*

> natural kind of living creature: *the human race; the race of fishes*. **7.** any group, class, or kind, especially of persons. . .[17]

It is, of course, not uncommon for a term to have multiple meanings, and usually common sense and experience will direct the interpreter to the most appropriate meaning for commencing the task of interpretation. The problem with 'race' is that the starting point is not as apparent as may first appear. Some hints at the difficulty of the task can be found in summary form in the *Fontana Dictionary of Modern Thought* under its consideration of the meaning of 'race':

> **race.** A classificatory term, broadly equivalent to subspecies. Applied most frequently to human beings, it indicates a group characterized by closeness of common descent and usually also by some shared physical distinctiveness such as colour of skin. Biologically, the CONCEPT has only limited value. Most scientists today recognize that all humans derive from a common stock and that groups within the SPECIES have migrated and intermarried constantly. Human populations therefore constitute a GENETIC continuum where racial distinctions are relative, not absolute.. . It is also acknowledged that visible characteristics, popularly regarded as major racial pointers, are not inherited in any simple package and that they reflect only a small proportion of an individual's genetic make-up.. . Socially, race has a significance dependent not upon science but upon belief. Men depict themselves and see one another in terms of groups which, however frail their objective basis, thereby assume social importance.[18]

These observations point to the lack of an objective reference point for defining race. That is, the term is socially determined, and is relative to

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[17] *The Macquarie Concise Dictionary* 3rd ed (Macquarie Library Pty Ltd, Sydney 1998) under definition of 'race'.

[18] A Bullock and O Stallybrass (eds) *The Fontana Dictionary of Modern Thought* (Fontana/Collins, 1979 at 520.

the time and place where the determination is made. The highly relative (and inflammatory) nature of racial categorisations has been illustrated in recent times. The racial genocide conducted in Rwanda and Burundi involved the Hutu and Tutsi enthnic groups which were barely distinguishable, partly because intermarriage between the groups had been common. Both groups spoke the same language, could not be readily distinguished by appearance (although the Tutsi were usually taller) and both lived together in settlements before the genocide took place.[19] Banton notes that often the distinction between 'racial' or 'ethnic' groups can be barely transparent:

> It was reported that when travellers were stopped at road blocks in Yugoslavia at the beginning of the conflict they might be asked to recite the Lord's Prayer, because although they spoke a common language Serbs and Croats tended to use different words for 'bread' in the plea 'give us this day our daily bread'. In Rwanda people were required to carry an identity card which specified their ethnic group;[20]

The Nazis had similar problems identifying Jews. For although some Nazis claimed that Jews had different head and facial structures to non-Jews which confirmed their biological inferiority, the Nazis nevertheless required Jews to wear Star of David armbands and to carry identity papers so they could be distinguished.

This is not to suggest that different groups in society do not have distinct traditions, language, shared history and identity, but it does mean that the term 'race' lacks the objective and plain and natural meaning that may first be supposed. It is, in fact, a term which is highly relative in time and place. A group that may be thought of as a distinct racial group a century ago may not be considered as such

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[19] M Banton *Racial Theories* 2nd ed (Cambridge Uni Press, Cambridge 1998) at 210.

[20] *Ibid* at 212.

today. Similarly, a group that may be thought of as a distinct racial group in one country may not be thought of as such in another. Thus there is a danger in a literalist assuming that their understanding of the plain and natural meaning of the term 'race' was shared by the Constitution's founders. Literalism therefore faces the difficulty of having to select the most appropriate of the multiple meanings of race. And it must offer some rational basis for its selection. Admittedly the task is not confined to literalists, but they undertake the task in more confined (and inadequate) contextual surroundings than non-literalists, which can lead them to error. Literalism may lead an interpreter to connote a meaning to the race power which bears little relationship with its meaning when s 51(xxvi) commenced. Avoiding this danger involves developing an understanding of the historical circumstances of s 51(xxvi)'s creation.

3. Referring to history

If it is accepted that strict literalism will not be sufficient for the interpretation of s 51(xxvi), the question arises as to how far one should go in examining extraneous material to gain insights into author intent to assist with interpreting the provision. It is possible, post-*Cole v Whitfield,*[21] to examine the Constitutional Debates. However, as will be shown below, they alone offer scant insight into the minds of the founders. Sir Samuel Griffith made a number of comments about the proposed race power which can only be adequately comprehended within the historical context in which they were made. The question then arises as to what extent we can proceed beyond the Debates to consider the historical context of the race power's creation? Historical accounts are often contested, and lawyers will usually be reluctant to entertain alleged facts that cannot be reliably verified. There is also the

[21] (1988) 165 CLR 360.

risk of inviting a wealth of information which a court, in a practical sense, cannot properly digest. But these concerns must be weighed up against the risk of maintaining a studied ignorance of history, which could well lead to highly inaccurate readings of the Constitution's text. As Goldsworthy observes:

> But once it is understood that the clarification of a statute's meaning requires taking account of all relevant evidence of legislative intention, then it should be appreciated that there can be a wide variety of evidence, that some pieces of evidence may contradict others, and that a final judgment requires weighing them against one another. The difficulty of the task should not impugn its authenticity.[22]

In any event, the High Court has not avoided paying heed to history. In *Cole v Whitfield*[23] the Court felt compelled to return to basics to discover the original purpose of s 92 to clear up the muddled and contradictory interpretations the Court had given the provision over preceding decades. The Court states that historical material may be referred to

> for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.[24]

History has been referred to in subsequent cases. In *McGinty's Case* McHugh J states that the Constitution must be interpreted "according to the ordinary and natural meaning of its text, read in the light of its history".[25] Reference to the historical sources is made in *Victoria v Commonwealth* where the history of treaty ratification and

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[22] J Goldsworthy "Originalism in Constitutional Interpretation" (1997) 25 FLR 1 at 9.
[23] (1988) 165 CLR 360.

[24] *Ibid* at 385.

[25] (1996) 187 CLR 140 at 230.

implementation in Australia towards the end of the 19th century is examined to interpret the scope of the external affairs power.[26] In *Theophanous v Herald & Weekly Times Ltd* McHugh J states that "each generation must read the provisions of the Constitution in their context and that includes the historical context of the Constitution".[27] And in *Cheatle v R* the Court reviews historical evidence of criminal trials to decide the meaning of s 80.[28]

In summary, the Constitutional Debates alone do not necessarily provide a sufficient historical context for ascertaining the meaning of constitutional provisions, and it will be argued in the next section, do not provide a sufficient basis for understanding s 51(xxvi). A deeper historical context is required to gain an adequate appreciation of the meaning attached to the term race at the time the provision was created, and to understand the underlying purpose of the provision.

4. Birth of the race power

The genesis of the race power was a proposal put by Sir Samuel Griffith to the 1891 Constitutional Convention to include an exclusive Commonwealth race power in the Constitution. His immediate purpose seems to have been for a power to deal with groups like the Kanakas in north Queensland.[29] Griffith had been involved with attempts to stop the 'blackbirding' of Pacific Islanders,[30] who were induced to enter a life

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[26] (1996) 138 ALR 129 at 138-44.

[27] (1994) 182 CLR 104 at 197.

[28] (1993) 177 CLR 541 at 562.

[29] B Galligan and J Chesterman "Aborigines, Citizenship and the Australian Constitution: Did the Constitution exclude Aboriginal People from citizenship?" (1997) 8 Public Law Review 45 at 50.

[30] See *Kartinyeri, supra* note 2 per Kirby J at para 135. He cites the Hon Arthur Calwell: see House of Representatives, *Parliamentary Debates* (Hansard), 14 May 1964 at 1902; cf Graham, *The Life of the Right Honourable Sir Samuel Walker Griffith GCMG PC* (1939) at 38-39.

of semi-slavery as labourers in the cane fields of Queensland, and were required to return home after three years.[31] Some Queenslanders were opposed to the use of Pacific Island workers because it would lead to moral contamination, while others were concerned that it involved elements of slavery.[32] The Queensland government attempted, however, to appease all sides with legislation, beginning with the *Polynesian Labourers Act* 1868, that provided for their segregation and for basic labour protection.[33]

The legislation, however, did not manage to prevent the Kanakas from being tricked into working for minimal sums on supposedly freely bargained contracts.[34] Griffith sponsored the *Pacific Island Labourers Amendment Act* 1885, which aimed at ending the use of the Pacific Islanders as indentured workers after 1890. The legislation coincided with the declining economic need for the Kanakas because of new technology and the recession of the 1890s during which there was a shortage of work. The practice was brought to a decisive end, however, when the federal Parliament enacted the *Pacific Island Labourers Act* 1901, leading to the deportation of the Kanakas.

The Queensland Parliament borrowed heavily from its Polynesian labourers legislation for the *Aboriginals Protection and Prevention of the Sale of Opium Act* of 1897, particularly the provisions dealing with basic labour practices, including the requirement for 12 month renewable agreements for Aboriginal employees, stipulating the nature and duration of work and remuneration.[35] The racial attitudes underlying

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[31] B Kercher *An Unruly Child: A history of law in Australia* (Allen & Unwin, Sydney 1995) at pp.149-50.

[32] *Ibid.*

[33] *Ibid* at 150.

[34] *Ibid.*

[35] See R Ganter and R Kidd, "The Powers of Protectors: Conflicts surrounding Queensland's 1897 Aboriginal Legislation" (1993) 25 Australian Historical Studies 536 at 541.

the Act are informative because it amounted to a special law for the people of a non-European race. In other words, to borrow the terms of s 51(xxvi), it constituted a law for the people of the Aboriginal race for whom the Queensland Parliament deemed it necessary to make a special law. The necessity for the law arose from

> two official reports which identified quite distinct areas of concern [regarding Aborigines], particularly sexual abuses of women and children, assaults and labour exploitation, killings by Native Police forces, and 'racial contamination'.[36]

The reports were commissioned by the Queensland Government which was seeking advice on legislation to protect Aborigines. In one report the Queensland public servant Meston advocated racial segregation to protect the non-Aboriginal population from 'racial contamination' and to preserve racial 'purity'.[37] In the other, senior police officer Parry-Okeden advocated a pragmatic mix of intensified police and other controls over Aborigines and Torres Strait Islanders.[38] Ganter and Kidd note that Meston's 'idealism' was repudiated in favour of Parry-Okeden's political pragmatism.[39] Despite that, the Act gave enormous discretion to administrators with Aborigines under their control. It allowed, for example, Meston as an administrator scope to implement his policy of racial segregation and allowed other administrators to operate a minor business empire in the Torres Strait Islands in which they controlled the labour resource necessary for the pearling and fishing industries.[40] Thus the Act enabled both policies of philanthropic protection and of

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[36] *Ibid* at pp.537-8.

[37] Ganter and Kidd, *supra* note 35 at pp.537-8.

[38] *Ibid.*

[39] *Ibid* at 540.

[40] *Ibid* at 554.

racial exclusion to be implemented. It also allowed for the institutionalisation of welfare:

> Institutionalisation not only catered for the whole range of dominant racial concerns, it was also the usual mechanism for the state provision of welfare. In confronting a range of racial concerns, such as widespread killings, illness and destitution, and inter-racial sexual and labour relations, the 1897 Act established 'risk' categories which became the focus of administrative attention.[41]

Griffith may well have intended in 1891 to provide the proposed Commonwealth Parliament the full range of powers with his suggested race power to make laws for philanthropic protection, racial exclusion and the institutionalisation of welfare for non-Aboriginal races. The provision proposed the grant of exclusive legislative power to the Federal Parliament with respect to:

> The affairs of people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community; but so that this power shall not extend to authorise legislation with respect to the aboriginal native race in Australia and the Maori race in New Zealand.[42]

Griffith believed that his colleague and co-delegate from Queensland, Macrossan, would have supported the proposal. Macrossan, a representative of the northern constituencies in the Queensland Parliament, died shortly before the Convention. In his constituencies "the question of black labour was a burning one".[43] Both Griffith and, as he believed, Macrossan supported a national race power

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[41] *Ibid* at 553.

[42] Clause 1 53(1); see *Official Record of the Debates of the Australasian Convention* (Sydney), 3 April 1891 at 701-704.

[43] 1891 *Debates* at 525.

> because the introduction of an alien race in considerable numbers into any part of the commonwealth is a danger to the whole of the commonwealth, and upon that matter the commonwealth should speak, and the commonwealth alone.[44]

What Griffith had in mind was the example of the "immigration of coolies from British India, or any eastern people subject to civilised powers".[45] He considered it necessary to provide the Commonwealth with the power because "no state should be allowed, because the Federal Parliament did not choose to make law on the subject, to allow the state to be flooded by such people as I have referred to".[46] This concern may have arisen from Victoria's experience with restricting Chinese immigrants with legislation in 1855 that restricted the number of Chinese that could arrive by ship. The legislation was easily evaded by Chinese arriving in South Australia and crossing the border to the Victorian goldfields.[47] It seems that Griffith did not intend the power to be restricted to non-European races because he averted to the fact that some countries made special provision for European government administrators at the insistence of their European governments. He commented that:

> The Dutch and English governments in the east do not allow their people to emigrate to serve in any foreign country unless there is a special law made by the people of that country protecting them, and affording special facilities for their going and coming.[48]

This suggests that Commonwealth legislation could provide for the needs of European administrators, and possibly business people, by

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[44] *Ibid.*

[45] *Ibid* at 702.

[46] *Ibid* at 703.

[47] Kercher, *supra* note 31 at 148.

[48] 1891 *Debates* 702-3.

providing them special conditions and amenities to encourage them to work in Australia. The later Conventions in 1897-98 held in Adelaide, Sydney and Melbourne confirmed Griffith's original purpose for the provision.[49] Higgins stated that he understood it was "to provide for the Parliament dealing with the kanaka question",[50] and O'Connor sought to have the provision clarify that it was complementary to the immigration power.[51]

There is debate about whether the founders intended the power to only apply to 'alien' races.[52] Quick and Garran, in their annotated commentary on the Constitution, state that the power is designed to enable laws that localise alien races within defined areas, to restrict their migration, to confine them to certain occupations and to give them special protection and ensure their return to the country from which they came.[53] Sawer believes their reference to 'alien' races did not have any precise meaning in the sense of nationality law, "but merely people of a 'race' considered *different from* the Anglo-Saxon-Scottish-Welsh-Cornish-Irish-Norman (etc. etc.) mixture, derived from the United Kingdom, which formed the main Australian stock".[54] Sawer relies in part for this conclusion on a comment of Barton's at the 1898 Convention that the power was not confined to aliens, but may also

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[49] Galligan and Chesterman, *supra* note 29at 51.

[50] 1897 *Debates* (Adelaide) at pp.831-32.

[51] *Ibid*.

[52] See R Sadler "The Federal Parliament's Power to Make Laws 'With Respect to…The People of Any Race…" (1985) 10 Sydney Law Review 591 who notes at 593 that:

> The placitum specifically excluded Commonwealth power to legislate with respect to Aboriginal people. This may have been insignificant if Quick and Garran were correct when they observed that the object of the power was to enable the Commonwealth to control the geographic distribution of 'aliens', to offer them special protection and to confine them within certain occupations.

[53] Quick and Garran "The Annotated Constitution of the Australian Commonwealth" (Angus and Robertson, Sydney 1901) at 622.

[54] G Sawer "The Australian Constitution and the Australian Aborigine" (1966) 2 FLR 17 at 19.

apply to British subjects.[55] Barton may have been referring to British subjects of other (ie Asian) races (for example, Indians). Sawer's interpretation extends the power to all races except those deriving from the United Kingdom. This seems to include 'races' from western Europe, including Italians, French, Germans and Greeks. His interpretation would allow laws Canadians enacted in the 19th century preventing those of the Japanese 'race', whether aliens, naturalised or natural born from voting in provincial elections and the employment of Chinese in underground mines.[56] Canada cannot, of course, enact those laws now because of section 15 of their 1982 Constitution. Sawer's interpretation provides s 51(xxvi) considerable, and concerning, scope, particularly given the extent of Australia's present multi-racial (or multi-cultural) mix. The second most common languages spoken in Sydney, it is said, are Chinese languages.[57]

Kirby J expresses some doubts about the purposes intended for including s 51(xxvi) in the Constitution. He rightly believes that, although Griffith may have been motivated by the blackbirding issue, the power was not necessarily intended to be limited to protecting the victims of that activity.[58] He adds that it is unclear whether the intention was to exclude State control over 'alien races' or to provide the Commonwealth with the power over aliens to deal with possible unrest and expulsion.[59] He observes that:

> The Convention Debates, particularly those of the Melbourne Convention of 1898, show that some delegates wanted to retain power for the States, and to permit the Federal Parliament to

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[55] See Sawer, *ibid* at 23; and Barton 1898 *Debates* at 229.

[56] See Sawer, *ibid* at 21.

[57] *International Herald Tribune*, Monday 1 June 1998 at 17.

[58] *Kartinyeri, supra* note 2 at para 135.

[59] *Ibid.*

enact, laws far from beneficial for people of minority races (such as Chinese in factories and shops[60], 'Asiatic or African ... miner[s]'[61] and so on). However, other delegates regarded the prospect of discriminatory legislation on the part of the new federal polity as 'disgraceful'[62] and 'degrading to us and our citizenship'[63].

It seems, then, that s 51(xxvi) was designed, at the time of its inception, to provide the Commonwealth the power to make special laws regarding races of non-European, or at most non-British nationality. It may have also included British subjects who were of 'non-British stock', including those from India. The power was intended to provide for the protection of other races, whether by setting minimal labour standards or by other means. And, although it did not require segregationist legislation, it certainly contemplated it as a possibility. So although it did not necessarily seek to ensure the promotion of segregationist ideals and doctrines of racial superiority (the Commonwealth Constitution was forged from too much pragmatism to have allowed it), the provision nevertheless allowed for legislation to be based on such fundamentalist notions.

Without drawing the parallels too strongly with the Queensland legislation that may have prompted Griffith's proposal, it is possible to envisage that s 51(xxvi) was intended to grant legislative power to provide for guest workers and to establish special trade zones with differential laws applying to overseas employees in the zone. It would have also have allowed laws confining racial groups to defined areas, restricting their employment and providing for their deportation. Had the exception for Aborigines not appeared in the original 1901 version of

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[60] *Debates* (Melbourne) 1898 at 236.

[61] *Ibid* at 240.

[62] *Ibid* at 247.

[63] *Kartinyeri*, per Kirby J *supra* note 2 at para 135. He cites the last quote as the *Debates* (Melbourne) 1898 at 250.

the Constitution, it would have empowered legislation that provided for the segregation of Aborigines from the rest of the population.

There is little tangible evidence as to why the founders excluded Aborigines from s 51(xxvi). Thus, there is scope for speculating why they were excluded. The Chief Protector of Aborigines, Western Australia told the 1927-29 Royal Commission on the Constitution that he believed Aborigines were excluded because "it was widely thought that they were a dying race whose future was unimportant".[64] Hanks later agreed, saying that the founders thought the Aboriginal population had been reduced to a remnant and that the delegates "were happy to leave to the States the responsibility of 'dealing with' those remnants".[65] Sawer believed that the lack of s 51(xxvi) debate on Aborigines revealed "a widespread attitude of white superiority to all coloured peoples, and ready acceptance of the view that the welfare of such people in Australia was of little importance".[66] But he also believed that as the Commonwealth was not initially given any independent mainland territory and general questions of land settlement, industrial development, employment relations and education were also left to the States, "few of the powers given to the Commonwealth had any obvious or direct relevance to aboriginal policy".[67] Galligan and Chesterman believe that the scant mention of Aborigines during the constitutional debates and in the Constitution results more from the "founders' respect for the States and state powers" than any attitude favouring or discriminating against them.[68]

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[64] Royal Commission on the Constitution (1927-1929) Minutes of Evidence at 488, quoted by Sawer *supra* note 54 at pp.17-18.

[65] P Hanks "Aborigines and Government: the developing framework" in *Aborigines and the Law*, P Hanks and B Keon-Cohen (eds) (Allen & Unwin, Sydney 1984) at pp.20-21.

[66] Sawer, *supra* note 54 at 18.

[67] *Ibid* at 17.

[68] Galligan and Chesterman, *supra* note 29 at 47.

If Harring's analysis of early colonial law is applied to the drafting of the Constitution, the founders' conduct cannot be seen as so benign. Indeed their scant mention of Aborigines could be seen as a positive choice to maintain their oppression. Harring observes that commentators have variously described the early Australian colonial law as "impotent, ambivalent, variable or standing behind the forceful dispossession of Aboriginal people while providing them the largely illusory protection of the law or providing them little thought, thus acting in a reactive way".[69] But, he argues:

> Once we recognise that law, in fact, existed as a powerful force in structuring colonial society in nineteenth century New South Wales, the 'impotence' and 'ambivalence' of law take on new meaning. Such outcomes reflect legal choices, or the choice of colonial officials not to use law in circumstances involving Aboriginal rights . . . Put more crudely, legal history involves both 'law' and 'outlaw', with choices to remain outside the law (or to refrain from resorting to the law) being legal choices nevertheless, the subject matter of legal history.[70]

Thus, the founders' failure to include Aborigines can be seen as a conscious choice for the Aborigines' continued oppression, and not one merely motivated by respect for States rights. Not that it can be assumed the Aborigines would have been treated any more fairly by the new Commonwealth Parliament. The enactment of oppressive colonial legislation was an activity in which many founding fathers themselves had participated.[71] Isaac Isaacs, himself a founding father, left no doubt about his racial attitudes when debating the first Australian electoral law in 1902 – the year after federation. Manning Clark

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[69] SL Harring "The Killing Time: a history of Aboriginal Resistance in Colonial Australia" " (1994) Ottawa Law Review 385 at pp.389-90.

[70] *Ibid* at 391.

[71] Galligan and Chesterman, *supra* note 29at 47.

observes that with regard to whether Aborigines should have the right to vote:

> Isaac Isaacs argued that until such time as Aborigines were thought worthy to vote for state parliaments members of the Commonwealth parliament should not consider them worthy to vote in a federal election. The Aborigines, he maintained, did not have the intelligence, interest or capacity to enable them to stand on the same platform with the rest of the people of Australia. No one demurred.[72]

Isaacs' views were not idiosyncratic.[73] He represented the attitudes of his time. And they were times of heightened, and to an extent unprecedented, racial bigotry. Attwood notes, for example, that attitudes to Aborigines in the bush were relatively harmonious before the late 19th century, because Aboriginal labour was valued by the pastoralists.[74] But they began to change as rural communities "increasingly came to be comprised of newcomers, women now as well as men, who were relatively unfamiliar with Aborigines and who increasingly prized personal and civic respectability".[75] They harboured deep fears and suspicions of the Aborigines which prompted the discriminatory legislation enacted around the turn of the century. Racial fears and bigotry were not confined to the Aborigines, the

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[72] CMH Clark *A History of Australia, Volume V: The people make laws 1888-1915* (Melbourne University Press, Melb 1981) at 217 re the Commonwealth Franchise Bill in which debate began in April 1902.

[73] B Kercher, *supra* note 31 at 149 describes the passage of the *Immigration Restriction Act* 1901 as follows:

> The debate in the new national parliament had an unapologetic air of white superiority, with expressions of concern that non-whites would lower the civilisation and standard of living of the British people of Australia. The bill was moved by the Prime Minister, Edmund Barton. Like most Australians of their day, most of the founding fathers were white supremacists at heart.

[74] See B Attwood "Aborigines and Academic Historians: some recent encounters" (1990) 24 Aust Historical Studies 122 at 132.

[75] See Attwood, *ibid* at 132.

Chinese in particular were also to fall victim. They began to arrive in Australia in the 1840s as cheap labour for the pastoral industry and were followed by tens of thousands more when gold was discovered.[76] Resentments grew on the goldfields where the "Eureka flag flew as the miners attacked the Chinese; radicalism and nationalism had a racist element".[77] Kercher believes that:

> White attitudes were based on greed, a deep feeling of their own moral superiority and fear of what the Chinese might bring, the spread of vices such as opium smoking and gambling, racial conflict and cheap competition for white workers. . .Australian egalitarianism was based on an equality of white men alone. Like Aborigines, Asians were left out of the embrace of mateship. Such icons as *The Bulletin* magazine and the Labor party, and most politicians, openly favoured immigration restrictions based on race at the end of the nineteenth century.[78]

Interestingly, in the 1860s conservatives supported the British empire's open-door immigration policy and opposed anti-Chinese laws, but were accused by liberals of doing so for cheap labour on their properties.[79] But their support eroded, and increasingly restrictive laws were introduced against the Chinese, despite objections from London about their racist character.[80] Higher poll taxes and greater restrictions on the numbers of Chinese allowed on each arriving ship were imposed. The increasingly racist content of Australian colonial legislation was by 1896 concerning London to the extent that Secretary of State for the Colonies, Joseph Chamberlain, informed the premiers that while he

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[76] Kercher, *supra* note 31 at 147.

[77] *Ibid* at pp.147-8.

[78] *Ibid* at 148.

[79] *Ibid.*

[80] *Ibid.*

"was sympathetic to the colonies' aims and to the concern about the threat to white workers, he was worried that the openly racial basis of the legislation offended Asian members of the empire as well as Britain's ally, Japan".[81] He proposed a more covert means for achieving the same ends – the language test. This infamous device, which lasted until 1958, was used to exclude entry into Australia of those the government considered undesirable or inconvenient. Even those fluent in English were excluded if their race, political belief or some other characteristic did not suit the government of the day because the language test could be set in any European language.[82]

Deep springs fed the racial attitudes of the late 19th century, and their widely divergent sources led to complex and sometimes contradictory racial attitudes. From one spring flowed the influence of the British humanitarian movement, which had gained impressive victories, including the abolition of British slavery, during the early part of the century.[83] From another flowed economic self interest. Pastoralists, gold miners and rural (and to a lesser extent, urban) workers, as we have seen, believed it was in their economic interest to despise the Chinese and other races. From yet another source sprang the influence of the pseudo-sciences of social-Darwinism and eugenics, which fed deeply harboured fears and racial arrogance. Fears existed of being outnumbered and contaminated by other races, including the Chinese, Indian and Kanaka people. This, of course, presumed a separateness of the 'European' races from the other feared races. Co-existing with fear was racial arrogance born of the assumption that European races were superior to others. This arrogance led to bureaucratic control over almost all aspects of daily Aboriginal life and

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[81] *Ibid* at 149.

[82] See Kercher, *ibid* at 131.

[83] See AGL Shaw "British Policy Towards the Australian Aborigines, 1830-1850" (1992) 25 Australian Historical Studies 265 at 269.

the belief amongst some that protection was required to smooth the pillow for a dying race. An (often unarticulated) undercurrent flowing through many of these sentiments and policies was the eugenic notion of racial strength and purity.[84]

The eugenic movement was not particularly well organised or evident in Australia, at least not to the extent it was in the United States, Britain and other parts of Europe. Garton, however, warns against underestimating its influence on Australian ideas and attitudes,[85] which were informed by European and American debates on race and biology. Eugenics was founded by Francis Galton, who coined the term in 1883, and who took inspiration from his cousin Charles Darwin's book the *Origin of the Species* (published in 1859).[86] He later defined eugenics as "the study of agencies under social control that may improve or impair the racial qualities of future generations either physically or mentally".[87] Galton was not alone in attaching significance to race, as Hannaford explains:

> During the period from 1890 to 1915, race as an organizing idea claimed precedence over all previous formulations of nation and state. Although the works of many racialist writers of the period are virtually unreadable today. . .they attracted vast audiences in

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[84] See generally R McGregor *Imagined Destinies: Aboriginal Australians and the doomed race theory 1889-1939* (Melbourne Uni Press, Melbourne 1997).

[85] S Garton "Sir Charles Mackellor: Psychiatry, Eugenics and Child Welfare in NSW 1900-1914" (1986) Historical Studies 21, and S Garton "Sound Minds and Healthy Bodies: Re-considering eugenics in Australia: 1914-1940" (1994) 26 Aust Historical Studies 163.

[86] DJ Kevles, *In the Name of Eugenics: Genetics and the uses of human heredity* (University of California Press, Berkeley 1985) at 12. Darwin approved of Galton's work, and stated in *The Descent o f Man* "We know, through the admirable labours of Mr Galton, that genius…tends to be inherited" (see Kelves at 20). Galton derived the term 'eugenics' from a Greek root meaning 'good in birth' or 'noble in heredity' (see Kevles at ix).

[87] *Ibid* at 37.

> Germany, France, Britain and the United States, who were greatly excited by racial ideas.[88]

Eugenics gained a growing number of adherents in the late 19th century, which developed into a flood of popularity by the early 20th. Galton was knighted in 1907 and his eugenic ideas were exalted in the popular press. His adherents included Alexander Graham Bell, George Bernard Shaw, Harold Laski and Beatrice and Sidney Webb.[89] It was seen by many as "a promising new instrument for the release of civilization from the uncertainties and contingencies of existing politics".[90] Tragically, and in a way its adherents had not counted on, it achieved that end. Although eugenics was primarily interested in biological progression and 'improvement' by weeding out weaker biological strains in the human species, racial concerns readily fell into the vortex of eugenic interest and concern. The eugenicists, like many others who subscribed to various other racial theories, were interested in the traits of different 'races' – hair and skin colour and texture, facial shape, the length of limbs, and so on. And of course they were interested in measuring and comparing racial traits of intelligence. In the pursuit of scientific endeavour, eminent scientists derived reams of scientific data that confirmed their own prejudices, as well as that of the general populace.[91] Amongst the leading eugenic scientists was the American, Davenport, who in 1911 identified the hereditary incidence of Huntington's chorea, hemophilia, albinism and polydactylism.[92] He proceeded to consider whether state laws limiting the entitlement to marry within and between families had a sound scientific basis. He recommended the better administration of the laws by eugenics boards

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[88] Hannaford, *supra* note 1 at pp.326-27.

[89] Kelves *supra* note 86 at pp.57-63.

[90] Hannaford, *supra* note 1 at 334.

[91] Kelves *supra* note 86 at pp.46-7.

[92] Hannaford, *supra* note 1 at 333.

staffed by biologists who would issue marriage licenses on the basis of scientific data. His recommendation was not followed in the US, but was given effect by the Nazi law of 28 June, 1933.[93] Meanwhile a number of US states introduced sterilisation laws which were aimed at the feebleminded, to prevent them breeding children of inferior intelligence.

These laws were at times successfully challenged in the courts until the Supreme Court decision of *Buck v Bell*[94] in which the Court upheld the constitutionality of Virginia's sterilisation law on the basis that the law was within the police power of the state, it provided due process of law and did not constitute cruel or unusual punishment. This allowed the authorities to sterilise Carrie Buck, who after giving birth to a child out of wedlock, was tested as having the IQ of 9 years (and her mother tested at 8 years). In giving the Court's opinion, Justice Oliver Wendell Holmes stated that:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who sap the strength of the State for these lesser sacrifices. . .in order to prevent our being swamped with incompetence. . .[95]

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[93] *Ibid* at 334.

[94] 274 US 201 (1927).

[95] *Ibid* at 205. Note Kevles, *supra* note 86 at 165:

> In 1917, Reginald C Plunnett, the Balfour Professor of Genetics at Cambridge University, had calculated the number of generations it would require to reduce the incidence of the 'feebleminded' by a given fraction if in each generation all of them were sterilized. Assuming that 'feeblemindedness' was the product of a unit-recessive character and that mating occurred at random in the population, Punnett concluded that to diminish the frequency from 1 in 100 to 1 in 1,000 would require twenty-two generations, to 1 in 10,000 ninety generations, and to 1 in 1,000,000 more than seven hundred generations–all of which argued that sterilization promised no quick fix to the problem of mental deficiency.

The decision gave added respectability to the eugenic cause. About half the US states legislated to allow the sterilisation of those in prisons and other institutions on the basis of their feeblemindedness, social inadequacy and retardation.[96] By the mid-1920s some 20,000 sterilisations had been legally performed in the US.[97] These were not limited to those residing in institutions. A former member of the Montgomery County, Virginia, Board of Supervisors recalls state sterilisation authorities raiding whole families of 'misfit' mountaineers in the 1930s.[98] Hitler's sterilisation law was introduced in 1933 and required the sterilisation of those suffering feeblemindedness, schizophrenia, epilepsy, blindness, severe drug or alcohol addiction and gross physical deformity.[99] The law met with international objection, to which the Nazis responded by pointing to the US model they had adapted. They enforced the new law, however, with a vigour and efficiency that far exceeded the US. Although initially the program was not based on racial categories, it was not long before this changed. Sterilisation was extended to include those with infectious diseases or different 'racial' backgrounds. In 1939 the law moved beyond sterilisation to euthanasia of certain classes of the mentally diseased or disabled in asylums. Amongst the classes were Jews, to whom the procedure applied, regardless of their mental health.[100]

This is not to suggest that eugenic theories on social biology inevitably lead to racial segregation and racial genocide. The US experience confirms this. And indeed many eugenicists either did not

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In 1930 Jennings noted in his book *The Biological Basis of Human Nature* that only 10% of feebleminded children were the offspring of feebleminded parents. See Kevles, *ibid.*

[96] Hannaford, *supra* note 1 at 362.

[97] Kevles, *supra* note 86 at 112.

[98] *Ibid* at 116.

[99] *Ibid*.

[100] *Ibid* at 117-18.

support the more extreme racial theories or gave it lukewarm support. Searle comments that:

> The contention that British eugenists were not 'super-nationals' or glorifiers of war might be countered with the objection that they were nearly all of them pronounced racialists, as their very language proves. Phrases like 'the traditions of the race', 'racial instinct' and 'race-regeneration' occur with monotonous regularity in eugenical literature. This by itself, however, is not conclusive, since these phrases were also regularly employed by contemporaries who cannot by any stretch of the imagination be called 'racialist'. In the early twentieth century the word race seems to have been interchangeable with 'nation', 'community', or even 'people'.[101]

Thus, the term 'race' was interchangeable with other terms dealing with group identity, which themselves related to different ideologies. Many eugenicists, particularly the British, did not believe in the virtues of racial purity, and to the extent that they did, they were not necessarily anti-Semitic. Indeed, some believed that the alleged racial purity of the Jews and their above average intelligence confirmed the virtues of racial homogeneity. In general, however, there was a belief in racial hierarchy, with all the consequent prejudice that it confirmed or engendered.

Racial eugenics and other theories of racial hierarchy suffered a loss of credibility and acceptability after the second world war because of their adoption (and to an extent) distortion by the Nazis. Their theories, although extreme, were sourced from the thinking and politics of the late 19th and early 20th century. On his own admission, Hitler obtained all of his ideas confirming the singular importance of race from the period immediately preceding 1910.[102] The Nazi ideas and attitudes

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[101] GR Searle, *Eugenics and Politics in Britain, 1900-1914* (Leyden, Noodhoff 1976) at 39.

[102] Hannaford, *supra* note 1 at 326-27.

derived in part from a misreading of Nietzche (who ironically saw the Jews as an example of a superior race)[103], the formation of the anti-Semitic movement in Germany, Austro-Hungary and France in the 1880s, partly in response to the influx of Jews from the Russian pogroms, and the popularising of myths on 'the jewish conspiracy' and Aryan supremacy that were pedalled by Drumont in France.[104] Extremist anti-Semitic ideology and politics were not invented by the Nazis, as the late 19th century anti-Semitic movement and the extremist rantings of the Mayor of Vienna, Karl Lueger (which inspired Hitler) attests. Nor did they invent eugenic science and the idea of Aryan racial superiority, which, ironically, derived from France. But the Nazis combined these extant theories and policies to appalling effect. They crushed the delicate liberal notions of due process, equality before the law and the rule of law. And as Kirby J points out, this was not in one fatal blow, but by means of attrition, so the early laws were capable of judicial assent.[105]

Although eugenic theories on social biology do not inevitably lead to racial segregation and racial genocide, the US experience of sterilisation laws alone highlights the dangers that arise if the courts fail to maintain an intense scepticism of laws that single out vulnerable groups in society for the deprivation of basic human rights. As Hannaford reminds us:

> However well-intentioned these scientific societies and journals may have been at the time of their formation, and however much we may wish to distance their illustrious academic and industrial founders from what happened in the death camps, it has to be remembered that the first experiments on the feebleminded were

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[103] *Ibid* at 314.

[104] *Ibid* at 315-24.

[105] *Kartinyeri, supra* note 2 at para 163.

sanctioned by states in the United States and justified by the US Supreme Court.[106]

The European and American racial theories of the late 19th century, it can be reasonably supposed, offered succour to those who believed in racial segregation, which in turn played a role in inspiring legislation applying to the Chinese, Kanakas and Aborigines. The Queensland public servant Meston, for example, as we have seen, wrote a report advocating racial segregation to protect the non-Aboriginal population from 'racial contamination' and to preserve racial 'purity'.[107] Labelling someone like Meston a eugenicist is, however, potentially misleading. Most, like him, fed their attitudes from streams that were sourced from the humanitarian, neo-Darwinist, eugenic, Christian and other springs of belief and ideology. And each stream of thought carried differing quantities of the ideologies sourced from the springs.[108] And although the Constitutional Conventions were attended by men "who were in general sensitive, humane, and conscious of religious and social duties to the less fortunate sections of the community"[109], they nevertheless revealed in their debates "a widespread attitude of white superiority to all coloured peoples".[110]

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[106] Hannaford, *supra* note 1 at 335.

[107] Ganter and Kidd, *supra* note 35 at pp.537-8.

[108] See Ganter and Kidd *ibid* at 536 where they say: "Apart from an agreed, and unshakable, sense of superiority, the white community did not speak with one voice about Aborigines. There was a sense of philanthropy as well as repugnance, there were those who would 'soothe the dying pillow' as well as those who believed in the possibility of preservation, there was some strong interest in Aboriginal labour and even some acknowledgement of a debt owed by the white community, but there was no dominant official sentiment".

[109] Sawer, *supra* note 54 at 17.

[110] *Ibid* at 18.

5. Altered meanings - the 1967 amendment

During the period after World War II the community's attitudes and assumptions about race began to undergo a profound change. The change was not immediate and did not develop according to a consistent pattern, but it was profoundly influenced by the horrors of the Nazi race program. The change in general attitude is marked by the 1967 amendment to s 51(xxvi), which was motivated by a general desire to enable the Commonwealth to make laws which treat Aborigines as full and equal citizens. The amendment was prompted by the realisation that the States' exercise of power over Aborigines was a failure. Ironically, the failure was in part due to segregationist legislation motivated by the same assumptions about race that created s 51(xxvi).

On its face the changes made by the 1967 amendment were 'minimalist', as Gaudron J describes it.[111] The original words of the relevant parts of section 51 remained unaltered except for the removal of eight words shown here in italics:

> Parliament shall have the power to make laws for the peace, order and good government of the Commonwealth with respect to:
>
> > (xxvi) The people of any race, *other than the aboriginal race in any State,* for whom it is deemed necessary to make special laws.[112]

A narrow literalist reading of the Constitutional alteration suggests that the amendment was designed merely to extend the Commonwealth's

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[111] According to Gaudron J in *Kartinyeri*, *supra* note 2 at 29:

> The 1967 amendment was one that might fairly be described in today's terms as a 'minimalist amendment'. As a matter of language and syntax, it did no more than remove the then existing exception or limitation on Commonwealth power with respect to the people of the Aboriginal race.

[112] At the same time section 127 was repealed, which had stated that:

pre-existing racial power (to discriminate against racial groups) to Aborigines.[113] Gummow and Hayne JJ suggest that the pre-amendment scope of the provision remains essentially unaltered, except for the extension of powers over Aborigines, because the amendment was driven by considerations of federalism:

> The treatment in the 'yes' case of the proposed alteration to the power of the Commonwealth legislature emphasised considerations of federalism. It did not speak of other limitations upon the nature of the special laws beyond confirming that they might apply to the people of the Aboriginal race 'wherever they may live' rather than be limited to the Territories.[114]

It is true that the Yes Case made it clear the amendment would not provide the Commonwealth an exclusive power over Aborigines and that "the Commonwealth's object will be to co-operate with the States"[115], but the statements appear to be aimed at ameliorating concerns about the undue extension of Commonwealth power than stating an end itself. The substantive purpose, as the Yes Case makes clear, was for the Commonwealth and the States "to ensure that together we act in the

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In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

[113] See Kirby J *Kartinyeri, supra* note 2 at para 157 where he says:

> Whatever the initial object of the original exception to par (xxvi), by the time that the words were removed, the amendment did not simply lump the Aboriginal people of Australia in with other races as potential targets for detrimental or adversely discriminatory laws. It was the will of the Australian Parliament and people that the race power should be significantly altered.

[114] *Kartinyeri*, *ibid* at para 93.

[115] Chief Electoral Officer Commonwealth, *The Arguments For and Against the Proposed Alterations Together with a Statement Showing the Proposed Alterations*, 6 April 1967 at 11.

best interests of the Aboriginal people of Australia".[116] The amendment was about Aborigines, not federalism.

The amendment of s 51(xxvi) occurred when there was a general sense in the Australian community that denying Aborigines 'full citizenship' and equality under the law was unjust, and continuing the injustice would adversely affect Australia's international reputation. Post-war reaction to the grotesqueness of the Nazi program of racial extermination led to a change of international attitude on race and the eugenic and social biological theories of racial superiority that had underscored it. The Nazis, as we have seen, took abstract theorising and virulent racist propaganda to their (il)logical extreme by putting words to action with a program of racial purification which as we know involved the mass killings of millions of Jews, Gipsies and Poles. The Nazis' activities brutally illustrated to the post-war world the extremes that attitudes of racial separation and superiority could be taken. This in turn led to the creation of institutions, policies and laws in the post-war period that promoted racial tolerance and equality. The 1967 amendment to the Australian Constitution was a child of the post-war ambitions to promote racial harmony.

The antidote for theories of racial superiority became racial tolerance and equality. The United Nations was established, largely to prevent the outbreak of international conflicts and to promote the interests of the international community. One of its most significant foundation documents was the Universal Declaration of Human Rights 1948. This, and the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (the 'Convention on Racial Discrimination'), helped lay the foundations for national laws and constitutions to provide for racial tolerance and equality. Australia

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[116] Chief Electoral Officer Commonwealth, *The Arguments For and Against the Proposed Alterations Together with a Statement Showing the Proposed Alterations*, 6 April 1967 at 11.

became a signatory to the Convention on Racial Discrimination on 13 October 1966 and ratified it on 30 September 1975, leading eventually to the enactment of the *Racial Discrimination Act* in 1975 which gave domestic effect to the Convention.

The Convention on Racial Discrimination was preceded by a number of general human rights statutes and conventions including the European Convention for the Protection of Human Rights and Fundamental Freedoms which was drawn up by the Council of Europe in 1950 and came into force in September 1953.[117] Article 14 of the Convention prohibits discrimination, including discrimination on the grounds of race, in the enjoyment of fundamental rights and freedoms. Canada enacted its Bill of Rights in 1960, which was an ordinary federal statute dealing with the protection of a wide range of fundamental rights, including racial equality. Section 1 recognised the right of the individual to equality before the law and the protection of the law regardless of the individual's race, national origin, colour, religion or sex. The United States' Supreme Court changed its understanding of the Fourteenth amendment to its Constitution which provided that all its citizens were entitled to equal protection of the laws. It overturned the separate but equal doctrine of *Plessy v Ferguson*[118] (which upheld a Louisiana statute that required blacks to ride in separate train carriages on the basis that the train facilities were separate but equal) in favour of the removal of racial segregation in the 1954 decision of *Brown v Board of Education*[119]. The legislative and judicial changes represented, and at times led, social attitudes to race. The pattern of change in attitudes was at times traumatic, as illustrated by social unrest in the US, particularly during the 1950s and 60s, and

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[117] ZM Nedgati "Human Rights Under the European Convention" (North-Holland Publishing, Amsterdam 1978) at 1.

[118] 163 US537 (1896).

[119] 347 US 483 (1954).

South Africa in the 1970s to 90s. The pattern of change was rarely even, and no doubt at places superficial. The race debates in Australia in response to the *Mabo (No 2)*[120] and *Wik*[121] High Court decisions reveal how superficial the mask of tolerance can be.

By the mid-1960s, then, there was a growing awareness in the world community, including Australia, of the dangers, irrationality and injustice that racial segregation and discrimination can cause. This placed the race power in s 51(xxvi) of the Constitution in a different light, which affected the meaning of the term 'race' in the provision. So although the spelling of the term had not altered in the 66 years since federation, its meaning and value had. By the end of the 19th century race was the term used for dubious biological and historical categorisations for the purpose of asserting hierarchies of ability, intelligence and social worth. This in turn justified segregating people and depriving them of their basic rights and entitlements. By the 1960s fears of being overwhelmed by 'alien' (ie Asian) races had subsided in Australia, and the consequences of taking ideas of racial superiority to their extremes had been illustrated by the Nazis. According to Kirby J:

> The laws of Germany and South Africa…provide part of the context in which par (xxvi) is now understood by Australians and should be construed by this Court. I do not accept that in late twentieth century Australia that paragraph supports detrimental and adversely discriminatory laws when the provision is read against the history of racism during this century and the 1967 referendum in Australia intended to address that history. When they voted in that referendum, the electors of this country were generally aware of that history. They knew the defects in past Australian laws and policies. And they would have known that the offensive legal

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[120] *Mabo v The Commonwealth (No.2)* ('*Mabo 2*') 175 CLR 1.

[121] *Wik Peoples v The State of Queensland & Ors* (1996) 187 CLR 1.

> regimes in Germany during the Third Reich and South Africa under apartheid were not the laws of uncivilised countries. Both in Germany and in South Africa the special laws enacted would probably have been regarded as unthinkable but a decade before they were made. They stand as a warning to us in the elaboration of our Constitution.[122]

What then was the purpose and effect of the constitutional amendment? The mischief rule can assist with an answer. Applying the rule involves comparing s 51(xxvi)'s post-amendment meaning with its original purpose to discover the mischief with which the amendment sought to deal. The essential question, then, is why did Parliament bother asking the Australian electors to agree to the provision's amendment? Constitutional changes are not lightly embarked upon. The process is expensive and Australia's experience of constitutional amendment reveals the electorate's reluctance for change. Consequently, there must have been a perceived problem that could only be dealt with by the grant of Commonwealth power.

The perceived problem, it is submitted, was the legislation and policies of at least some States that discriminated unfairly against Aborigines and which denied them full participation in the life of the nation as equal citizens. Legislation applying to Aborigines in some States were segregationist. Queensland's *Aboriginals Protection and Restriction of the Sale of Opium Act of 1897*, for example, provided for the removal of Aborigines and the maintenance of their order and discipline, the custody and education of their children and their employment and apprenticeship.[123] These matters were dealt with in a way that allowed extreme levels of administrative discretion and control,

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[122] *Kartinyeri, supra* note 2 at para 164.

[123] Note that the Queensland legislation was followed by South Australia with the *Northern Territory Aborigines Act 1910* and *Aborigines Act 1934* and Western Australia with the *Aborigines Act 1905*.

that did not apply (or would not have been tolerated) by the majority non-Aboriginal population. The Act also provided for the prohibition of Aboriginal rites and customs, and allowed administrators to control the marriage of female Aborigines and to prohibit visitors to Aboriginal camps.[124] In 1934 the Act was amended to prohibit sexual intercourse between an Aboriginal woman and non-Aboriginal man and to allow administrators to cancel written agreements to employ an Aboriginal or half-caste.[125] Wills and deeds of gift or transfer of land were declared invalid unless approved and witnessed by the Chief Protector for Aborigines. The Minister could declare an Aboriginal or half-caste to be uncontrollable and to be kept in an institution (including a prison) without any rights of administrative or judicial review. In 1939 the Act provided for the removal and detention of any Aboriginal in a reserve.[126] The Act remained on the statute books until its repeal in 1965.

It was recognised by some not long after federation that the States were treating Aborigines poorly and that Commonwealth power and responsibility was required to deal with the situation. In 1911 a non-government conference called for full federal responsibility for Aborigines and in 1929 a minority report of the Royal Commission on the Constitution recommended federal financial assistance to States with the most numerous Aborigines.[127] In 1936 federal control over Aborigines was raised but rejected, with an agreement that there be regular meetings of State and Federal officials regarding Aboriginal affairs. And in 1944 Prime Minister Curtin proposed a referendum (which was defeated) that, amongst other things, proposed the

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[124] *The Aborigines Protection and Restriction of the Sale of Opium Act of 1901.*

[125] *The Aborigines Protection and Restriction of the Sale of Opium Acts Amendment Act of 1934.*

[126] *The Aboriginals Preservation and Protection Act of 1939.*

[127] P Hanks, "Aborigines and Government" *supra* note 65 at 21.

Commonwealth have a power with respect to "the people of the Aboriginal race".

Concern that the Commonwealth should be doing something to assist Aborigines mounted in the post-war period, but section 51(xxvi) was perceived as a bar to federal laws for Aborigines.[128] In 1958 the Joint Parliamentary Committee on Constitutional Review was established to consider constitutional reform.[129] It recommended the repeal of section 127. Concern also surfaced in the 1950s and early 1960s about the denial of the Aborigines' right to vote in Queensland and Western Australia. Federal law only allowed Aborigines and Torres Strait Islanders who could vote in State elections to vote in federal elections. As a result, the Federal *Electoral Act* was amended in 1962 to allow all Aborigines and Torres Strait Islanders to vote in federal elections despite State laws. Western Australia amended its Electoral Act that year to allow Aborigines the vote.[130] Queensland did not allow it until 1965, and even then subject to the proviso that anyone "who influences or attempts to influence in any manner or by any means whatsoever" an Aboriginal person to enrol commits an offence.[131] The rising concern about Aborigines also resulted in a number of federal parliamentary motions and bills (in 1962, 1964, 1965 and 1966) each

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[128] See Sadler, *supra* note 52 at 595-96: " While s 51(xxvi) existed in its unamended form the Commonwealth Parliament was arguably prevented – because of the negative implications within s 51(xxvi) – from making laws which dealt with Aboriginal persons…This fear was probably without substance as the exclusion of Aborigines under s 51(xxvi) would not, on normal principles of characterization, preclude the Commonwealth from making legislation which extended to and made specific provision for Aborigines under other heads of power". He mentions that the Select Committee of the Commonwealth House of Representatives on the Voting Rights of Aborigines considered that legislation allowing Aborigines to vote in federal elections might be invalid because of s 51(xxvi).

[129] See "Report of the Joint Committee on Constitutional Review" (Government Printer, Canberra 1959).

[130] *Electoral Act Amendment Act 1962* (WA).

[131] *The Election Acts Amendment Act of 1965* (Qld).

requiring a referendum for altering the Constitution with regard to Aborigines.

The general mood preceding the referendum is partially captured by Professor Sawer, who wrote in 1966 that:

> Today there is a public conscience concerning the aborigines; since about 1956, steps have been taken to give them increased citizenship rights and liberties, to atone for wrongs done them by the white man, and to secure their full participation in government...[132]

The urge for constitutional change was for more than simply granting federal powers over Aborigines. There was a more general sense that Aborigines had been badly treated and should be treated as equal citizens. A successful bill was introduced by Prime Minister Holt on 1 March 1967 leading on 27 May 1967 to Australia's largest yes vote for constitutional change.[133]

The electors were asked to approve amending s 51(xxvi) and deleting section 127, which prohibited the counting of Aborigines when reckoning the population. In the official Yes Case provided to electors before the referendum it was stated that the purposes of the proposed amendments were "to remove any ground for the belief that, as at present worded, the Constitution discriminates in some ways against people of the Aboriginal race, and, at the same time, to make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race".[134] The Yes Case later repeated these propositions:

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[132] G Sawer *supra* note 54 at 17.

[133] See *Official Year Book of the Commonwealth of Australia, No 54, 1968* (Commonwealth Bureau of Census and Statistics, Canberra 1968) at 66. The vote was 5,183,133 in favour and 527,007 against, delivering a yes vote of 91%.

[134] The Statement for the Yes case, election material for the 1967 referendum, which was authorised by "the majority of those members of both Houses of the Parliament who voted for the proposed law and was prepared by the Prime Minister, the Rt. Hon. Harold Holt Leader of the Federal Parliamentary Liberal Party; by the Deputy Prime

> The proposed alteration of this section [ie 51(xxvi)] will do two things. First, it will remove words from the Constitution that many people think are discriminatory against the Aboriginal people.
>
> Second, it will make it possible for the Commonwealth parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Parliament considers it necessary.[135]

The Yes Case continued by questioning, after quoting section 127, why it was included in the Constitution:

> Well, there were serious practical difficulties in counting the Aborigines in those days. They were dispersed, and nomadic. Communications in inland Australia were poor, and frequently non-existent. Today the situation is very different and counting is practicable.
>
> Our personal sense of justice, our commonsense and our international reputation to a world in which racial issues are being highlighted every day, require that we get rid of this out-moded provision.
>
> Its modern absurdity is made clear when we point out that for some years now Aborigines have been entitled to enrol for, and vote at, Federal Elections. Yet section 127 prevents them from being reckoned as "people" for the purpose of calculating our population, even for electoral purposes.

The overwhelming and record breaking yes vote for the referendum proposal was influenced in part by Parliament's unity and argument for the need for reform, and media stories and images which alerted the public to the poverty and degradation suffered by indigenous people,

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Minister, the Rt. Hon John McEwen, Leader of the Australian Country Party; and by the Leader of the Opposition, Mr Gough Whitlam, Leader of the Australian Labor Party". As the legislation had bi-partisan support, a 'No' case was not offered.

[135] *Ibid.*

who at the time were living in one of the world's richest nations. As Brennan J observed in the *Tasmanian Dam Case,* the 1967 referendum was an "affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial".[136] And as Sawer noted in 1966, there was a desire to "atone for wrongs done them by the white man" and to ensure that Aborigines could fully participate in government.[137] In the Parliamentary debates for the bill to amend the Constitution[138] repeated mention was made of a need to enable Commonwealth laws for the benefit of Aborigines. Prime Minister Holt said that the bill was introduced in response to the popular impression that the words excluding Aborigines in s 51(xxvi) were discriminatory.[139] And the object was to enable the Commonwealth to work with the States for the advancement of Aborigines.[140] The opposition agreed.[141]

The intention therefore was to enable the Commonwealth (possibly in co-operation with the States) to make laws for Aborigines, including removing the bar to the entitlements of citizenship that effectively had been denied them by some States. The mischief the alteration was designed to address was the State laws that discriminated against Aborigines and denied them the basic fundamental rights and freedoms enjoyed by other non-Aboriginal members of the community.[142] The

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[136] *Commonwealth v Tasmania*, *supra* note 3 at 242.

[137] G Sawer *supra* note 54 at 17.

[138] The Constitution Alteration (Aboriginals) Bill 1967 (Cth).

[139] House of Representatives, *Parliamentary Debates* (Hansard), 1 March 1967 at 263.

[140] *Ibid* at 263

[141] See *Kartineryi, supra* note 2 per Kirby J at para 145.

[142] See Galligan and Chesterman, *supra* note 29at 46 who state that:

> The 1967 referendum was enormously significant as a symbolic act and for converting the s 51(xxvi) into an effective Commonwealth power to pass laws with respect to Aboriginal people. It did not, however, restore Aborigines to citizenship because the Constitution had never excluded them.

mischief was also laws that were based on the value that some races were more equal than others because of inherent 'racial characteristics' that were superior to others.

Although the amendment was motivated by the desire to improve the position of Aboriginal people, the desire was based on assumptions about the meaning and value of race which were substantially different from those held at federation. Section 51(xxvi) was infused, by its amendment, with values and meaning which differed from, and to an extent contradicted, those held at federation. Thus, the challenge, if not the obligation, on the interpreter is to interpret the provision in a way that maintains fidelity to the text while accommodating the meaning and values imported into the provision by its amendment.

6. Applying the validity test

A law purporting to be exercised under s 51(xxvi) obviously must be a law regarding a race of people. What may not be immediately obvious is that it cannot readily be assumed that a law's categorisation of a race will be constitutionally valid. The matter is open to judicial review. To illustrate the point, it is highly debateable whether Parliament can enact a law for the 'Dutch race'. But deciding whether Parliament has validly categorised a group of people as a race requires untangling the knot of unarticulated and articulated legislative assumptions about the group's alleged distinct racial characteristics. Similarly, the Constitution's assumptions about the term race need to be made explicit. If there is harmony between the legislative and constitutional assumptions about the relevant characteristics for defining a racial group, the challenged legislation's racial categorisation will likely be valid.

Although Aborigines were citizens all along, they did not enjoy the full benefits of citizenship. For one thing they were denied the right to vote in elections in some

A clear understanding of the term 'race' is also important because the characteristics that are perceived to exist for defining a group of people as a distinct race arguably bears a relationship to the powers that can be exercised regarding the group. Thus the question of whether a group is properly defined as a race in challenged legislation is a preliminary one in deciding the validity of its racial categorisation. Identifying the rationale for categorising a group as a race can also assist in determining whether the legislation properly exercises power with regard to the race.

As has been discussed earlier in Part 2, the categorisation of a group of people as a race is often a contentious one, and not one that can be done on the basis of 'objective' scientific evidence. Rather it is now seen to be socially determined, which means that racial categorisation can vary in time and between places. Racial categorisation involves selecting features or characteristics of a group which are seen to be unique to the group. The characteristics which are perceived to be relevant in defining the group as a distinct race can vary over time and place. The characteristics which were considered relevant for defining Aborigines as a distinct racial group in 1901 differ from those considered relevant a century later. In 1901 the grounds for racial distinction were based on pseudo-biological or nationalist conceptions of race, which led to the assumption, for example, that Aborigines were a distinct and inferior sub-species or group and that their difference in appearance was linked to their sub-species or sub-social status. As McGregor observes, in the literature of classical evolutionism, which was in vogue at the turn of the century,

> the concepts of race and progress were both pressed into service to fill a major hiatus in the narrative account of the origins of man and his civilisation. The various races were rendered as stages in a developmental sequence; but unlike the superficially similar

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States until the 1960s.

> scheme of the Enlightenment, in the evolutionary version it was a developmental sequence not only of society but also of biology. Human anatomy, mentality, culture and society all marched in step, within discrete racial units. By making the transition from savagery to civilisation an integral part of the evolution of the human species, the latter process was imbued with both meaning and direction.[143]

Charles Darwin, himself a liberal humanitarian who was opposed to Negro slavery,[144] held an 'optimistic view' of the evolution of humans. His views were enormously influential by the end of the 19th century. He believed that humans were gradually evolving from primitives to a superior race, and this process was a continuing one, so that

> At some future period, not very distant as measured by centuries, the civilised races of man will almost certainly exterminate and replace throughout the world the savage races. At the same time the anthropomorphous apes. . .will no doubt be exterminated. The break will then be rendered wider, for it will intervene between man in a more civilised state, as we may hope, than the Caucasian, and some ape as low as a baboon, instead of as at present between the negro or Australian and the gorilla.[145]

Darwin was only one of numerous influential scientists and commentators who ranked human races according to their level of

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[143] McGregor, *supra* note 84 at 31. Banton cautions, however, that:

> Even the chest beating in 1895 of British Secretary of State for the Colonies, Joseph Chamberlain, about 'the British race [being] the greatest governing race that the world has ever seen' should be treated with caution. A modern reader might assume that he was suggesting the biological superiority of the British race in governance, when in fact he 'probably regarded race as a synonym for nation'. *Supra* note 19 at 92.

[144] See McGregor *ibid* at 30.

[145] C Darwin *Descent of Man* Vol 1, (John Murray, London 1871) at 200-1.

development, and the Aborigines invariably ranked at the bottom.[146] Thus, the characteristics that were seen to distinguish Aborigines as a racial group were their lower forms of social behaviour and biological development. These identified characteristics served as the basis for legislative attention. Legislation was required to separate many Aborigines from the rest of the community, to protect them from the rest of the community and *vice versa*. It can be recalled from the discussion in Part 4 that the Queensland *Aboriginals Protection and Prevention of the Sale of Opium Act* of 1897 sought to protect Aborigines from abuse by whites and (in the view of some) to protect whites from racial contamination. The lower status of Aborigines made them vulnerable to abuse, requiring legislative intervention. But the legislation that protected them also assumed that they were not capable of, or entitled to, the rights and privileges of other citizens because of their lower social and biological status, and so denied them the entitlements of full and equal citizenship.

Racial categorisation of Aborigines on the basis of social and biological status became increasingly problematic with intermarriage. The response was to sub-categorise Aborigines in order to retain the status ranking of racial groups. As Hanks notes, the genealogical approach to defining Aborigines persisted from federation at least until the 1967 referendum. He provides the example of the 1966 census which asked respondents to nominate their race and explained: "If of more than one race give particulars, for example, ½ European- ½

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[146] Earlier in the 19th century Barron Field, a judge of the New South Wales Supreme Court subscribed to the views of the German philosopher Professor Blumenbach regarding racial classifications. Field, like Blumenbach, divided the varieties of human species into Caucasian, Mongolian, Ethiopian, Malayan and American races. These sort of rankings were common, although they may vary in their categories. Field differed with Blumenbach about his placement of Aborigines with the Malayan race. He claimed instead that the "skull, the genius, the habits, of the Australians appear to me, as far as I have been able to investigate the subject, to have, in all of them, the degenerate Ethiopian character". (Quoted by McGregor *supra* note 84 at 8.) Ethiopians stood at the lowest rank of the Blumenbach scale.

Aboriginal, 3/4 Aboriginal- 1/4 Chinese. . .[147] The States continued to define Aborigines by reference to proportions of 'Aboriginal blood'. Queensland and Western Australian legislation of the mid-1960s defined an Aborigine as "a person who has a preponderance of the blood of an Aborigine."[148] The attitude at the federal level soon began to show signs of change, so that the 1971 census asked for a person's 'racial origin', but 'If of mixed origin, indicate the one to which he considers himself to belong'".[149]

To-day the basis for distinction is established more on sociological grounds. In *Mandla v Dowell Lee*[150], for example, the House of Lords was required to consider whether Sikhs were a 'racial group' for the purposes of the *Race Relations Act 1976* (UK). The Act allowed an 'ethnic group' to fall within the Act's definition of race. Lord Fraser notes that

> it would be absurd to suppose that Parliament can have intended that membership of a particular racial group should depend on scientific proof that a person possessed the relevant distinctive biological characteristics (assuming that such characteristics exist).. . .the briefest glance at the evidence in this case is enough to show that, within the human race, there are very few, if any, distinctions which are scientifically recognised as racial.[151]

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[147] Australian Bureau of Census and Statistics *Census 1966: Householder's Schedule* quoted by P Hanks in "Aborigines and Government: the developing framework" in *Aborigines and the Law* P Hanks and B Keon-Cohen (eds) (Allen and Unwin, Sydney 1984) at 30.

[148] *Aborigines and Torres Strait Islanders Affairs Act* 1965 (Qld) s 6(1)(b). See also *Native Welfare Act* 1963 (WA) s 4.

[149] See P Hanks "Aborigines and Government: the developing framework" in *Aborigines and the Law* P Hanks and B Keon-Cohen (eds) (Allen and Unwin, Sydney 1984) at 30-31.

[150] [1983] 2 AC 548.

[151] *Ibid* at 561.

He proposed a number of conditions he considered essential for defining an ethnic group, including a long shared history, a cultural tradition of its own, a common geographical origin or descent, a common language, a common literature a common (and different) religion and being a minority in the general community.[152] Brennan J makes mention of similar categories in the *Tasmanian Dam Case*. He says that the biological element is essential to determining who was an 'Aborigine', but adds that

> it does not ordinarily exhaust the characteristics of a racial group. Physical similarities, and a common history, a common religion or spiritual beliefs and a common culture are factors that tend to create a sense of identity among members of a race and to which others have regard in identifying people as members of a race.[153]

In the same case Deane J defines Aborigines on what he considers is the conventional meaning of the term namely "a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal".[154]

The characteristics seen as defining the Aboriginal race in 1901 differ markedly from those identified by the above-mentioned courts in the 1980s. The assumptions underlying those categorisations have also markedly changed. In 1901 the underlying assumption was of racial hierarchy, whereas in the 1980s it was of self identity largely based on unique social characteristics that cannot necessarily be ranked according to hierarchy. Identifying and making explicit the underlying assumptions for racial categorisation offers a way of understanding some of the processes which lead the legislature to enact race-based legislation. If a legislature assumes that a racial group is identifiable by

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[152] *Ibid* at 562.

[153] *Tasmania Dam Case, supra* note 3 at 244. See Brennan J's discussion on race generally at pp.243-44.

[154] *Tasmania Dam Case, supra* note 3 at 274.

its inferior characteristics, then it is unsurprising if it enacts legislation that confirms the group's inferior status and denies them entitlements due to non-members of the group. If a racial group is characterised as being equal in status, but different in terms of certain social norms, then legislation would rationally treat them as distinct and equal. Thus it can be generalised that the process for deciding whether and why a group is considered to be a distinct race is relevant to the question (put either in a political or constitutional context) whether the legislation is appropriate. That is: why we consider a group to be a distinct race relates to what we can and should legislatively do about it.

The relationship between the characteristics that define a racial group and the power that may be exercised with regard to the group has arisen in consideration of the scope of s 51(xxvi). Stephen J notes in *Koowarta v Bjelke-Petersen*[155], for example, that:

> Because the reference to 'The people of any race' is qualified by the requirement that they should be such that it is deemed necessary to make special laws for them, they must possess some quality which calls for laws special to themselves. This requirement is more than a mere qualification of the power; it also predicates a character which laws made under par. (xxvi) must possess: they must be special laws, in the sense of having some special connexion with people of any race.. . . Although it is people of 'any' race that are referred to, I regard the reference to special laws as confining what may be enacted under this paragraph to laws which are of their nature special to the people of a particular race. It must be because of their special needs or because of the special threat or problem which they present that the necessity for the law

[155] (1982) 153 CLR 168.

> arises; without this particular necessity as the occasion for the law, it will not be a special law such as s 51(xxvi) speaks of.[156]

In other words, there must be some distinct quality (or characteristics) of the racial group which pre-exists the necessity for a special law regarding that distinct quality. The law may deal with the need, threat or problem that relates to the racial quality. For example, it may be recognised that a particular community or group of Aborigines form a racial group because they hold a distinct body of traditions, observances, customs and beliefs regarding particular areas, objects or relationships.[157] On that basis a law (the *Heritage Protection Act*, for example) may be enacted to protect those areas, objects or relationships from desecration.

The *Native Title Act Case* appears, however, not to support Stephen J's reliance on the term 'special' to qualify the scope of s 51(xxvi). It was stated in that case that "'[s]pecial' qualifies 'law' [and] does not relate to necessity" with the consequence that the "special quality" of the law in question is to be "ascertained by reference to its differential operation upon the people of a particular race"[158]. Thus, a special law appears to be merely a law that treats one race differently from others. Stephen J's general point, however, is that s 51(xxvi) limits its scope to laws that relate to the distinct needs, threats or problems relating to the race in question. This point is picked up by Gaudron J in *Kartinyeri*, although she relies on the term 'deemed necessary' rather than 'special laws' for creating the relationship between the characteristics that distinguish a race and the legislative mechanisms for dealing with the distinct characteristics. She states that:

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[156] *Ibid* at pp.209-210.

[157] See definition of "Aboriginal tradition" under s 3(1) *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth).

> The criterion for the exercise of power under s 51(xxvi) is that it be deemed necessary - not expedient or appropriate - to make a law which provides differently for the people of a particular race or, if it is a law of general application, one which deals with something of 'special significance or importance to the people of [that] particular race'. Clearly, it is for the Parliament to deem it necessary to make a law of that kind. To form a view as to that necessity, however, there must be some difference pertaining to the people of the race involved or their circumstances or, at least, some material upon which the Parliament might reasonably form a political judgment that there is a difference of that kind. Were it otherwise, the words 'for whom it is deemed necessary to make special laws' would have no operation and s 51(xxvi) would simply be a power to make laws for the people of any race.[159]

Parliament must therefore make its decision to enact a special law on a reasonable basis. There must be a difference between the group to whom the law will apply and the rest of the community which is appropriate for categorising them as a racial group—that is, a 'relevant difference' must exist.[160] Two consequences follow, according to Gaudron J, once the racial differences are identified: first, a valid law can only relate to the matters of difference,[161] and second, the law must be reasonably capable of being viewed as appropriate and adapted to the difference asserted[162]. The second consequence is that there be a rational connection between the racial difference and the legislative measures applying to them.

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[158] (1995) 183 CLR 373 at 460-461 citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186 per Gibbs CJ, 245 per Wilson J and 261 per Brennan J. See also Gaudron J in *Kartineryi*, *supra* note 2 at para 37.

[159] *Kartineryi, supra* note 2 at para 39.

[160] *Ibid* at para 40.

[161] *Ibid*.

The requirement that the legislature make rational judgements regarding racial laws has an antecedence in the equal protection clause (the Fourteenth Amendment) under the US Constitution. The clause was introduced after the Civil War and was aimed at providing emancipated blacks with full and equal status. The Supreme Court's interpretation of the provision initially did not remove racially discriminatory laws.[163] This interpretation, however, was overturned in the landmark decision of *Brown v Board of Education*[164] in which Warren CJ found that the requirement that children be taught in segregated schools, even with equal physical facilities, "generates a feeling of inferiority [amongst blacks] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone".[165] The decision did not lead the Supreme Court to subsequently overrule statutes which made distinctions amongst people leading to different legal treatment. Indeed it was recognised that there are perfectly fair and rational grounds for treating categories of citizens differently.[166] For example, refusing to allow under 16 year olds to apply for a driver's licence may be fairly done to protect road users.

Under the US Constitution legislation can fairly classify people for unequal treatment if the categorisation is rational, relevant to achieving a legitimate end and made to achieve a legitimate legislative purpose.[167] Legislation should be rational in the sense that like groups should usually be treated alike; relevant in that the categorisation must be necessary for achieving the legislative purpose; and the purpose is

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[162] *Ibid* at para 41.

[163] See *Plessy v Ferguson,* 163 US537 (1896).

[164] 347 US 483 (1954).

[165] *Ibid* at 494.

[166] L Tribe *American Constitutional Law* 2nd ed (Foundation Press, Mineola, NY 1988) at pp.1465-88.

[167] See R West "Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment" (1990) 42 Florida Law Rev 45 at 53.

required to be legitimate in that it must be for the public interest or deal with an issue the legislature is permitted to pursue.[168] The Supreme Court uses a two tiered scrutiny test: strict and minimal. Of interest for present purposes is that the Court considers legislative categorisation on the basis of race, religion and nationality as inherently suspect, requiring strict scrutiny.[169] The Court considers that blacks and whites have few inherent differences and therefore presumes that legislation which employs racial categories is likely to be making racial distinctions for irrational purposes which do not further legitimate legislative ends.[170] Legislation which categorises groups on an economic and social basis is not inherently suspect, however, and is therefore subjected to minimal scrutiny. Here the onus is on the challenger to prove that the classification of a group for discriminatory treatment lacks a rational relationship to the legislative object.[171]

Similar concerns about race laws are reflected by section 15 of the Canadian Charter of Rights and Freedoms 1982, which states that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(2) specifically allows programs or activities that have the object of ameliorating disadvantage. The present tests for section 15 were decided in a trilogy of 1995 Supreme Court cases: *Miron v*

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[168] *Ibid.*

[169] *City of Richmond v JA Croson Co* 109 SCt 706 (1989) at pp.720-23.

[170] R West, *supra* note 167 at 55.

[171] *McGowan v Maryland* 366 US 420 (1961); see also WS Tarnopolsky "The Equality Rights" in WS Tarnopolsky and G Beaudoin (eds) *The Canadian Charter of Rights and Freedoms: Commentary*, (Carswell, Toronto 1982) at 403.

Trudel[172], *Egan v Canada*[173] and *Thibaudeau v Canada*[174]. It was decided that the analysis under section 15(1) involves two steps. First the complainant must show a denial of equal protection or benefit of the law compared to other people. That is, whether a legislative distinction "has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed on others or of withholding or limiting access to benefits or advantages which are available to others".[175] Second, it must be shown to be discriminatory by denying one of the equality grounds mentioned in section 15 and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. The second component of the test applies considerations similar to that applied by the US Supreme Court by requiring the purpose of legislation to be identified and the relevance of the categorisation for achieving the purpose examined. Legislation will be valid if the legislative purpose is valid and the legislative categorisation of groups of people is relevant for achieving the purpose.[176]

L'Heureux-Dube J. in *Miron*, *Egan* and *Thibaudeau*, applied a slightly different test by requiring consideration of whether the (allegedly discriminatory) categorisation "is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a

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[172] [1995] 2 SCR 418.

[173] [1995] 2 SCR 513.

[174] [1995] 2 SCR 627.

[175] *Benner v. Canada (Secretary of State)* Supreme Court of Canada file no 23811, delivered 27 February 1997, unreported per Iacobucci J at para 61.

[176] *Ibid* at para 64. Note however that legislation that violates section 15 can be valid if, under section 1 of the Charter, the violation is demonstrably justifiable in a free and democratic society, that is the objective of the legislation is pressing and substantial and the means chosen to attain the legislative end must be reasonable and demonstrably justified in a free and democratic society. See *R vOakes* [1986] 1 SCR 103.

human being or as a member of Canadian society, equally deserving of concern, respect, and consideration".[177] According to Iacobucci J, making this distinction requires

> consideration of both the group adversely affected by the distinction and the nature of the interest adversely affected by it. The interaction of the group's social vulnerability, in light of the social and historical context, and the constitutional and societal significance of the interest will determine whether the impact of the distinction constitutes discrimination.[178]

Thus, the mere fact of categorising groups of people for unequal treatment may be valid if relevant for achieving a valid legislative purpose. It is unlikely, however, that categorisation on the basis of race will be relevant for allowing a valid purpose, unless for ameliorating disadvantage.

Although s 51(xxvi) is not couched in terms of equality, indeed it was originally designed to allow unequal treatment, it arguably requires a rational relationship between the special racial characteristics of a group and the special legislative measures regarding the group. The characteristics which defined a race in 1901 were identified for the purpose of ranking races according to a hierarchy of social and biological superiority. The assumption of racial hierarchy meant that, at the time of federation at least, s 51(xxvi) legislation could, and indeed should, treat races unequally in terms of their basic rights and entitlements. Hierarchy no longer serves as a basis for defining race. Instead it is now taken that racial difference does not imply racial superiority or inferiority. Legislation which now seeks to treat a race as inferior would be suspect and probably unconstitutional. The definition the challenged legislation provides of the 'race' and the assumptions

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[177] *Ibid* at para 66 per Iacobucci J.

[178] *Ibid*.

underlying the definition would invite scrutiny. And the connection between the characteristics that are singled out as defining the group as a race and the measures applied in the legislation regarding the race would also require strict scrutiny. In this context the US and Canadian equal protection jurisprudence would be informative, but not decisive, in determining validity.

7. Conclusion

The race power can only be understood if the contingent nature of the term 'race' is itself appreciated. This can only be done if the historical circumstances of the creation and amendment of the race power is considered. Doing so reveals that the term race is volatile and has altered substantially since it was first included in the Constitution. This factor profoundly affects the meaning and operation of s 51(xxvi). Consequently any test for the application of the provision must accommodate the provision's volatile nature whilst maintaining fidelity to the text of s 51(xxvi). Gaudron J's test in *Kartinyeri* comes closest to achieving these objectives.

Chapter 6

The Protection of Fundamental Rights under the Constitution

> We need not go far back in history to find cases in which the community, seized with a sort of madness with regard to particular offences, have set aside all principles of justice. If a state did behave itself in that way, why should not the citizens of the Commonwealth who did not belong to that state be protected?
>
> Richard O'Connor
> Constitutional Convention Debates
> Melbourne 8 February 1898

1. Introduction

The protection of fundamental common law rights and upholding the rule of law will often serve the interests of an indigenous minority as much as it will assist non-indigenous individuals and minorities. Arguably, a bill of rights would play a reconciliatory role by helping to ensure that indigenous people maintain the same essential entitlements to due process and non-arbitrary treatment as other citizens.

This chapter explores the possibility (which was inspired by comments of Gummow and Hayne JJ in *Kartinyeri*[1]) that there is a largely unwritten bill of rights in the Australian constitutional structure. The bill of rights includes the usual guarantees of due process, freedom of association, religion and movement and the non-arbitrary removal of property that exist in most bills or charters of rights. It is also possible, along the lines of s 35 of the Canadian Constitution, that there are

[1] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at para 89.

certain indigenous rights in the unwritten components of the Constitution. That possibility is briefly explored in this chapter.

For the most part this chapter argues that there exists, and should exist, a constitutional guarantee of the maintenance of the rule of law, and a relatively comprehensive constitutional bill of rights which takes both a written and an unwritten form. While not focusing on the impact this will have on the protection of the interests of indigenous people, it is largely assumed that they can only benefit from (and will be no worse off) as the result of constitutional protection as they are vulnerable to arbitrary treatment by the legislature and the administration. Certainly Australian history confirms this. The forced removal from Mapoon to make way for the Comalco mine in the 1970s,[2] the operation of Aboriginal protection legislation for much of the 19th and 20th centuries, and the treatment of the stolen generations are amongst a plethora of examples of indigenous people being deprived of even the most basic human rights. Freedom of movement was restricted by laws preventing Aborigines and Torres Strait Islanders leaving their reserves. Even the entitlement to marry was restricted by laws requiring Aborigines to gain the prior permission of a police officer. Many of these restrictions operated well after the 1967 referendum and are contrary to a bill of rights.

Mabo (No.2), as was mentioned in chapter 2 fell short of marking the beginning of an adequate reconciliation process because, although the Court acknowledged past wrongdoing and found that the common law could recognise native title, it offered no basis for finding restraint on parliament's powers to arbitrarily or capriciously curtail or extinguish native title in the future. Although the States and Territories were prohibited from discriminating against indigenous people on the grounds of their race because of the Federal *Racial Discrimination Act*,

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[2] See R Kidd *The Way We Civilise* (UQP, Brisbane 1997) at pp.201-227.

the Court offered no basis for restricting the Federal Government's power to repeal or amend the Act to allow the States and Territories to discriminate in the future. Reconciliation requires that measures be put in place to limit or remove the possibility of past wrongs occurring again. The past wrongs involved serious abuses of the fundamental rights of indigenous people in Australia.

Australia's written Constitution does not provide a complete codification of the fundamental rights that the constitution (in the broadest sense) in fact protects. The written Constitution, therefore, is only a partial account of the constitution as a whole. The constitution includes the written Constitution, constitutional implications arising from the written Constitution, principles regarding the rule of law and implied nationhood powers. It also includes, it is argued in this chapter, certain fundamental common law rights which are presumed to underlie the Constitution. These rights derive from the history and experience of the common law, informed by international and other developments, and include the protection of due process of law, and protection against the arbitrary exercise of power.

The argument in this chapter is that a court interpreting the Constitution presumes that the Constitution's authors did not intend that it would enable the legislature to exercise its powers in an arbitrary or capricious way so as to undermine the existence of a fundamentally decent and democratic society. The presumptions are applied in much the same way as presumptions are applied when interpreting ordinary legislation. That is, it is presumed that the authors of the Constitution did not intend to undermine fundamental rights unless they expressly stated otherwise in the Constitution. The Constitution can be amended at any time to specifically override the presumptions. In a de facto sense this means that a more comprehensive bill of rights underlies the Australian constitution than that expressly outlined in the written Constitution.

In practice, the Australian Constitution has been infrequently amended. There would appear to be a reasonably low probability that the Constitution will be amended to any great extent in the future. This means there is a low likelihood of the Constitution being amended to override any fundamental common law principles that the High Court might find exist in our constitutional system. In effect the Court could develop the scope of common law presumptions over time, with a relatively low chance of the electors amending the Constitution to limit that development. The grounds upon which judicial review could be deployed to strike down legislation could potentially increase, thus effectively shifting substantial amounts of power from the legislature to the judiciary. This may in turn erode the principles of power separation under the Constitution. The courts must therefore exercise their power of judicial review with considerable constraint so as to maintain due respect for the coordinate branches of government. The courts can do this by assuming that Parliament is in the best position to exercise political judgement in deciding on the appropriateness of enacting laws, unless those laws employ irrational and disproportionate means for achieving valid legislative objectives. A valid legislative objective is one that is within the scope of a constitutional power grant.

Although the protection of fundamental rights would be designed to protect all members of Australian society, the motivation for the argument for constitutional protection of the rights in this chapter is to advance the goals of reconciliation. That is, without that protection in the past, great wrongs were done to the indigenous people. They were treated as not possessing even the most basic rights accorded to non-indigenous people. A necessary component of reconciliation is first recognising the past (and present) harm being done, and second, establishing means for ensuring that such abuse does not occur in the future. As we have seen in chapter 4, the interpretation given to the race power by Gummow and Hayne JJ, at least, potentially offers no constraint on the creation and enforcement of laws that fundamentally

undermine the interests of indigenous people. This chapter puts the case for the existence of the rule of law and fundamental constitutional rights which in fact do protect indigenous people from such power abuse.

2. The rule of law

As mentioned in chapter 4, Gummow and Hayne JJ stated somewhat elusively in *Kartinyeri* that there may well be limits on the exercise of legislative power under s 51(xxvi) because of the manifest abuse test. Recall that s 51(xxvi) grants the Commonwealth power to enact laws for the "people of any race for whom it is deemed necessary to make special laws". In the *Native Title Case* the High Court left open the question whether the term "deemed necessary" provided the Court "some supervisory jurisdiction to examine the question of necessity against the possibility of a manifest abuse".[3] In *Kartinyeri* Gummow and Hayne JJ elaborated that the manifest abuse test relates to (i) the common law's presumption that statutes do not intend to interfere with common law rights, freedoms and immunities[4]; (ii) the fact that courts can judicially review legislation on the basis of the *Marbury v Madison* doctrine[5]; and (iii) the Constitution being underpinned by the rule of law.[6] There seems no real basis for confining these observations to the operation of the race power. Judicial review, for instance, is not confined to s 51(xxvi), and nor (it will be argued) is the operation of presumptions when interpreting constitutional provisions. In addition, the rule of law is a pillar upon which the whole constitutional structure rests, not just the operation of s 51(xxvi).

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[3] (1995) 183 CLR 373 at 460.

[4] *Supra* note 1 at para 89.

[5] *Ibid.*

[6] *Ibid.*

The meaning of the "rule of law" is far from clear. Dixon J mentioned in the *Communist Party Case* that the Constitution is framed in accordance with many traditional conceptions, including the rule of law.[7] Gummow and Hayne JJ subsequently noted in *Kartinyeri* that the High Court has not given consideration to Dixon J's statement. This is not surprising as the term "rule of law", like the term "sovereignty", is elusive. Certainly Dixon made no attempt to offer a definitive account of what he understood the term to mean. But he did seem to understand the doctrine of the separation of legislative and judicial power as encompassing a fundamental common law principle that was indistinguishable from the rule of law.[8] Indeed Dixon vested common law traditions and the rule of law with enormous symbolic force, a force that ultimately restrains the untrammelled exercise of legislative power. Mason was to later vest considerable symbolic force in the Australian people as the ultimate sovereign authority that limits the scope of legislative power.[9] As Wait notes, both Dixon and Mason "vested ultimate constitutional authority in symbolic sovereigns in order to ensure the integrity of the rule of law".[10]

Other members of the High Court have considered the meaning of the rule of law on various occasions. In *Watson v Lee*[11] Stephen J quoted Scott L.J. in *Blackpool Corporation v. Locker* with approval where he said "there is one quite general question . . .of supreme importance to the continuance of the rule of law under the British constitution, namely, the right of the public affected to know what that law is".[12] In

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[7] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.

[8] M Wait "The Slumbering Sovereign: Sir Owen Dixon's common law constitution revisited" (2001) 29 Fed Law Rev 57 at 67.

[9] H Patapan *Judging Democracy: The new politics of the High Court of Australia* (Cambridge University Press, Cambridge 2000) at pp.30-31.

[10] Wait, *supra* note 8 at 71.

[11] (1979) 144 CLR 374 at 394.

[12] (1948) 1 KB 349, at p 361.

dealing with the argument in *A v Hayden* that senior police officers who were involved in a raid on the Sheraton Hotel should be exempted from observing the law because of national security, Murphy J responded by stating that under the rule of law the "Governor-General, the Federal Executive Council and every officer of the Commonwealth are bound to observe the laws of the land".[13] In *Cheng v The Queen* Gaudron J stated that trial by jury is embedded in our judicial process and that it is important "to the rule of law and, ultimately, the judicial process and the judiciary itself".[14] In *Enfield City Corporation v Development Assessment Commission* she said that the rule of law requires that those holding executive and administrative powers must exercise their powers only in accordance with the laws which govern their exercise.[15] In *Re Carmody; Ex parte Glennan* it was observed that s 75(v) of the Constitution is a provision of "cardinal significance".[16] The provision provides the High Court with original jurisdiction to deal with matters involving writs of mandamus, prohibition, or an injunction sought against an officer of the Commonwealth. After noting its cardinal significance Kirby J proceeded to observe that under the provision:

> all officers of the Commonwealth (including federal judges) are rendered accountable in this Court to the Constitution and the laws of the Commonwealth. Being the means by which the rule of law is upheld throughout the Commonwealth, the provision is not to be narrowly construed or the relief grudgingly provided.[17]

The themes covered by these observations on the rule of law can be summarised as including: the need for relative certainty in the

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[13] (1984) 156 CLR 532 at 562.

[14] [2000] HCA 53 at para 80.

[15] (2000) 199 CLR 135 at para 56.

[16] (2000) 74 ALJR 1148 at 1149.

[17] *Ibid* at para 3, quoted with approval by Kirby J in *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57 at para 139.

application of the law, the limitation of the exercise of administrative power within the scope of its grant, the entitlement of those accused of certain crimes to due process rights such as trial by jury, and the fact that the law applies equally to all regardless of a person's station in society.

Some commentators have defined the rule of law more by what it is not rather than what it is. Some say the rule of law can be distinguished from its binary opposite the rule of force, or anarchy.[18] It has been contrasted with arbitrary rule, in which rulers abandon constraints of reason to serve their own purposes and not those of the people they govern.[19] Locke noted this trait of tyrants in the behaviour of King James I when, in a speech to Parliament in 1603, the King sought to make the distinction between "a rightful king and an usurping tyrant" by claiming that "whereas the proud and ambitious tyrant doth think his kingdom and people are only ordained for satisfaction of his desires and unreasonable appetites, the righteous and just king doth by the contrary acknowledge himself to be ordained for the procuring of the wealth and property of his people".[20] The good king, he claimed, is motivated by the public good whereas the tyrant is motivated by personal benefit and greed. Despite these proclamations of good intent, James I proved in practice to be a tyrant.[21] Similarly, when the Australian Parliament sought to introduce tyrannical legislation in the form of the *Communist Party Dissolution Act* it did so

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[18] TAO Endicott "The Impossibility of the Rule of Law" (1999) 19 Oxford Jour of Legal Studies 1 at 2.

[19] Ibid.

[20] J Locke *Of Tyranny* Chap. XVIII at section 200.

[21] The Stuarts systematically abused the instruments of power. They used the prerogative courts and the Star Chamber, as Maitland later observed, as "a court of politicians enforcing a policy, not a court of judges administering the law", FW Maitland, *The Constitutional History of England* (Cambridge University Press, 1909) at 263. The power abuses included imprisonment without trial, using torture to extract confessions, confiscating property without recompense, and passing laws with retrospective effect.

claiming that the legislation was necessary for the defence of the nation. The perceived threat was so great that the Act allowed the government to declare a body to be a communist affiliate and an unlawful association. The body was thereby dissolved and its property confiscated. It also made it an offence punishable by 5 years imprisonment to be an officer or member of the body. There were no processes for judicial review if a body was declared to be a communist affiliate, except that a person or body could apply to a single judge for a declaration it was not communist, with the burden of proof being on the applicant.[22] The then Prime Minister, Mr Menzies stated in Parliament that the objectives of the Communist Party and the Labour Party were identical, suggesting that the government would declare the Parliamentary opposition party a communist affiliate, thereby creating a *de facto* single party state.[23]

Locke took an expansive and systemic view of the means by which power comes to be abused, and proposed systems to prevent the potential for its abuse, which informed the development of principles for the rule of law. Locke's concern was to devise ways more generally to avoid the "irregular and uncertain exercise of the power"[24] in which persons are "subject to the inconstant, uncertain, arbitrary will of another man".[25] Locke believed it fundamental that

> whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide

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[22] G Winterton "The Significance of the *Communist Party* Case" (1992) 18 Melb Uni Law Rev 630 at 639.

[23] *Ibid* at 646 and 654.

[24] Locke, *supra* note 20 sec 127.

[25] *Ibid* sec 22.

> controversies by those laws; and to employ the forces of the community at home only in the execution of such laws.[26]

The legislature is not exempt from these principles.[27] It "cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges,"[28] while the "supreme executor of the law . . . has no will, no power, but that of the law."[29] Hayek noted that Locke frequently emphasised that there must be no punishment without a previously existing law providing for it, "that all statutes should have only prospective and not retrospective operation" and that the discretion of all magistrates should be strictly circumscribed by law.[30] Hayek adds that Locke's governing idea was that the law should be king or, as one of the polemical tracts of the period expressed it, *Lex Rex*.[31] Indeed, Locke took power abuse by rulers to be so serious an infraction that it entitled their subjects to rise up and oppose it.[32]

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[26] *Ibid*, sec 131.

[27] After the initial overthrow of the Stuarts it was realised that parliament itself had the capacity to act as arbitrarily as the king. With this came the recognition that "whether or not an action was arbitrary depended not on the source of the authority but on whether it was in conformity with pre-existing general principles of law". FA Hayek, *The Constitution of Liberty* (Routledge & Kegan Paul, London 1960) at 169.

[28] Locke, *supra* note 20, at sec 136.

[29] *Ibid*, sec 151.

[30] Hayek, *supra* note 27 at 169.

[31] S Rutherford, *Lex Rex: The Law and the Prince,* (London, 1644). See Hayek, *supra* note 27 at 169.

[32] See Locke, *supra* note 20 at section 202 where he says that "if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject, which the law allows not, œases in that to be a magistrate; and, acting without authority, may be opposed, as any other man, who by force invades the right of another".

According to Endicott, the rule of law offers constraint, consistency and certainty.[33] It requires that laws be "open, clear, coherent, prospective, and stable".[34] Other commentators provide the rule of law further scope, so that it encompasses a range of fundamental rights, including the right to due process, the peaceful possession of property and so on.[35] The common ground held by fundamental rights and the rule of law is a concern to prevent power abuse. One of the strategies for avoiding this is to ensure that power is not concentrated in one person or institution, which is of course the basis of the doctrine of the separation of powers. Another strategy is to place constraints on the arbitrary exercise of power by requiring that sufficient regard is given to fundamental rights or principles designed to limit the entitlement of a law-maker to enact laws that arbitrarily or capriciously subject groups or individuals to harsh and unfair treatment.

Krygier notes the possibility raised by some authors that the rule of law is not just a restraint on power, it is also "a way of *realizing* certain values, among them 'respect for the dignity, integrity, and moral equality of persons and groups". [36] Krygier admits that this proposed positive operation of the rule of law is contested, with many writers

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[33] Endicott, *supra* note 18 at 2.

[34] *Ibid* at 1.

[35] The International Commission of Jurists has argued that "the Rule of Law is a dynamic concept…which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which legitimate aspirations and dignity may be realized". ICJ *The Rule of Law in a Free Society* Report of the International Congress of Jurists, New Delhi 1959 at p.3. See also L Strelein "The 'Courts of the Conqueror': The judicial system and the assertion of indigenous peoples' rights" (2000) 5 Australian Indigenous Law Review 1 at 3. See generally Hayek, *supra* note 27.

[36] M Krygier, "The Grammar of Colonial Legality: Subjects, Objects, and the Australian Rule Of Law" in *Australia Reshaped. Essays on Two Hundred Years of Institutional Transformation,* (Cambridge UP, 2002, forthcoming) at 9. See also Philip Selznick, 'Legal Cultures and the Rule of Law' in Martin Krygier and Adam Czarnota, eds., *The Rule of Law after Communism,* (Dartmouth/Ashgate, Aldershot, 1999), 26. See too David Dyzenhaus, *Judging the Judges, Judging Ourselves. Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing, Oxford, 1998).

"preferring a more austere, formal conception, and contending that links between the rule of law and the realization of those values are contingent at best".[37] He thinks that the rule of law does in fact create several and intimate connections, and creates an institutional fabric which is not known everywhere. In other words Krygier conceives of the rule of law operating at several levels, both formal and less formal.

Returning to the formal and more broadly accepted understanding of the rule of law, it relates to broad concerns about ensuring the separation of powers and about ensuring constraint, consistency and certainty in the creation and application of laws. Fundamental common law principles, such as the right to due process, the non-arbitrary taking of property and the right to freedom of movement and association are principles that support and give effect to the rule of law by restraining the arbitrary exercise of power. The possibility of overlap regarding the rule of law and fundamental rights principles was evident in *Commissioner, Australian Federal Police v Propend Finance Pty Limited*, which dealt with legal professional privilege.[38] Gummow J noted that:

> Views differ as to whether the privilege is to be characterised as "a practical guarantee...of fundamental constitutional or human rights", or one of those traditional common law rights which is not to be abolished or cut down otherwise than by clear statutory provision, "a substantive rule of law". Certainly the privilege alike protects the strong as well as the vulnerable, the shabby and discredited as well as the upright and virtuous, those whose cause is in public disfavour as much as those whose cause is held in popular esteem.

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[37] Krygier *ibid* at 10.

[38] (1997) 188 CLR 501.

There is an inter-relationship between the rule of law and fundamental common law principles. The former expresses broad concerns for constraint, consistency and certainty in the enactment and administration of laws, the latter sets out more specific principles for the protection of individuals and groups against the arbitrary exercise of power.

It will now be argued that constitutional provisions are to be interpreted subject to the presumption that the provisions are intended not to operate in a way that undermines fundamental common law principles. It is also arguable that the underlying structure of the Australian constitutional system as a whole presumes the existence and operation of fundamental common law principles. The effect of the latter, broader, argument is that all legislation, State and Federal, are to be read subject to an implied bill of rights. This chapter will focus on the first argument, whilst allowing for the possibility of the second, broader, argument.

The significance of the rule of law for minority groups, including indigenous groups, was explicated by Williamson J in the Canadian case of *Campbell v Attorney-General*

> Finally, an entrenchment of rights essential to maintain the distinct culture of aboriginal peoples is consistent with the principles of constitutionalism discussed by the Supreme Court of Canada in 1998, after *Sparrow*, *Badger*, and *Delgamuukw*, in *Reference Re Secession of Quebec.* In the section of those lengthy reasons concerning the principles underlying our constitutional structure, the Court said at page 259:
>
> > An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule…a constitution may seek to ensure that vulnerable minority

> groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority.[39]

Common law presumptions

Common law courts interpret legislation on the expectation that certain tenets of our legal system will be followed by the legislature.[40] The presumption made by a court when interpreting a statute is that Parliament had no intention to oust the jurisdiction of the courts or to alter common law doctrines.[41] Clear and express terms in the statute can rebut the presumptions.[42] According to Pearce and Geddes, the presumptions can be viewed "as the courts' efforts to provide, in effect, a common law bill of rights – a protection for the civil liberties of the individual against invasion by the state".[43] And, according to Bankowski and MacCormick, they can be seen to operate in a "quasi-constitutional way, expressing fundamental rights and liberties of

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[39] (2000) 156 D.L.R. (4th) 713 at para 142 – Supreme Court of British Columbia at first instance.

[40] DC Pearce and RS Geddes *Statutory Interpretation in Australia* 3rd ed (Butterworths, Sydney 1988) at para 5.1.

[41] Pearce and Geddes, *ibid* at para 5.1. See also *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at pp.635-36; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523; *Potter v. Minahan* (1908) 7 CLR 277 at 304; *Hamilton v* Oades (1989) 166 CLR 486 at 494; *Baker v Campbell* (1983) 153 CLR 52 per Dawson J at 123; *Smorgon v ANZ Banking Group Ltd* (1976) 134 CLR 475 at 487; *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 and *Wheeler v. Leicester City Council* (1985) AC 1054, per Browne-Wilkinson LJ at 1065.

[42] See *Sargood Bros v Commonwealth* (1910) 11 CLR 258 at 279; *Melbourne Corp v Barry* (1923) 31 CLR 174 at 206, and *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 45 ALR 609 at 617.

[43] Pearce and Geddes, *supra* note 40 at para 5.1.

citizens and regulating the relations between parliament, the executive and the courts".[44]

Pearce and Geddes state that the presumptions represent the philosophy that "it is the responsibility of the courts to protect the individual from the excesses of the State. It is assumed that this protection is best afforded by the principles of the common law".[45] The courts meet this responsibility by presuming that Parliament acts justly and reasonably.[46] According to the High Court, the application of the presumptions is a "stringent one".[47]

The argument here is that there is no fundamental reason why the same presumptions that apply to the interpretation of ordinary statutes should not also apply to the interpretation of the Constitution itself. That is, a court should presume that the authors of the Constitution did not intend that its provisions would oust the jurisdiction of the courts or alter common law doctrines, unless a constitutional provision clearly and plainly states otherwise. The High Court has not expressed a unanimous view on this argument, although it is fair to assume that most judges might be opposed to it at present. Brennan J and Dawson J, for example, have expressly rejected the proposition that constitutional provisions can be read subject to the presumptions.[48] Kirby J, on the other hand, effectively supports the proposition.[49]

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[44] Z Bankowski and DN MacCormick "Statutory Interpretation in the United Kingdom", in D N MacCormick and RS Summers *Interpreting Statutes: A comparative study* (Aldershot, UK 1991) at 391.

[45] Pearce and Geddes, *supra* note 40 at para 5.11.

[46] *Ibid.*

[47] *Coco v R* (1993) 179 CLR 427 at 438.

[48] See section headed "Contrary views" below.

[49] See next section, below.

It is argued here that the presumptions operate both at a constitutional level in determining whether a statute is within power, and at an ordinary statutory interpretation level. In the former case it is presumed that the Constitution does not intend to undermine common law rights, unless a constitutional provision expressly states otherwise. In the latter case it is presumed that the legislation does not intend to undermine rights unless a provision in the legislation expressly states otherwise. In the former case a constitutional grant of power will be understood not to include the power to undermine fundamental rights, unless the power grant expressly provides otherwise. This means, in effect, that constitutional provisions are to be interpreted as being subject to an unwritten bill of rights, despite the fact that there are only a limited number of rights expressly mentioned in the written Constitution.[50]

Legislation relying on the power grant for validity and which undermines fundamental rights will be unconstitutional, unless the court decides on balance, after paying respect due to coordinate branches of government, that parliament has undermined the rights to the minimal extent necessary to give effect only to a valid legislative objective. The reasons for this qualification of due respect are explained in Part 6, below. In deciding this, the court assumes that parliament and the administration, and not the courts, are the appropriate venues for creating and implementing policy. The courts are merely the umpires and will rule a provision unconstitutional if parliament has acted irrationally and disproportionately and thereby exceeded the rules of fair play.[51] The courts are not secondary policy makers, and therefore

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[50] The written provisions in the Constitution providing for the protection of fundamental rights are: trial by jury, s 80; freedom of religion, s 116; acquisition of property on just terms, s 51(31); rights of electors, ss 24 and 41; prohibition against discrimination towards interstate residents, s 117; and freedom of movement amongst the states, s 92.

[51] The proportionality test sources from the jurisprudence of the European Court of Human Rights and has influenced a number of jurisdictions including the Australian

cannot substitute their evaluation of the appropriate measures for policy creation and implementation for that of parliament's. This argument is further elaborated upon in Part 6, below.

(a) High Court views supporting the fundamental common law principles limitations

Although a number of High Court judges have rejected the proposition that presumptions apply to the interpretation of Constitutional provisions, that is not a unanimous view.[52] Kirby J effectively applied the use of common law presumptions to the interpretation of the Constitution, although he appears to require ambiguity in the Constitutional text to trigger a reference to the common law presumptions. Ambiguity is not a prerequisite for interpreting an ordinary statute, so it is unclear why he requires it for Constitutional text. In any event, in *Newcrest Mining* he stated that:

> Where the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights.[53]

His rationale, in part, was that

> To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country,

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High Court. See T Jones "Fundamental Rights in Australia" (1994) 22 Fed Law Rev 57 at pp. 77-78. See also J Jowell and A Lester "Proportionality: Neither novel nor dangerous" in J Jowell and D Oliver (eds) *New Directions in Judicial Review* (Stevens, London 1988). See also *Davis v Commonwealth* (1988) 166 CLR 79 per Mason CJ, Deane and Gaudron JJ at 100 where they refer to a legislative measure that was "not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power". Also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

[52] See next section, below.

[53] *Newcrest Mining (WA) Limited v The Commonwealth of Australia* (1997) 190 CLR 513 at 657.

> accommodates itself to international law, including insofar as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.[54]

He made similar points in *Kartinyeri* where he stated that:

> Where there is ambiguity [in a provision in the Constitution], there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity[55]. Such violations are ordinarily forbidden by the common law and every other statute of this land is read, in the case of ambiguity, to avoid so far as possible such a result. In the contemporary context it is appropriate to measure the prohibition by having regard to international law as it expresses universal and basic rights. Where there is ambiguity in the common law or a statute, it is legitimate to have regard to international law[56]. Likewise, the Australian Constitution, which is a special statute, does not operate in a vacuum. It speaks to the people of Australia. But it also speaks to the international community as the basic law of the Australian nation which is a member of that

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[54] *Ibid* at pp.657-58.

[55] cf *Kruger v The Commonwealth* (1997) 71 ALJR 991 at 1037; 146 ALR 126 at 190.

[56] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; *Dietrich v The Queen* (1992) 177 CLR 292 at 306, 321; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287. A similar approach has been adopted in the United Kingdom: *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 283; *R v Home Secretary, Ex parte Brind* [1991] 1 AC 696 at 761; *Derbyshire CC v Times Newspapers* [1992] QB 770 at 830; in New Zealand: *Tavita v Minister for Immigration* [1994] 2 NZLR 257 at 266; and in Canada: *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences* [1943] SCR 208 at 249; *Schavernoch v Foreign Claims Compensation* [1982] 1 SCR 1092 at 1098.

community.[57]

Toohey J made extra curial statements that fundamental common law principles may operate to restrain the exercise of parliamentary and administrative power. He stated that "the courts would over time articulate the content of the limits on power arising from fundamental common law liberties".[58] He added that it would "be a matter for the Australian people whether they wished to amend their Constitution to modify those limits. In that sense, an implied 'bill of rights' might be constructed".[59]

(b) Contrary views

The statement is often repeated that the founding fathers expressly rejected the US approach to a bill of rights. Barwick CJ, for instance, said that unlike the US, the Australian Constitution is "built upon confidence in a system of parliamentary Government with ministerial responsibility".[60] Brennan J claimed in *Nationwide News Pty. Limited v Wills* that the power to strike down laws merely on the ground that the law abrogates human rights and fundamental freedoms is one that might be exercised by a court where a written bill of rights exists, but not in Australia.[61] He appears to take the express rejection by the founding fathers of the inclusion of the due process clause based on the 14th Amendment, as proposed by Mr O'Connor, as grounds for concluding that it was intended that Parliament have the power to

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[57] *Kartinyeri* note 1 at para 166. Some of Kirby J's footnotes have been retained.

[58] J Toohey "A Government of Laws, and Not of Men?" (1993) 4 PLR 158 at 170.

[59] *Ibid* at 170.

[60] *Attorney-General (Cwlth); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 24. See also *Re Bolton and Another; ex parte Beane* (1987) 162 CLR 514 per Brennan J at 523.

[61] (1992) 177 CLR 1 at 43.

overturn due process. This, I believe, is not a fair conclusion to be drawn from the constitutional debate, as will be further argued in Part 4, below.

Care needs to be taken not to make too much of the distinction between the US and Australian constitutions regarding the protection of fundamental rights. It is true that the US Constitution provides for a relatively comprehensive set of bill of rights provisions. The Australian Constitution, however, is not devoid of bill of rights provisions. It provides for trial by jury (s 80), freedom of religion (s 116), the acquisition of property only on just terms (s 51(31)), the rights of electors (ss 24 and 41), the prohibition against discrimination towards interstate residents (s 117), and for freedom of movement amongst the states (s 92). It should not be assumed that the US written bill of rights provides a complete account of the fundamental rights capable of being protected. This is evident from the 9th Amendment, which expressly states that the "enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people". So it is fair to say that neither the US nor the Australian written constitutions provide a codification of the rights capable of being protected. Thus, the written constitutions in both cases do not provide a complete account of the values, rights and interests that are protected by the two constitutional structures.

Dawson J took the view in *Kruger*[62] that the Constitution does not provide due process protection. He also pointed to the constitutional debate about the due process clause and concluded that:

> The framers preferred to place their faith in the democratic process for the protection of individual rights and saw constitutional guarantees as restricting that process. Thus the Constitution contains no general guarantee of the due process of law. The few

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[62] *Kruger v The Commonwealth* (1997) 190 CLR 1.

> provisions contained in the Constitution which afford protection against governmental action in disregard of individual rights do not amount to such a general guarantee. It follows that, in so far as the plaintiffs' claim is reliant upon a constitutional right to the due process of law, it must fail.[63]

Thus, he was of the view that "the Australian Constitution, with few exceptions and in contrast with its American model, does not seek to establish personal liberty by placing restrictions upon the exercise of governmental power".[64] In his view, those "who framed the Australian Constitution accepted the view that individual rights were on the whole best left to the protection of the common law and the supremacy of parliament".[65]

3. The constitutional protection of fundamental common law rights

The founding fathers had the US Bill of Rights before them when they debated the creation of the Australian Constitution.[66] They chose to adopt a limited number of bill of rights provisions, and so to that extent departed from the US model. Arguments now differ as to whether the founders were motivated by a faith in some kind of parliamentary self discipline which would prevent parliament from undermining fundamental rights, or by the belief that it was so obvious that parliament cannot breach fundamental rights that there was no need to expressly state the proposition in the Constitution. Some originalists suggest that reading the constitutional debates will reveal the intentions

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[63] *Ibid* at 61.

[64] *Ibid.*

[65] *Ibid.*

[66] See G Williams *Human Rights Under the Australian Constitution* (Oxford University Press, Melbourne 1999) at pp.30-33.

of the Constitution's authors.[67] In answer to this, we should be mindful that the founding fathers are not the sole authors of the Constitution. It was also subject to the approval of the electors in the Australian colonies and passage through the Parliament in Westminster. In any event, the debates are at best only a partial account for the motivation behind their decisions to include provisions in the Constitution. Many of those at the constitutional conventions did not speak during a debate on a particular clause, so we have no basis for understanding why they voted in the way they did on the clause. Where debate did take place, one is often left to guess at the sub-text behind their comments, or left with differing and sometimes conflicting grounds for supporting or rejecting a proposition. Take for example the following (unedited) transcript of the exchange regarding a proposal by O'Connor for a due process clause in the Constitution:[68]

> **Mr. OCONNOR** (New South Wales). I beg now to move-
>
> That the following words be inserted after the word "not"-"deprive any person of life, liberty, or property without due process of law."
>
> **Dr. COCKBURN** (South Australia).-Why should these words be inserted? They would be a reflection on our civilization. Have any of the colonies of Australia ever attempted to deprive any person of life, liberty, or property without due process of law? I repeat that the insertion of these words would be a reflection on our civilization. People would say-"Pretty things these states of Australia; they have to be prevented by a provision in the Constitution from doing the grossest injustice."
>
> **Mr. OCONNOR** (New South Wales).-I have mentioned before the reasons, and they appear to me to be very strong, why these words should be retained. The honorable member will not deny that there

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[67] See chapter 4, part 2, above.

[68] Constitutional Convention Debates, Melbourne 8 February 1898, at 688.

should be a guarantee in the Constitution that no person should be deprived of life, liberty, or property without due process of law. The simple object of this proposal is to insure that no state shall violate what is one of the first principles of citizenship.

Mr. KINGSTON.-Is there not that guarantee now?

Mr. OCONNOR.-I do not think so. We are making a Constitution which is to endure, practically speaking, for all time. We do not know when some wave of popular feeling may lead a majority in the Parliament of a state to commit an injustice by passing a law that would deprive citizens of life, liberty, or property without due process of law. If no state does anything of the kind there will be no harm in this provision, but it is only right that this protection should be given to every citizen of the Commonwealth.

Sir JOHN FORREST.-Would not the Royal assent be withheld?

Mr. OCONNOR.-I do not know that it would. The Royal assent is practically never refused to any Bill that deals with our own affairs, and it is highly improbable that it would be refused under any circumstances.

Mr. ISAACS.-Suppose a state wanted land for railway purposes, and took it compulsorily, there being a provision in one of the statutes that the amount to be paid should be determined by arbitration, would not that be taking the land without due process of law?

Mr. OCONNOR.-No, it would not; and, as an honorable member reminds me, there is a decision on the point. All that is intended is that there shall be some process of law by which the parties accused must be heard.

Mr. HIGGINS.-Both sides heard.

Mr. OCONNOR.-Yes; and the process of law within that principle may be [start page 689] anything the state thinks fit. This provision

simply assures that there shall be some form by which a person accused will have an opportunity of stating his case before being deprived of his liberty. Is not that a first principle in criminal law now? I cannot understand any one objecting to this proposal.

Dr. COCKBURN-Very necessary in a savage race.

Mr. OCONNOR.-With reference to the meaning of the term due process of law, there is in Baker's *Annotated Notes on the Constitution of the United States*, page 215, this statement-

Due process of law does not imply that all trials in the state courts affecting the property of persons must be by jury. The requirement is met if the trial be in accordance with the settled course of judicial proceedings, and this is regulated by the law of the state.

If the state law provides that there shall be a due hearing given to the rights of the parties-

Mr. BARTON.-And a judicial determination.

Mr. OCONNOR.-Yes, and a judicial determination-that is all that is necessary.

Mr. ISAACS.-What is the good of it? It is an admission that it is necessary.

Mr. OCONNOR.-Surely we are not to be prevented from enacting a guarantee of freedom in our Constitution simply because imputations may be cast upon us that it is necessary. We do not say that it is necessary. All we say is that no state shall be allowed to pass these laws.

Mr. ISAACS.-Who asks for the guarantee?

Dr. COCKBURN.-The only country in which the guarantee exists is that in which its provisions are most frequently violated.

Mr. OCONNOR.-I think that the reason of the proposal is obvious. So long as each state has to do only with its own citizens it may

make what laws it thinks fit, but we are creating now a new and a larger citizenship. We are giving new rights of citizenship to the whole of the citizens of the Commonwealth, and we should take care that no man is deprived of life, liberty, or property, except by due process of law.

Mr. GORDON.-Might you not as well say that the states should not legalize murder?

Mr. OCONNOR-That is one of those suppositions that are against the first instincts of humanity.

Mr. GORDON.-So is this.

Mr. OCONNOR.-No, it is not. We need not go far back in history to find cases in which the community, seized with a sort of madness with regard to particular offences, have set aside all principles of justice. If a state did behave itself in that way, why should not the citizens of the Commonwealth who did not belong to that state be protected? Dr. Cockburn suggested in so contemptuous a way that there could be no reason for this amendment, that I got up to state again what had been stated before.

Dr. COCKBURN.-Not contemptuous.

Mr. OCONNOR.-I know the honorable member meant nothing personal, but I thought it necessary to state the reasons of what, had it not been for the honorable member's statement, would have seemed to be a perfectly obvious proposition. Mr. Clark, of Tasmania, thought the amendment of importance, and pointed out that it had been put in the United States Constitution. It should also be put in this Constitution, not necessarily as an imputation on any state or any body of states, but as a guarantee for all time for the citizens of the Commonwealth that they shall be treated according to what we recognise to be the principles of justice and of equality.

Sir EDWARD BRADDON (Tasmania).-The amendment suggested by the Parliament of Tasmania would have modified this clause so as to, perhaps, make it acceptable. That amendment having been rejected, I cannot but think that it would be advisable to strike the whole clause out. I think the clause as it stands is calculated to do harm rather than good. It will cause friction between the states and the [start page 690] Commonwealth, and also involve considerable interference with the rights of the several states. If it is to be decided that a state shall not enforce any law abridging the liberties of other citizens of the Commonwealth, and it be understood that those citizens are to have this indulgence while within the state, that will involve some danger. The latter part of the clause, which says that the state shall not "deny to any person within its jurisdiction the equal protection of the laws," must involve confusion, and may involve serious disagreement. That is the way it strikes me.

Question-That the words "deprive any person of life, liberty, or property without due process of law" proposed to be inserted be so inserted-put.

The committee divided- Ayes ... ... 19; Noes 23

Majority against the amendment 4

What can be made of this debate? First it may be noted that most who voted on the proposition did not speak to it, so we do not know the reasons for their vote. Second, it does not follow that those who rejected Mr O'Connor's proposed clause favoured allowing the Commonwealth or the States the power to deprive any person of life, liberty or property without due process of law. Isaacs asked what was the good of the provision, and questioned whether it was necessary, presumably because due process would be assumed in the operation of constitutional government. Mr Gordon suggested that laws that controverted due process would be against the first instincts of

humanity, just as legalising murder would, and therefore it was unnecessary to expressly prohibit it as it the proposition is so obvious it goes without saying. Braddon was the only delegate to expressly raise the issue of interference with the rights of the several states to legislate as they see fit. Arguably, given the closeness of the vote and the reasons given by a number of those who voted against the proposition, it was largely accepted that, whether it be put expressly in the Constitution or it be accepted as a first principle that goes without saying, parliament may not legislate to do away with due process rights.

A secondary concern raised by Mr Kingston was that placing the due process provision in the Constitution would adversely reflect on our civilisation because it meant that our parliaments would have to be expressly told not to perpetrate the grossest injustice. The position today is in fact the reverse. Australia now stands conspicuously outside the community of democratic nations with some form of relatively comprehensive written bill of rights.[69] Even the UK, which itself has had a history of major constitutional documents protecting fundamental rights (ie Magna Carta and the Bill of Rights of 1689) is a signatory to the European Convention on Human Rights and Fundamental Freedoms, which enables individuals in the UK to petition European Commission and the European Court for alleged breaches of the Convention.

Consistent with Locke's concern about Parliament's capacity to act as a tyrant, O'Conner argued in the constitutional debates that we "need not go far back in history to find cases in which the community, seized with a sort of madness with regard to particular offences, have set aside all principles of justice".[70] Given the closeness of the vote on

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[69] Common law countries with a bill of rights include Canada, New Zealand, the United States and India. Hong Kong has recently enacted a Bill of Rights Ordinance, while the European Community has had a Convention for the Protection of Human Rights since 1953.

[70] Constitutional Convention Debates, Melbourne 8 February 1898 at 689.

his due process clause, and the complex and largely unstated reasons for the ayes and noes, we cannot conclude that the founding fathers necessarily disagreed with his observation. Some may have voted against a due process clause on the grounds offered by Gordon, namely, there seemed to be no need to make the obvious requirement in the Constitution that parliament may not breach the rule of law just as there was no need to require that Parliament not pass laws permitting murder.[71] According to Williams and Bradsen the issue of race and citizenship proved to be the critical factor in the decision of the framers not to adopt Inglis Clark's proposed bill of rights.[72]

Some of those who voted in the negative to O'Connor's proposition may have felt that the common law itself provided sufficient protection of fundamental principles. As Patapan observes:

> In fact, the common law was regarded as one of the most important measures for the protection of immemorial rights and liberties. Though common law rights were subject to parliamentary control and therefore could be limited for the public good, this was not considered to pose a major threat to liberty because Parliament itself was seen as a manifestation and defence of another form of liberty – the right to be represented and participate, through voting, in the formulation of laws. To the founders, the executive and not Parliament posed the greatest threat to liberty.[73]

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[71] See the pre-Canadian Charter case of *Retail, Wholesale & Department Store Union, Local 580 v Dolphin Delivery Ltd* (1986) 33 DLR (4th) 174 at pp.184-85 per McIntyre J where he said that the fundamental freedoms are "so elementary that it was not necessary to mention them in the Constitution".

[72] J Williams and J Bradsen "The Perils of Inclusion: The Constitution and the Race Power" (1997) 19 Adel LR 95 at 109. See also G Williams "Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the '14th Amendment" (1996) 42 Australian Journal of Politics and History 10.

[73] Patapan, *supra* note 9 at 42.

The question as to which is the more appropriate institution for ensuring the protection of fundamental rights – Parliament alone, or the Courts supervising the exercise of power via judicial review – is a perennial one, which will now be considered.

4. Parliamentary supremacy

A lingering concern in the debate about subjecting the Constitution to common law presumptions is that striking down legislation by courts on the basis of an unwritten bill of rights is essentially undemocratic. It is feared that the courts would trespass into the parliamentary and administrative realms of government, and would substitute the views and values of unelected judges for those of the representatives of the people.[74] Kirk makes the plain assertion that judicial review *is* undemocratic.[75] This, however, begs the question as to what precisely is meant by "democracy"? The term, like other grand terms such as "sovereignty", has a generally accepted core meaning, but surrounding that core is a penumbra of nuances that accommodate widely differing perceptions and ideals. Often inherent in the term democracy is an imagined system of government in which parliament is thought to be an efficient instrument for giving effect to the will of the people. Utopian fantasies of democracy, liberalism, socialism or any other ideal when examined closely conjure up a world that is intolerant of those who do not strictly conform to the dictates of the ideal. Because of the utopian demand for a rigid adherence to its ideals, any infraction is dealt with swiftly and harshly to ensure that no-one spoils the good life. Judicial review may be seen to spoil the party, and therefore by definition is

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[74] See L Zines in *Constitutional Change in the Commonwealth* (Cambridge University Press, New York 1991) at 52 where he cautions against judges using judicial review in a way that promotes "judicial aggrandisement or personal predilections" and allows judges to "discover in the constitution his or her own broad political philosophy". See also Winterton *supra* note 22 at pp.228-35.

[75] J Kirk, "Rights, Review and Reasons for Restraint" (2001) 23 Syd Law Rev 19 at 51.

undemocratic as it sullies the ideal. In reality ideal democracy does not exist. Parliament is capable of being subjected to the undue influence of small and powerful lobby groups, of being effectively controlled by an elite within the cabinet and the administration, and of acting (with the approval of the majority) in a harsh and arbitrary way towards minorities. Thus, caricaturing parliament as democratic and judicial review as undemocratic essentially misses the point that constitutionalism assumes that if power is concentrated into the hands of any single individual or institution (whether it carries the label of "democracy" or not), then the temptation and the means for power abuse are thereby provided.

Locke considered the nature of tyranny in *The Second Treatise of Civil Government* (1690). Although he was highly critical of the exercise of tyrannical power by King James I,[76] he did not confine his fears to monarchs:

> It is a mistake, to think this fault is proper only to monarchies; other forms of government are liable to it, as well as that: for wherever the power, that is put in any hands for the government of the people, and the preservation of their properties, is applied to other ends, and made use of to impoverish, harass, or subdue them to the arbitrary and irregular commands of those that have it; there it presently becomes *tyranny,* whether those that thus use it are one or many.[77]

Parliament is just as capable of the tyrannical exercise of power as a monarch. The Lockean conception is that no person or body should have complete freedom to make whatever laws they desire. This contrasts with the Hobbesian conception of sovereignty (and the legal positivism deriving from it), which assumes that the sovereign (whether

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[76] J Locke *Of Tyranny* Chap. XVIII at section 200.

[77] *Ibid* at section 201.

a person or an institution) always proceeds within a rational framework.[78] Applying that conception to the modern debate, supporters of parliament's unrestrained exercise of plenary powers assume that Parliament will always act rationally as agents of the people in creating legislation. Thus, the courts, by referring to fundamental principles when judicially reviewing legislation, must be wrongly (and undemocratically) substituting their values for those of the people. In reality, however, "all rational thought moves within a non-rational framework of beliefs and institutions".[79] Thus it is conceivable that Parliament can act irrationally, and therefore wrongly make assumptions, for example, about a class of people or a perceived threat to society, which it sees as justifying the exercise of arbitrary power. Constitutionalism, on the other hand, is designed to restrain the exercise of arbitrary power by establishing a system for the independent review of the rationality of such decisions. The power of review, however, is a power of last resort so as to avoid the unbalancing of power in favour of one institution (the judiciary) and against another (the parliament).

Constitutionalism requires built in checks and balances so that power does not rest in one institution. Locke and Montesquieu mooted these checks and balances in response to the calamity and power abuses of the 17th century. But they by no means offered the first or last word on the creation of a system to restrain tyranny. Plato (427-347 BCE), bruised by his experiences of the "thirty tyrants" of Athens, proposed a "mixed constitution" (with a mix of monarchic, oligarchic and democratic elements) in his unfinished *Laws*.[80] Donato Gianotti

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[78] Hayek, *supra* note 27 at 180.

[79] *Ibid* at 180.

[80] Plato *The Laws of Plato* (T Pangle trans, Uni of Chicago Press 1988) pp136-74. See E-U Petersmann "How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?" (1998) 20 Michigan Journal of International Law 1 at pp1-2.

mooted the separation of powers in his book *The Republic of Florence* (1534) in which he proposed the four distinct state functions of elections, legislation, judicial review and foreign policy.[81] The French aristocrat Alexis de Tocqueville in his classic two volume *Democracy in America* (Vol 1 in 1835 and Vol 2 in 1840) celebrated the aristocracy of the legal body, "which can unforcedly mingle with elements natural to democracy" to ensure a healthy republic.[82] He saw that the success of the American republic resulted in large measure from the role of lawyers who make a special study of laws and from this derived the habits of order "and an instinctive love for a regular concatenation of ideas [which] are naturally strongly opposed to the revolutionary spirit and to the ill-considered passions of democracy".[83] In his view, the law's institutions and actors play, in some aristocratic sense, the secondary role of restraining the excesses of the administration and the legislature, but in a way that is restrained and unforced.

(a) The will of the people

Critics of judicial review tend to reduce the "will of the people" to a momentary conception of the people's will. Their will should instead be understood as both momentary and enduring. Petersmann recites the story of Ulysses and the sirens to illustrate the point that all societies have adopted rules to reconcile the long-term and short-term interests of the people.[84] Constitutionalism is designed to restrain the arbitrary exercise of power for immediate purposes so as to preserve the larger ambition of the people for a fair and civilised society. When Ulysses

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[81] See Petersmann *ibid* at 3.

[82] A de Tocqueville *Democracy in America*, ed JP Mayer (Doubleday & Co, New York 1969) at 266.

[83] *Ibid* at 264. See also Patapan, *supra* note 9 at pp.1-3.

[84] Petersmann, *supra* note 80 at 1.

approached the island of sirens he had the insight to realise that it was unlikely that he would be able to resist the calls of the sirens (who would eventually kill him if he yielded to their temptations). He ordered his companions to tie him to the mast and refuse any of his requests to be released while the sirens were calling him.[85] Ulysses' pre-commitments were based on the insight that human rationality is imperfect and that our submission to short-term temptations may be inconsistent with our long-term interests.[86]

The enforcement of fundamental common law rights by judicial review does not involve an absolute limitation of the will of the people, merely "a subordination of immediate objectives to long-term ones".[87] According to Hayek:

> In effect this means a limitation of the means available to a temporary majority for the achievement of particular objectives by general principles laid down by another majority for a long period in advance. Or, to put it differently, it means that the agreement to submit to the will of the temporary majority on particular issues is based on the understanding that this majority will abide by more general principles laid down beforehand by a more comprehensive body.[88]

The authors of the Constitution sought to create institutions and implement enduring values to ensure a decent and humane society. However, according to one of its framers, the Constitution is not designed to permit a system by which the people, seized with a sort of

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[85] See J Elster, "Ulysses and the Sirens: Studies in rationality and irrationality" (Cambridge University Press New York, 1979) cited by Petersmann *supra* note 80 at 1.

[86] Petersmann, *supra* note 80 at 1.

[87] Hayek, *supra* note 27 at 180.

[88] *Ibid.*

madness, set aside all principles of justice.[89] Judicial review is designed to give effect to the enduring values of the Constitution, by allowing an institution separate from the legislature, to examine legislation to determine whether it undermines the enduring ambitions of the people, even if that requires curtailing their more immediate desires. Thus, "constitutions are based on, or presuppose, an underlying agreement on more fundamental principles – principles which may never have been explicitly expressed, yet which make possible and precede the consent and the written fundamental laws".[90]

This argument has been criticised on the basis that it assumes that there are distinct periods of rationality (eg when the constitution is written) and irrationality (eg when legislation is enacted arbitrarily disposing of minority rights), when in fact, in relation to rights, there is merely ongoing rational disagreement.[91] This point can descend into endless circles of relativism. Relative to the majority of the people in 1950 the communist threat was (arguably) rationally judged as so threatening as to require the measures set out in the *Communist Party Dissolution Act*.[92] For those subjected to McCathyist witch-hunts it was an irrational overreaction. As things turned out, the Act was found to be invalid, a referendum to allow such an Act in the future was supported by a majority of electors, but not in a majority of States, and so the proposal failed. Australia managed to survive the perceived or actual threat without the Act.[93] Whether this outcome reflects on the

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[89] See O'Connor, Constitutional Convention Debates, Melbourne 8 February 1898, at 689.

[90] Hayek, *supra* note 27 at 180.

[91] J Waldron, "A Rights-Based Critique of Constitutional Rights" (1993) 13 *OJLS* 18 at 47-48.

[92] An Australian Gallop Poll in May 1950 found 80% of voters favoured banning the Communist Party. See Winterton, *supra* note 22 at 645.

[93] *Ibid* at 655.

rationality of the majority is a moot point. Rationality, it can be endlessly argued, is in the eye of the beholder.

Rather than abandon the matter to hopeless relativism, Touchie proposes a more sophisticated analysis. He argues that fundamental types of harm are easier to discuss impartially than are other, less important, forms of harm, or gain.[94] There is a broader consensus amongst those required to make judgements about what constitutes fundamental harm than there is about what constitutes non-fundamental harm, or gain. Also fundamental types of harm are psychologically more intense and more potent, than less important forms of behaviour or state of affairs. According to Touchie, the additional potency allows us (but doesn't necessary force us) to be relatively more precise about fundamental forms of harm than about non-fundamental types of harm and, *a fortiori*, most types of gain. Although Touchie's claims do not entirely escape relativism, they do offer a firmer basis for some form of ranking of harm. Enduring constitutional values can be linked to principles aimed at avoiding fundamental harm. A broad consensus can be achieved, for example, about the wrongfulness of the Nazi and the South African programs for systematically depriving minorities of their fundamental rights, and the rightfulness of constitutionally established mechanisms for avoiding such harm in the future. The reconciliation processes that took place in Germany and South Africa after the collapse of their tyrannical regimes essentially achieved this. It is true to say, however, that after stepping away from the more obvious cases of fundamental harm, rights aimed at avoiding harm become increasingly contestable. Constitutionalism provides for the contest of these issues via the process of judicial review. Constitutionalism does not hold out the judiciary as a superior or infallible institution. The power of judicial

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[94] J Touchie, "On the Possibility of Impartiality in Decision-Making" (2001) 1 *Macquarie Law Journal* 20.

review is left in the hands of judges who "are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right".[95] Constitutionalism therefore, accepts the fallibility of all the actors within the system.

(b) The positivist perspective on parliamentary supremacy

Much confusion about parliamentary supremacy stems from John Austin's positivist insistence on supreme law-making power being in the possession of a single institution or group of institutions.[96] As mentioned in chapter 3, positivism has maintained a powerful influence over Australian courts, and therefore its influence on the parliamentary supremacy debate needs to be considered. Austin insisted that sovereign power was absolute and unique.[97] Consequently, the "courts did what the sovereign told them, not because a rule obliged it, but simply because the sovereign was the most powerful actor in the legal system".[98] One of the more extreme statements of parliamentary sovereignty comes, unsurprisingly enough, from Dicey who stated that parliament has "the right to make or unmake any law whatever, and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[99] Other adherents and variants on Austin can be found in Wade, Hart, Kelsen and Harris,[100] each of whom subscribe to a hierarchical structure of law-making and law interpreting authority.[101] Simply put,

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[95] Hayek, *supra* note 27 at 180.

[96] See NW Barber "Sovereignty Re-examined: The courts, parliament, and statutes" (2000) 20 Oxford Journal of Legal Studies 131 at 132.

[97] *Ibid*.

[98] *Ibid*.

[99] AV Dicey *Introduction to the Study of the Law of the Constitution* 8th ed (McMillan, London 1915) at 38. See also L Strelein *supra* note 35 at 4.

[100] *Ibid* at pp.134-137.

[101] *Ibid* at pp.137-8.

they each agree that parliament possesses exclusive ultimate law-making authority, and the courts possess exclusive jurisdiction to interpret the law. That is, the courts may have law-making authority by developing common law principles, but this authority is subservient to parliament's exclusive power to ultimate law-making authority. The court's power defers to parliament's. There cannot, under the positivist theories, be two ultimate law-making authorities. The rigidity of the positivist doctrine is such that the theory can be disproved by evidence of the non-exclusivity of law making and law interpreting authority.

Barber points to the parliamentary rule that it has exclusive authority to create, interpret and enforce parliamentary privilege as one example of the failure of the positivist account.[102] It cannot explain the parliamentary exercise of judicial power. Barber argues that this example shows that "legal systems can, and do, contain multiple unranked sources of legal power".[103] One could also refer to the obligation of the Australian Parliament to comply with World Trade Organisation Dispute Settlements Body (DSU) rulings in this context. The World Trade Organisation agreements were created outside the Australian legal system processes. It can be (weakly) argued that Australia voluntarily entered the agreements and therefore has the sovereign power to reject or disobey the agreements and any rulings of the WTO's Dispute Settlements Body. However the economic consequences of withdrawing from the agreements render disobedience an untenable proposition. In reality Australia must comply with the WTO agreements or suffer sanctions that will either compel obedience or lead to substantial economic losses to Australian industries. The positivist test of ultimate law-making authority (ie the capacity to compel obedience) would lead to the conclusion that the WTO has ultimate (and therefore, presumably, ultimately exclusive) sovereign

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[102] *Ibid* at 138.

[103] *Ibid* at 139.

law-making power. This is because the positivist determination of the source of sovereign power is essentially a political one – it is the institution that can compel obedience that is sovereign. But a conclusion that the WTO is *the* sovereign law-making body in Australia offers no adequate account for Parliament's role in Australia. Similar problems arise when accounting for the power and authority of European Union institutions over the UK Parliament. In reality the WTO, and in Europe the European Union Parliament and Commission, have become unranked sources of law.[104]

The conclusion that can be drawn from this discussion is that "it is a mistake to assume that it is either a logical or empirical necessity for a legal system to give supreme legal force to one institution, or to have a legal rule that will, or can, decisively resolve conflict between different legal sources".[105] Our system can be more reliably, and more interestingly, described as one in which a number of legal systems over-lap in a non-hierarchical fashion in which 'law' can exist separately from the state.[106]

Interestingly, the strict legalist, Sir Owen Dixon opposed the notion of parliamentary sovereignty. According to Wait, Dixon was opposed on the grounds that it was inconsistent with federalism, discordant with Australian legal history and an affront to the sovereignty of the Parliament in Westminister.[107] He saw that the Crown was the "legal expression of the sovereign state".[108] He envisaged the Crown as a somewhat enigmatic creature, which itself was bound by the ultimate

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[104] *Ibid* at 139.

[105] *Ibid* at 139.

[106] *Ibid.* See N MacCormick "Institutional Normative Order: A conception of law" (1997) 82 Cornell LR 1051.

[107] M Wait *supra* note 8 at 60.

[108] O Dixon, *supra* note 131 at 59. See also Wait, *ibid* at 63.

authority and traditions of the common law and the rule of law.[109] The Constitution was seen to be founded on deeply rooted common law values and principles, which provide a "cultural reservoir of assumptions about the legal and political systems which the Constitution establishes".[110] In his view this cultural reservoir was not available to the United States when they wrote their constitution because the common law traditions regarding power restraint were not then well established in Britain, and because the US were making a revolutionary break from the British system of monarchical government.

When the Americans were creating their newly independent state they were entering virgin constitutional territory. They entered mindful of the dangers that their new democratic creature, the Congress, could itself become an instrument of repression. Consequently, it was seen to be necessary to spell out in a bill of rights the limits that should be placed on the exercise of power by Congress and the administration. By way of contrast when the Australian Constitution was being written in the late 19th century the political and constitutional tumults leading to the English Bill of Rights of 1689 had long subsided. The experiences of those turbulent times had entered the genetic memory of the common law, leading in part to the development of the common law presumptions. There was, by the 19th century, a degree of power sharing between the British monarch and parliament – although power was inexorably shifting from the monarch to the parliament and the administration. The limits on the exercise of power by each of those institutions was largely unstated, but nevertheless understood. These understandings, along with developing common law principles, formed the "tradition" of the common law, of which Dixon spoke. It should be cautioned, however, that the legal imagination can prompt extravagant

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[109] Wait, *ibid*.

[110] T Blackshield "The Implied Freedom of Communication" in G Lindell (ed) *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (1994) 232 at 260. See also Wait, *ibid* at 65.

claims about the principled operation of the common law. Take for example the famous dictum of Lord Viscount Sankey's in *Woolmington v DPP* in which he said that "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt".[111] This statement was made less than 50 years after the courts confirmed that the onus was on the defendant to negative *mens rea*.[112]

More recently the High Court has seen that parliamentary supremacy is curtailed by the democratic foundations of the Constitution. This view contrasts with Dixon J's reference to the Crown and the inheritance of common law traditions. Instead, the Mason court departed from the theory of imperial sovereignty, with its positivist references to parliamentary sovereignty, by adhering to a theory of sovereignty residing with the Australian people.[113] This theory, it was said, is implied in the text and structure of the Constitution and is given effect by the underlying constitutional principle of representative government.[114] According to Mason CJ in *ACTV* the "very concept of representative government and representative democracy signifies government by the people through their representatives".[115] Consequently, the elected representatives, as agents of the people, are

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[111] [1935] AC 462 at pp.481-2.

[112] See *R v Tolson* (1889) 23 QBD 168 at 181, Foster's *Crown Law* (1762) and *R v Greenacre* 8 C & P 35, at 42.

[113] H Patapan *supra* note 9 at pp.30-31.

[114] See *A-G (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 per Stephen J at 56; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 per Brennan J at 47, Deane and Toohey JJ at 70, Gaudron J at 94; *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106 per Mason CJ at 137-138, Deane and Toohey JJ at 168, Dawson J at 184, Gaudron J at 210, McHugh J at 228-230; *McGinty v Western Australia* (1996) 186 CLR 140 per Brennan CJ at 168-171, Dawson J at 182, Toohey J at 198-202, Gaudron J at 220-221, Gummow J at 269-270; *Langer v Australian Broadcasting Corporation* (1997) 189 CLR 520 per the Court at 557-559, 566-567. However, note that Deane and Toohey JJ found that the Constitution also had an underlying principal of equality in *Leeth v Commonwealth* (1992) 174 CLR 455 at 485.

[115] *ACTV* (1992) 177 CLR 106 at 137.

accountable to the people for what they do.[116] The people exercise ultimate sovereignty by means of the right to vote, in which "all citizens of the Commonwealth who are not under some special disability are entitled to share equally in the exercise of those ultimate powers of governmental control".[117]

According to Patapan, "the concept of sovereignty of the people introduces a different form of constitutionalism" than had previously existed in Australia.[118] It "represents a radical constitutive formulation of the people's coming together"[119] and envisages the Constitution as a type of social contract. There are a number of possible ways of theorising this conception:

> It may well be that as an expression of Lockean liberal constitutionalism the Constitution secures natural rights, limited government and representative government. However, sovereignty of the people also opens up a world of fundamentally different aspects of sovereignty, from Hobbes' sovereign to Rousseau's general will, and different political visions, from communitarianism to republicanism.[120]

Indeed the concept of sovereignty of the people appears to offer a broad range of possibilities, from liberal democracy, to autocratic government, to Jacobean forms of socialism. It is likely, though, that the High Court was inclining more towards the Lockean view rather than the Hobbesian. This can be deduced from their references to processes and institutions established in the Constitution, which imply the necessity for restraining the arbitrary and unaccountable exercise of power.

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[116] *Ibid* at 138. See also, *Nationwide News* (1992) 177 CLR 1 at 47 per Brennan J

[117] Per Deane and Toohey JJ in *Nationwide News ibid* at 36.

[118] H Patapan, *supra* note 9 at 31.

[119] *Ibid*.

[120] *Ibid*.

In conclusion, the striking down of legislation by judicial review is not *ipso facto* anti-democratic. It does not necessarily involve the substitution of the will of the people by the will of the courts. The courts are not necessarily engaged in enforcing their conception of what is right for that of the people. Rather we should conceive the will of the people as involving both short term and enduring desires and ambitions. At times the short-term ambitions of the people to undermine the fundamental rights of a minority must be constrained, by means of judicial review, to meet the longer term ambitions of the people for a fundamentally fair and decent society. The courts, in this context are not acting to subvert the democratic process, rather by giving effect to those enduring values they are enhancing democracy.

5. Due respect for the coordinate branches of government

Common law presumptions contain a number of values that need to be fully appreciated before they can be applied to constitutional interpretation. The presumptions are best understood in a ranked hierarchy. The highest order presumption, or what I call the meta-presumption, is that a fundamental common law presumption (in the case of interpreting a statute) must ultimately defer to a statutory provision if it clearly and expressly overrides the common law presumption. The meta-presumption is built on the constitutional value that the author of the provision, namely Parliament, is the ultimate law-making authority and not the courts. Parliament gains its law-making legitimacy by being an institution designed to represent the will of the people. At the next level in the hierarchy are the common law principles that are presumed to apply, unless the relevant instrument (the Constitution or a statute) states otherwise.

The meta-presumption becomes slightly more complex when the instrument being interpreted is the Constitution itself. If we simply

took the meta-presumption and applied it to the interpretation of a constitutional provision it would tip the power balance too heavily towards the courts. Striking down all legislation that undermined common law rights would severely limit the scope of law-making power. A constitution could, of course, be amended in the future to expressly allow parliament the power to enact laws that overturned fundamental common law rights. In practice the Australian Constitution is difficult to amend.

The meta-presumption therefore needs further sophistication in the context of constitutional interpretation. Recall that the value underlying the meta-presumption when interpreting a statute is that parliament is a superior law making authority to the courts. The meta-presumption, when applied to interpreting the Constitution is that the Constitution establishes the superstructure institutions of government (the legislature, judiciary and administration), the division of powers between the various parliaments in the federation, and the enduring values of the people for a fundamentally decent and democratic system of government. Therefore the Constitution is superior to parliament and the judiciary. One of the underlying values of the Constitution, relevant to the meta-presumption, is that power not be unduly centred in one place. Power is separated between the various superstructure institutions, although it appears that the separation of powers between the legislature and administration is not as distinct under the Australian Constitution as it is under the US Constitution. Given the cumbersome nature of constitutional change, particularly regarding the Australian Constitution, it is necessary to modify the strict application of the meta-presumption to avoid creating a de facto situation where the balance of power shifts from the legislature to the courts. The courts must therefore provide "the respect due to coordinate branches of

government".[121] This means a court does not "decide a political question; at most it must decide the limits within which a political assessment might reasonably be made".[122] Sir Anthony Mason describes this as "deference to legislative judgement" rather than a "concession to Parliamentary supremacy".[123]

Due respect for the coordinate branches of government is achieved in the second of a two stepped process. First, the court decides using its usual methods of constitutional interpretation whether, prima facie, challenged legislation is within power. Second, if the legislation survives the first test, it is assumed that parliament has not abused its legislative powers unless it is evident that parliament has enacted legislation that imposes measures that constitute an irrational or disproportionate means for achieving the (constitutionally valid) objects of the legislation. If the legislation includes measures that on their face undermine fundamental common law rights, these signal issues for further judicial inquiry. The question then becomes, is there some rational or proportionate basis for parliament undermining the fundamental right? The question is not; does the court propose a better way of achieving the legislation's object? The latter question would allow the judiciary to substitute its political judgement for that of parliament's. As Brennan J notes in *Koowarta*, the "court does not have to decide a political question; at most it must decide the limits within which a political assessment might reasonably be made".[124]

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[121] Per Brennan J in *Baker v. Carr* 369 US 186 (1962) (7 LEd 2d 663) quoted with approval by Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70 at 139.

[122] Per Brennan J in *Gerhardy v Brown ibid*.

[123] A Mason "Defining the Framework of Government: Judicial deference versus human rights and due process" Paper presented the Centre for Public Policy, Workshop on the Changing Role of the Judiciary (University of Melbourne, 7 June 1996) at 6; quoted by L Strelein *supra* note 35 at 4.

Fundamental rights may be undermined to achieve legitimate legislative objectives

Even if the argument put in this chapter for Constitutional presumptions is accepted, this does not prohibit Parliament from enacting legislation undermining fundamental rights. Fundamental rights are principles rather than hard rules. They are identifiable by their broad scope, for example the right to freedom of speech. Their very breadth often means they will conflict with other rights. For example freedom of speech may conflict with the right to peaceful possession of one's property if a person incites a hostile crowd to burn down a building. Decisions about which rights are to be curtailed in order to satisfy other rights require questions of judgement, often political judgement. Frequently there are situations where matters of general public interest can only be attained by placing certain limits on fundamental rights. For example the objective of public safety and the reduction of adverse economic harm may require wide search and seizure powers to government officials to limit the outbreak of foot and mouth disease in cattle. Again, determining the extent to which fundamental rights should be impaired is often a largely political one – although often not solely a political question. If, for example, under the guise of a law to deal with the outbreak of foot and mouth the legislature allowed for the indefinite imprisonment of asylum-seekers, the legislation would raise questions as to its constitutionality.

Legislation can, therefore, legitimately curtail or undermine fundamental rights. Williams observes that "instead of seeking to establish the Constitution as a catalyst for the protection of the civil liberties, the framers sought to infuse the Constitution with responsible government in a way that would enable some fundamental rights to be abrogated by a sovereign parliament even where such rights might have

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[124] (1982) 153 CLR 168 at 217.

been recognised by the common law".[125] Dawson J tends to see the power to undermine fundamental rights as being very broad, and indicates an extreme reluctance to review legislation that does so. In *Polyukhovich v The Commonwealth*, for example, he stated that there is no doubt that Parliament can enact ex post facto laws.[126] He added that there "are plenty of passages that can be cited showing the inexpediency, and the injustice, in most cases, of legislating for the past, of interfering with vested rights, and of making acts unlawful which were lawful when done; but these passages do not raise any doubt as to the power of the Legislature to pass retroactive legislation, if it see fit".[127] Brennan J was of the view in *Nationwide News Pty. Limited v Wills* that "the court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political rights which, in the court's opinion, should be preserved".[128] He observed that the courts "are concerned with the extent of legislative power but not with the wisdom or expedience of its exercise".[129] He feared that if "the courts asserted a jurisdiction to review the manner of a legislative power, there would be no logical limit to the grounds on which legislation might be brought down".[130] Brennan J's primary fear behind judicial review on the basis of breaching fundamental freedoms is that it offers no logical boundaries for restraining judicial intervention. The underlying fear is that the lack of boundaries would invite judges to substitute their political views for those of Parliament.

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[125] G Williams, *supra* note 66 at 45.

[126] (1991) 172 CLR 501 at 644.

[127] *Ibid*.

[128] (1992) 177 CLR 1 at 43.

[129] *Ibid* at 44.

[130] *Ibid.*

Brennan J later qualified the suggestion that Parliament has free reign to trespass on fundamental rights by quoting with approval Sir Owen Dixon's statement in a (non-curial) speech in which he said "constitutional questions should be considered and resolved in the context of the whole law, of which the common law, including in that expression the doctrines of equity, forms not the least essential part".[131] A principal concern that Brennan J appears to raise is not so much that Parliament should be disallowed from undermining fundamental rights, but that the courts should not be substituting its political judgement for that of parliament.

Legitimate concerns about the courts trespassing into the legislature's domain by substituting their own political views are not limited to nations, like Australia, that lack a more comprehensive written bill of rights. It is a concern regularly raised by the US Supreme Court and the Canadian Supreme Court amongst others. It is often forgotten that for much of its history the US Supreme Court has been reluctant to strike down legislation, despite the bill of rights. It took some 50 years after the Court announced it had the power to judicially review legislation in *Marbury v Maddison*[132] to again use that power. And despite the equal rights amendment, the Court found that the denial of citizenship to slaves was valid.[133] Looking over the full distance of 200 years of US Supreme Court decisions, the Court's relatively interventionalist approach during the 1960s and 1970s was something of an aberration.

As Brennan J and others have cautioned, the courts must maintain constant vigilance to ensure they do not trespass into the

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[131] Brennan J in *Nationwide News Pty. Limited v Wills* (1992) 177 CLR 1 at 45 quoting with approval O Dixon "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 Australian Law Journal 240, at p 245; reprinted in Jesting Pilate (1965) 203, at pp 212-213.

[132] 5 vs (1 Cranch) 137 (1803).

[133] *Dred Scott v Sandford* 60 U.S. 393 (1856).

domain of the legislature. And this is in part achieved by paying due respect for the co-ordinate institutions of government. As an example of the operation of this principle, one can look to the Canadian Supreme Court's approach to section 1 of the Charter of Rights and Freedoms, which states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Court has observed, in relation to this provision, that:

> Section 1 recognizes that in a democracy competing rights and values exist. The underlying values of a free and democratic society guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights. A principled and contextual approach to s. 1 ensures that courts are sensitive to the other values which may compete with a particular right and allows them to achieve a proper balance among these values. At each stage of the s. 1 analysis close attention must be paid to the factual and social context in which an impugned provision exists.[134]

More specifically, if *prima facie* a legislative provision limits a fundamental right set out in the Charter, the Court may nevertheless determine that the provision is valid if the limitation is reasonable and demonstrably justified in a free and democratic society.[135] The Court asks two broad questions when assessing the validity of a legislative provision limiting the Charter rights:

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[134] *R v Sharpe* [2001] 1 SCR 45, see the headnote, summarising the judgment of *Per* L'Heureux-Dubé, Gonthier and Bastarache JJ.

[135] See *R v Oakes* [1986] 1 SCR 103, *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835, and *Thomson Newspapers Co v Canada (Attorney General)* [1998] 1 SCR 877.

1. Is the legislative objective of the Act in which the provision appears pressing and substantial?[136]

2. Is there proportionality between the limitation on the right and the benefits of the law? That is, does the legislative provision set out to achieve the legislative objective in a reasonable and proportionate manner having regard to the fundamental right being affected?[137]

The second question is answered by responding to a sub-set of three further questions:

(a) *Rational connection*

The Crown must demonstrate that the law is likely to confer a benefit or is "rationally connected" to Parliament's goal. There must be a rational connection between the purpose of the law and the means adopted to give effect to the purpose. The Court can refer to evidence provided by the parties and to experience and common sense in making its judgement.[138]

(b) *Minimal impairment*

The question here is, does the law impair the right of free expression only minimally? If the law is drafted in a way that unnecessarily catches things or activities that have little or nothing to do with achieving the legislative objective, then the provision will be found to be unconstitutional.[139]

It is not necessary for the purposes of this test for the Court to be satisfied that Parliament adopted the least restrictive means of achieving its end. It enough if the means adopted fall within a range of reasonable solutions to the problem confronted. The law

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[136] *R v Sharpe* [2001] 1 SCR 45 per McLachlin C.J. and Iacobucci, Major, Binnie, Arbour and LeBel JJ at para 81.

[137] Sharpe *ibid* at para 83.

[138] Sharpe *ibid* at para 94.

[139] Sharpe *ibid* at para 95.

must be *reasonably* tailored to its objectives and it must impair the right no more than is *reasonably* necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account.[140]

(c) *Proportionality: the final balance*

Here the Court takes all the elements identified and measured under the heads of Parliament's objective, rational connection and minimal impairment, and balances them to determine whether the state has proven, on the balance of probabilities, that its restriction on a fundamental *Charter* right is demonstrably justifiable in a free and democratic society.[141]

In providing due respect for the coordinate branches of government, the High Court could adopt the Canadian approach, which tends to place the onus on government to establish rationality and proportionality when there is a prima facie case of breach. Alternatively, the High Court could assume validity with the onus being on the complainant to prove a lack of proportionality and rationality where the fundamental common law principles affected are not expressly mentioned in the Constitution. These issues are yet to be considered by the Court. Kirk's comments in this context are apposite:

if a clear constitutional mandate has been given for a judicial role in protecting particular rights then, in a constitutional democracy, this should be respected. For this reason, greater caution is generally appropriate when recognising implied rights than when

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[140] See Sharpe *ibid* at para 96. See also *R v Edwards Books and Art Ltd* [1986] 2 SCR 713; *R v Chaulk* [1990] 3 SCR 1303; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139; *R v Butler* [1992] 1 SCR 452; *M v H* [1999] 2 SCR 3.

[141] *Sharpe ibid* at para 102.

applying express ones, though both may require significant judicial choice.[142]

6. Fundamental common law rights

The discussion so far has not mentioned what precisely are fundamental common law rights. There is not an immutable list of common law rights, nor are they frozen in their nature and operation. We can however gain an indication of the rights regarded as fundamental from judicial decisions. A number of High Court cases have outlined or referred to common law principles, including *Bropho v Western Australia*[143] in which the majority listed some of the common law rights recognised by the courts.[144] They include principles that a statutory provision must not–

- operate retrospectively;[145]
- deprive a superior court of power to prevent an unauthorised assumption of jurisdiction;[146]
- take away property without compensation.[147]

Other fundamental common law rights mentioned in High Court cases are given effect by the principle that a statutory provision must not–

- require a person to self-incriminate;[148]

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[142] Kirk, *supra* note 75 at 52.

[143] (1990) 171 CLR 1.

[144] Per Mason C.J., Deane, Dawson, Toohey, Gaudron and McHugh JJ at pp.17-18. They referred with approval at p.17 to *Benson v. Northern Ireland Road Transport Board* (1942) AC 520, at pp 526-527.

[145] *Bropho, supra* at note 143 at 17. The majority referred with approval at p.17 to *Maxwell v. Murphy* (1957) 96 CLR 261, at p 267.

[146] *Bropho, supra* at note 143 at 17. The majority referred with approval at p.17 to *Magrath v. Goldsbrough, Mort and Co. Ltd.* (1932) 47 CLR 121, at p 134 .

[147] *Bropho, supra* at note 143 at 18. The majority referred with approval at p.18 to *Attorney-General v. De Keyser's Royal Hotel* (1920) AC 508.

- cause undue infringement of personal liberty (including *habeas corpus*).[149]

In *Dietrich v The Queen* the Court outlined the fundamental common law principles for a fair trial.[150] Another source for assisting to identify the content of fundamental common law rights is a useful listing of these rights in the definition of "fundamental legislative principles" in Queensland's *Legislative Standards Act 1992.* The Act establishes a system by which Parliamentary Counsel is required to advise the government whether any legislation they are drafting is likely to offend fundamental legislative principles. The Act therefore establishes a pre-legislative review process by which government is advised whether it is affecting fundamental rights. The government can respond to this advice by making a conscious decision to alter a bill before it is presented to Parliament so as to not undermine fundamental legislative principles, or to do so in the minimum necessary way to achieve a legitimate legislative objective. Section 4(1) of the Act defines fundamental legislative principles as "principles relating to legislation that underlie a parliamentary democracy based on the rule of law". Section 4(2) states that the principles include requiring that legislation has sufficient regard to (a) the rights and liberties of individuals; and (b) the institution of Parliament. Section 4(3) then provides a non-exhaustive list of fundamental principles. It states that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review;

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[148] *Sorby v Commonwealth* (1983) 57 ALJR 248 at 260 per Mason CJ and Wilson and Dawson JJ.

[149] *Re Bolton; ex parte Beane* [1987] 61 ALJR 190 per Brennan J at 193.

[150] (1992) 177 CLR 292.

(b) is consistent with principles of natural justice;

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons;

(d) does not reverse the onus of proof in criminal proceedings without adequate justification;

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer;

(f) provides appropriate protection against self-incrimination;

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively;

(h) does not confer immunity from proceeding or prosecution without adequate justification;

(i) provides for the compulsory acquisition of property only with fair compensation;

(j) has sufficient regard to Aboriginal tradition and Island custom;

(k) is unambiguous and drafted in a sufficiently clear and precise way.

A common theme underlying fundamental common law rights is a protection against the abuse of power by the state.

7. Conclusion

The protection of fundamental rights doctrine proposed in this chapter is essentially a doctrine of restraint, and not of advancing political and social change. It operates to restrain the excessive exercise of power. There are occasions when the status quo is judged to be so unjust that radical political change is required. The rights debate is inadequate to the task of prompting reform, even where there are pressing needs for reform. One example where the rights paradigm was seen as promoting

injustice rather than preventing it was when the US Supreme Court ruled compulsory minimum wage legislation as an unconstitutional restraint on freedom of contract.[151] Hayek was a supporter of constitutional rights because he sought to protect the proprietary "rights" of the rich not to have their wealth "arbitrarily" redistributed to the poor. The rights paradigm is inadequate to the task of dealing with wealth redistribution issues.

This chapter does not suggest that constitutionalism is a panacea for society's ills. It raises difficult issues that some members of the High Court appear more comfortable leaving to parliament. But as difficult as the issues are, they cannot be ignored. The inhumanity of past legislation cannot be responded to by simply using the catch-cry that parliament is a democratic institution and therefore should be left to do as it pleases. As we have seen, such a response opens the door to tyranny.

It might be wondered what the practical implications are of the argument I have put? What has in effect been argued for in this chapter is a broadening of the rights which the courts can refer to in deciding whether legislation is unconstitutional. As a counter-balance, however, I have emphasised the need for restraint when exercising judicial review by requiring due respect for the coordinate branches of government. Thus the mere legislative breach of fundamental common law rights is not of itself sufficient to render the legislation unconstitutional. It may be that the breach is not irrational or

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[151] For at least two decades the Supreme Court struck down labour laws as unconstitutional, including in *Hammer v. Dagenhart*, 247 U.S. 251 (1918) when the Court struck down child-labour laws. In *Adkins v. Children's Hospital*, 262 U.S. 525 (1923) the Court voided a law setting minimum wages for women, and in *Schechter Corp. v. United States*, 295 U.S. 495(1935) it struck down a health and safety Act for chicken slaughter. In *Morehead v. Tipaldo*, 298 U.S. 587 (1936) voided a minimum wage Act for being a violation of freedom of contract. The Court's striking down of President Roosevelt's New Deal legislation led to a very public, and vitriolic, stand-off between the Court and the President.

disproportionate to achieving a constitutionally valid legislative objective.

Although widening the grounds for judicial review on the basis of an implied bill of rights is not a panacea for the injustices that may be inflicted by legislation upon indigenous people, it does offer a more extensive moral language for the court than presently exists. Indeed this is the purpose of law, to be just. As Villey noted, "Law and the just are synonymous terms: cleaned of the disguises with which Kantism had travestied it, but bare, as Aristotle faithfully observes and draws it, the aims of justice *coincide* identically with those of law."[152] The law does not fully capture morality, it is merely "a *moment* of morality", it is in fact "a stage and an instrument of concrete morality".[153] Widening the scope of judicial review to capture some of the moral language of the law offers the possibilities for ensuring a system of government based upon the premise that all people are entitled to be treated with fundamental decency. History (even recent history) illustrates that there are times when the majority has been seized with a kind of madness that has inflicted harm upon a minority. To learn from such wrongs and seek to establish mechanisms to prevent it occurring in the future is an act of reconciliation.

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[152] M Villey "Epitome of Classical Natural Law" (2000) 9 GLR 74 at 87.

[153] *Ibid* at 88.

Chapter 7

The Right to Equality

ALL ANIMALS ARE EQUAL
BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS

George Orwell *Animal Farm*

1. Introduction

Equality is a right of such broad potential scope that it deserves separate consideration from the due process rights outlined in the previous chapter. Equality is a readily championed right, but one that is extraordinarily difficult to quantify. According to Chief Justice Murray Gleeson, the proposition that people are equal is an expression of an ethical principle. It reflects, in his view, a value, not an observation.[1] Equality, however, is more than just a value, it is also a legally recognisable right, particularly so in jurisdictions where the right is an express constitutional right. Equality, as a legal right, shares some overlapping space with equality as a political, religious and ethical value – although obviously they do not share the whole space. Defining the boundaries of legal equality within the general (ie ethical, political, legal etc) dimensions of equality is far from easy, and is a quest that can expect no neat resolution. Equality rights have specific relevance to racial groups, such as indigenous people, as it does to other groups discriminated against on the basis of their religion, gender or some

[1] M Gleeson, Boyer lecture Four, "Four Aspects of the Commonwealth Constitution - Part 2", in The Rule of Law and the Constitution, ABC Books, Sydney, 2000, Broadcast 10/12/00

other basis. It therefore serves our discussion on reconciliation to offer a means by which constitutional protections and mechanisms can be established to prevent the abuses of the equality rights of indigenous people.

The less than equal treatment of indigenous people has a long antecedence in Australia. In 1837 the British House of Commons Select Committee on Aborigines expressed genuine concern for the Australian Aborigines and recommended using special legislation to protect their interests. As Rowley notes, this led to Aborigines being assigned a separate legally defined status that became the basis for establishing reserves and assimilation polices. And so the very attempt to protect the "native" British subject placed Aborigines at the discretion and the mercy of the protecting agencies.[2] Assimilation permitted enormous intrusions into the daily lives of indigenous people and denied them their fundamental rights. These legally sanctioned abuses extended into the second half of the 20th century.

> Thus while the goal of 'assimilation' expressed the best intentions, the special laws introduced to bring it about through tuition and control inevitably set the 'native' apart in a special category of wardship: the greater the effort towards assimilation, the more rigidly defined the differences in status become.[3]

It is difficult, if not impossible, for lawyers (who work from the presumption of the fundamental justice of our legal system) to comprehend the impact of this legal system on the daily lives of Aborigines. Life on Aboriginal missions for much of the first half of the 20th century, for example, involved the fear of arbitrary and capricious actions by officials. Officials had the power to take their children and refuse permission for marriage. The regimented life on reserves was

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[2] CD Rowley *The Destruction of Aboriginal Society* (Penguin, Melbourne 1983) at 20.

[3] *Ibid.*.

punctuated by the occasional and random threat of massacre by pastoralists or the police if a white man was killed or an Aboriginal for food killed one of their cattle. Kidd notes that as recently as 1966 regulations under the Queensland *Aboriginal Affairs Act* 1965 provided the managers of Aboriginal and Torres Strait Islander reserves almost limitless constraints over personal behaviours.[4] She adds that under the regulations

> A whole range of conducts now became punishable offences: failure to conform to a reasonable standard of good conduct; exhibiting behaviour detrimental to the well-being of other persons; committing acts subversive of good order or discipline on reserves. It was an offence to be idle, careless or negligent at work, to refuse work or to behave in an offensive, threatening, insolent, insulting or disorderly manner. Dormitories were redefined as places of detention for any boy or girl who committed an offence against discipline, who departed or attempted to escape from a community, who was guilty of 'immoral conduct', or who failed to obey instructions in hygiene, sanitation or infant welfare.[5]

The people who were subject to this law were subjected to this level of surveillance and control despite having committed no crime. They were regulated in this way for simply being an Aboriginal or Torres Strait Islander.

Equality as a legal right clearly exists in jurisdictions where it is expressed in their constitution. The question is whether it exists under the Australian Constitution, where a broad expression of the right does not appear. The High Court considered the existence of an implied right to equality in two significant decisions during the 1990s, *Leeth*[6] and

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[4] R Kidd, *The Way We Civilise* (QUP, Brisbane 1997) at 244.

[5] *Ibid.*

[6] *Leeth v Commonwealth* (1992) 174 CLR 455

Kruger[7]. In both decisions the majority distinguished between procedural equality[8] and substantive equality.[9] They supported an implied right to procedural equality and rejected the claim that the Constitution is underpinned by an implied right to substantive equality. Deane and Toohey JJ in *Leeth* and Toohey J in *Kruger* (Deane having by then left the Court), on the other hand, took a broader view of the implied equality right than it being merely procedural, but they left the dimensions of the right somewhat unclear. The argument in this chapter is that when interpreting and ruling on constitutional validity, the procedural/substantive equality dichotomy is flawed. It is also argued that the High Court's attempts at confining the implied equality doctrine to procedural equality are acts of folly. The dichotomy between procedure and substance may make sense in administrative law, where the courts may limit themselves to reviewing procedural justice as opposed to substantive justice, but is inappropriate in a constitutional context. That is to say, it is not appropriate to talk of equality with steadfast ignorance of the substantive impact of laws impacting on so-called procedural justice. This is because constitutional inquiries should be concerned with issues of substance rather than mere form.[10] Second, and relatedly, the procedural equality requirement of treating like cases alike inevitably requires inquiries of substance as to whether any two cases are in fact alike. The image of the blindfolded Themis, the goddess of justice, symbolises that justice seeks to function without fear or favour. That is, parties should not be prejudiced or favoured

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[7] *Kruger v Commonwealth* (1997) 190 CLR 1.

[8] That is "every man, whatever be his rank or condition, is subject to the ordinary law ... and amenable to the jurisdiction of the ordinary tribunals", Dicey *Introduction to the Study of the Law of the Constitution* 10th ed. ((Macmillan, London 1959) at 193.

[9] Substantive equality looks to a rule's results or effects. Procedural equality does not look at the different characteristics and circumstances of a person affected by a rule, whereas substantive equality does. How the law should take these differences into account is controversial.

[10] See chapter 4 part 2.

because of who they are and the office or position they may hold in the community. To this extent the symbol of Themis is consistent with notions of procedural justice. Themis should however not be seen to be ignorant of the values, mores and circumstances of the society in which she dispenses justice. Justice requires an understanding of the context and circumstances, as well as the substantive impact of its decisions, in which it functions, as we saw from our discussion in chapter 3.[11]

The equality "right" is more open-ended than the due process rights. Equality potentially covers a wide field. It raises issues of distributive justice (ie the distribution of wealth and property and the compensation for the compulsory taken of property), of equal access to justice, welfare rights and unfair discrimination on the basis of membership of a particular group in society, namely a racial, religious, gender or other groups. The legal or constitutional right to equality is necessarily more confined than the broader political and philosophical notions of equality. The actual and potential scope of the constitutional right is the subject of the discussion in this chapter.

2. The High Court considers the right to equality

The Australian Constitution does not have a broad provision about equality rights similar to the US Fourteenth Amendment or section 15 of the Canadian Charter of Rights and Freedoms. This does not mean the founding fathers were uninterested in the ideal of equality because the issue was raised a number of times during the Convention Debates.[12] Despite their aversion to broad constitutional statements of

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[11] See for example Part 4 c of chapter 3.

[12] See S Tarrant "The Woman Suffrage Movements in the United States and Australia: Concepts of suffrage, citizenship and race" (1996) 18 Adel Law Rev 47 at pp.56-59. See also CMH Clark *A History of Australia, Volume V: The people make laws 1888-1915* (Melbourne University Press, Melb 1981) at 143 who notes that on the first day of the Federal Convention of Australasia held in Adelaide in March 1897, for example, the

rights, the founding fathers did deal with aspects of equality, namely equality of voting rights (sections 24 and 25), non-discrimination because of residency (section 117) and the provision for unequal treatment (special laws) on the basis of race (section 51(xxvi)). Other equality provisions prohibit discrimination on the grounds of residency for taxes, bounties and excise (section 51(iii), 86, 88 and 90), and section 99 prohibits the Federal Government from giving preference to one or a number of States.

It is possible, even in the absence of an express general equality provision, that an implied equality doctrine underlies the Constitution. The High Court considered this possibility in *Leeth*[13] and *Kruger*[14]. The majority were not adverse to an implied procedural equality doctrine, but rejected the existence of an implied doctrine of substantive equality. The minority (Deane and Toohey JJ) were of the view that an implied doctrine of substantive equality existed. Procedural equality requires that no person be above the law and like cases are, as much as possible, to be treated alike. Procedural equality is satisfied if legislation or court proceedings do not in a formal sense make arbitrary distinctions between members of groups in society. Substantive equality, however, is interested in the outcomes of justice. A law that prohibits speeding may be equal in a procedural sense if it makes no distinctions regarding race, religion or gender, but might be substantively unequal if it is only enforced in areas where a particular racial group resides. The speeding law could be made substantively equal with subordinate legislation setting out procedures for ensuring non-discriminatory enforcement by requiring randomised selection of areas for police operations.

Convention received a petition from the Women's Christian Temperance Union of Australasia urging equal rights to vote by both sexes.

[13] *Leeth* (1992) 174 CLR 455.

[14] *Kruger v Commonwealth* (1997) 190 CLR 1.

In *Kruger* Brennan CJ rejected the argument that "all laws of the Commonwealth must accord substantive equality to all people irrespective of race"[15]. More specifically he believed that there is nothing in the text or structure of the Constitution that requires substantive equality in the treatment of all persons under s 122. Dawson J also rejected substantive equality, but appeared to accept procedural equality. He said that "whilst the rule of law requires the law to be applied to all without reference to rank or status", the common law has never required as a necessary outcome the equal, or non-discriminatory, operation of laws.[16] He therefore rejected the idea that the common law provides a foundation for a doctrine of equality, or at least he rejected the idea that it provides for "substantive equality as opposed to the kind of procedural equality envisaged by the rule of law".[17] He also rejected the possibility put by Deane, Toohey and Gaudron JJ in *Leeth* that Chapter III of the Constitution (which establishes the judiciary) carried with it a guarantee of equality rights:

> Ch III contains no warrant for regarding a law as invalid because the substantive rights which it confers or the substantive obligations which it imposes are conferred or imposed in an unequal fashion.[18]

In the earlier case of *Leeth* Gaudron J supported procedural equality believing there is a limited constitutional guarantee of equality before the courts and confirmed her view in *Kruger* that "there is a limited constitutional guarantee of equality before the courts, not an immunity from discriminatory laws which, in essence, is what is involved in the argument that there is an implied constitutional

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[15] *Ibid* at 45.

[16] *Ibid* at 66.

[17] *Ibid.*

[18] *Ibid* at 68.

guarantee of equality".[19] She saw that Chapter III is the sole source of the equality rights under the Constitution.[20]

The minority in *Leeth* (Deane and Toohey JJ) and *Kruger* (Toohey J) supported an implied equality doctrine that was both procedural and substantive in nature. They found two bases supporting the doctrine. The first is Chapter III of the Constitution because it vests exclusive judicial power in the courts, and the second is the "underlying or inherent theoretical equality of all persons under the law and before the courts", which is embedded in the Constitution (the "equality theory").[21]

Regarding the first basis, they said that Chapter III's exclusive vesting of judicial power in the courts implies that the courts must "exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially".[22] At this point they appear to be proceeding no further than the majority by effectively restating the procedural rule of law duty that a court "extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law".[23] But Deane and Toohey JJ did not stop there. They extended the obligation, requiring courts to "refrain from discrimination on irrelevant or irrational grounds".[24] This raises issues of substantive concern. The implications of that additional requirement can be illustrated this way. If a court were applying a law requiring restaurant owners not to serve Muslims, then procedural equality would require that that law be applied consistently to all restaurant owners

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19 *Ibid* at 112.

20 *Ibid* ; *Leeth supra* 6 note at 502-503

21 They point out that the first proposition is supported by Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. ((Macmillan, London 1959) at 193.

22 *Leeth supra* 6 note at 487.

23 *Ibid* at 487.

24 *Ibid.*

appearing before the courts. But if laws must not discriminate on irrelevant and irrational grounds (which is a requirement Deane and Toohey JJ found underlies the Constitution), it would be difficult for the court to avoid substantive inquiries into the rationality and relevancy of the law itself. A law that discriminated between groups on an irrational or irrelevant basis would therefore be unconstitutional. The court would, however, be required to consider the law's rationality at the time of its enactment, and not at the time that its validity is being challenged. In considering the challenged Ordinance in *Kruger*, which allowed for the removal of Aboriginal children from their parents, Toohey J stated "the Ordinance must be assessed by reference to what was reasonably capable of being seen by the legislature at the time as a rational and relevant means of protecting Aboriginal people against the inroads of European settlement".[25]

The second basis for the doctrine of implied equality referred to by Deane and Toohey JJ is the equality theory.[26] They said the theory has a common law basis and is "a basic prescript of the administration of justice under our system of government", and requires that people be treated equally under the law and before the courts.[27] The theory, in their view, is implicitly supported by the fact that the Australian people were parties to the compact leading to the creation of the Constitution.[28] Thus, "equality derives from the very existence of a Constitution brought into existence by the will of the people".[29] The Constitution makes a number of references to the people of Australia. The preamble and section 3 refer to the free agreement of the people in establishing the Constitution. According to Quick and Garran, these words

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[25] *Kruger supra* note 7 at 97.

[26] *Leeth supra* note 6 at pp.485-486.

[27] *Leeth supra* note 6 at pp.485-486.

[28] *Ibid* at 486.

[29] *Kruger supra* note 7 at 97.

"proclaim that the Constitution of the Commonwealth of Australia is founded on the will of the people whom it is designed to unite and govern".[30] Deane and Toohey JJ also referred to clause 5 section 5 of the Constitution as supporting the theory. It states that "(t)his Act" (which includes the actual terms of the Constitution) "and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people ... of every part of the Commonwealth".[31] Deane and Toohey JJ found, consistent with Detmold, that an implied doctrine of equality is based on "the essential or underlying theoretical equality of all persons under the law and before the courts".[32] Detmold emphasises the point that the Constitution, by prohibiting discrimination on the basis of State residency, provides for equality of the *people* rather than providing for equality of the *States*.[33] This is because

> If Australia were a confederation, the States would be its members and fundamentally the reference points for questions of legitimacy. Equality between the States would then be a fundamental requirement. But Australia is not a confederation. It is a federation; and though built organically on the States, it is much more than the sum of them. A confederation is an organisation of States. But a federal commonwealth, as is any commonwealth, is an organisation of people. And people are the fundamental

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[30] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (Angus and Robertson, Sydney 1901) at 285.

[31] *Leeth supra* note 6 at 486.

[32] *Leeth supra* note 6 at 486. The significance of their distinction between equality under the law and before the courts is unclear. As we will see below in Part 4, the Canadian Supreme Court in *R v Drybones* [1970] SCR 282 distinguished between inequality before the law and under the law. The distinction was later criticised for being unduly artificial. *Drybones* suggested that equality under the law raises issues of substantive equality. This suggests that Deane and Toohey JJ see the implied doctrine of equality as having the wider substantive law operation.

[33] MJ Detmold *The Australian Commonwealth: A fundamental analysis of its Constitution* (Law Book Co, Sydney 1985) at 73.

> reference points of its legitimacy. It is therefore people who are to be treated equally.[34]

Deane and Toohey JJ were essentially in agreement, saying that

> The States themselves are, of course, artificial entities. The parties to the compact which is the Constitution were the people of the federating Colonies. It is the people who, in a basic sense, now constitute the individual States just as, in the aggregate and with the people of the Territories, they constitute the Commonwealth.[35]

In this sense, the people were conceived as being the subjects rather than the objects of the Constitution's concern. This distinction between the subject of constitutional concern rather than the object of its concern is one that Krygier alerts us to as being significant, as we saw in chapter 1.[36]

One objection to the implied equality doctrine raised by the majority in *Leeth* and *Kruger* was that the Constitution's authors had an opportunity to include an express equality provision along the lines of the Fourteenth Amendment, but did not take that opportunity. The absence of the express provision is argued to be the basis for rejecting the implied doctrine of equality.[37] This sort of argument was discussed in the previous chapter regarding the due process rights, and will not be

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[34] *Ibid.*

[35] *Leeth, supra* note 6 at 484. Note also Brennan J's observations in *Davis v The Commonwealth* (1988) 166 CLR 79 at 110 that

> the Constitution did not create a mere aggregation of colonies, redistributing powers between the government of the Commonwealth and the governments of the States. The Constitution summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite "in one indissoluble Federal Commonwealth", melding their history, embracing their cultures, synthesizing their aspirations and their destinies. The reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition. The end and purpose of the Constitution is to sustain the nation.

[36] See chapter 1 part 2.

[37] See for example *Kruger, supra* note 7 per Dawson J at 61.

repeated here. Suffice to say Deane and Toohey JJ appeared to argue along similar lines to the previous chapter by saying that the Constitution does not spell out the doctrine of legal equality in express words because of the Constitution's "ordinary approach to fundamental principles".[38] That is, the Constitution does not spell out the fundamental principles upon which it is based because these were assumed by its authors.

Assume for the moment that Deane and Toohey JJ's views gain majority support by members of the High Court, where then does this take things? Deane and Toohey JJ were vague about the application of the implied doctrine of equality. Vagueness about the operation of the doctrine bedevils its authoritativeness and utility. Equality is a term with considerable and deeply contested, scope which helps explain the fears of the majority in *Leeth* and *Kruger* about its open-ended application. In exploring the potential ways in which the doctrine could be applied in Australia it is useful to review the history of the provision in the United States (where it has a considerable antecedence) and in Canada, where it has appeared as an express constitutional provision in relatively recent times. But before proceeding to that examination it is worth considering the broader philosophical, political as well as the legal implications of the term "equality".

3. The scope of the equality right

Underlying many religious and political philosophies and ideals is the desire for a world with a greater sharing of resources amongst all. There is something repellent, for example, about the fact that one child will be destined for destitution and another for great wealth, and presumably a greater measure of happiness, even if the first child is blessed with a surplus of natural talents and abilities that could

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[38] *Leeth supra* note 6 at 486.

potentially benefit the world and the second child is a moron. The fate of these children is determined by accident of birth rather than their abilities – to this extent life can be seen to be essentially unfair, and unjust. Yet the appropriate response to this injustice (if indeed it is accepted as being unjust) has for centuries thrown up political, philosophical and other theories and practices that have been and will remain contentious and contested.

As mentioned in the introduction to this chapter the Australian Chief Justice Sir Murray Gleeson stated that the claim that people are equal is an expression of an ethical principle, and reflects a value, not an observation.[39] Equality, however, is more than just a value, it is also a legally recognisable right, particularly so in jurisdictions where it is an express constitutional right. Arguably equality is also a value of fundamental constitutional significance, residing amongst the other corner stones of the constitution, namely democracy and the rule of law. The 19th century French anarchist Pierre-Joseph Proudhon (1840) cogently articulates the corner stone ideals for a just and equal society:

> I ask an end to privilege, the abolition of slavery, equality of rights, and the reign of law. Justice, nothing else; that is the alpha and omega of my argument: to others I leave the business of governing the world.[40]

Justice, then, arguably demands both "equality" and the rule of law.

Equality speaks to the ambition of egalitarianism. This is evident in the Judeo-Christian tradition, political theories of liberalism, communism, socialism, and equal-rights campaigns. It is found in philosophical theories from Aristotle's *Nicomachean Ethics* (Book V) to

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[39] M Gleeson, Boyer lecture Four, "Four Aspects of the Commonwealth Constitution - Part 2", in The Rule of Law and the Constitution, ABC Books, Sydney, 2000, Broadcast 10/12/00

[40] *What Is Property? Or, An Inquiry Into The Principle Of Right And Of Government.* Pierre-Joseph Proudhon. (BR Tucker trans) (1876) (Cambridge University Press, Cambridge 1994).

Rawls' *Theory of Justice*. Blainey notes that the rise of levelling and egalitarian views became one of the hallmarks of Australian life after 1851.[41] Indeed, the idea that adults should have a say in the governing of the country gained firm root in Australia ahead of nearly every other nation. Australian egalitarianism promoted

> The secret ballot—a device to prevent humble people from being bullied by employers and landlords and, later on, by some union leaders—was used for the first time in the world in the South Australian and Victorian elections in the 1850s. … Australia was also the first country in the world where nearly all women could not only vote but could also stand for parliament. At this time, in contrast, women were not entitled to vote in Britain, nor in most countries.[42]

The Australian Constitution is imbued with the egalitarian ambitions of the time of its creation, which spoke for Anglo-Saxon men and spoke barely for women and not for Aborigines and other "races". The egalitarian perspectives and assumptions lie at the heart of the Australian Constitution. The High Court accepts that procedural equality, for instance, was one of the unwritten presumptions of the Constitution. Whether the equality presumption extends beyond this is contentious.

The majority in *Leeth* and *Kruger* may well have sought to confine the dimensions of the legal entitlement to equality by creating a dichotomy between procedural and substantive equality. Admittedly, both procedural and substantive notions of equality have their problems. Strict procedural equality shares an ancestry with strict positivism. Its strictness allows the law to ignore the impact of grossly

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[41] G Blainey, "This Land Is All Horizons - Australian Fears And Visions", The Boyer Lectures 2001, ABC Radio Program Six, "Almost Equal" broadcast Sunday 16 December 2001.

[42] *Ibid.*

unfair and inequitable laws, as we shall see in the discussion below. Substantive equality is also problematic if it is allowed to operate without clear bounds, otherwise it risks allowing the courts to trespass into the political domain when determining legislative validity. Determining the legitimate bounds of judicial review is an issue that will always be fraught with difficulty, but one that should not be proffered as a ground for ignoring the Court's obligation to inquire into the constitutional validity of laws. The problem with procedural equality, as suggested earlier, is that it will not invalidate legislation if on its face it does not place people above the law or provide unequal access to justice, even if in the real experience of the legislation it promotes inequality. Procedural equality was famously ridiculed by Anatole France (1894) with his quip that "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the street, and to steal bread".[43] According to Pojman a "law that makes it permissible to serve only white patrons at your restaurant is just as much a law as one which prohibits you from discriminating on the basis of race. If this is so, then the idea of equality before the law can be reduced to the formal principle of treating equals equally and unequals unequally. It is not an egalitarian theory at all".[44]

Procedural equality merely requires that no person be above the law and like cases are, as much as possible, to be treated alike.[45] Mere procedural equality devoid of concerns about substantive equality is at risk of prohibiting legal inquiry and judgement from concerning itself

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[43] A France, *The Red Lily* (1894), ch. 7.

[44] L Pojman "Stalking the Wild Taboo: Theories of Equality: a critical analysis" www.1raine.com/swtaboo/taboos/lp_equal.html at Part 1.4

[45] Sadurski believes that formal equality before the law is "not so much a principle of equality as one of non-arbitrariness". See W Sadurski "Equality Before the law: A Conceptual Analysis" (1986) 60 ALJ 131 at 132.

with issues of justice.[46] By separating law from justice, it creates a "sterile phraseology"[47] depriving the law of its body so that it "no longer has a soul; or a *raison d etre*; nor any title to obedience".[48] That is, procedural concerns are of proper interest to the courts, providing the courts do not ignore matters of substantive concern. In effect the procedural and substantive equality distinction is artificial. To confine questions of equality to merely procedural issues allows the courts to stand mute regarding laws that are procedurally correct, but which perpetrate obvious injustice. Take the example of the Communist Party case, which involved more than merely procedural issues.[49] The enactment of the Communist Party Dissolution Act followed the correct parliamentary process, and the Act was on its face "open, clear, coherent, largely prospective, and stable".[50] The law could be applied with consistency and certainty, although it is highly debateable whether it could have been administered with restraint.[51] The Act, however, undermined in a substantive way the values of a free and democratic society by limiting freedom of association and freedom of speech by employing measures that were a disproportionate and irrational response to the mischief parliament sought to deal with. Although the High Court did not use the substantive equality principle to find the Act to be unconstitutional, it appears that the Court considered more than the procedural operation of the Act, and was concerned about its substantive impact. Dixon J, for example, said that

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[46] In *Commissioner, Australian Federal Police v Propend Finance Pty Limited* (1997) 188 CLR 501, Gummow J referred to the existence of a "a substantive rule of law". This suggests that the rule of law has more than merely procedural concerns.

[47] M Villey "Epitome of Classical Natural Law" (2000) 9 GLR 74 at 90.

[48] *Ibid.*

[49] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

[50] TAO Endicott "The Impossibility of the Rule of Law" (1999) 19 Oxford Jour of Legal Studies 1 at 1.

[51] *Ibid* at 2.

> History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.[52]

In other words, he makes an observation about the substantive effect that some laws may have on the democratic process. He observes that the dangers to democracy can arise from institutions themselves claiming they need extraordinary powers for their own protection. Although Dixon J felt it unnecessary to directly address the impact of the Communist Party Dissolution Act upon the rule of law because the legislature lacked the constitutional power to enact the legislation in the first place, he nevertheless described the impact of the Act on property rights and the "civil rights of the members" of prohibited organisations because "they illustrate the substantial effect and nature of the provisions in question".[53] Thus, a proper inquiry into the validity of procedure cannot be ignorant of issues of substance, regardless of the fact that a law appears on its face to treat parties equally. That is, a "law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal".[54]

Substantive equality is also problematic as it risks inviting the courts into a boundless inquiry into whether legislation transgresses equality values. These values are politically and philosophically contested. Thus, the legal inquiry involves finding where the boundaries lie. At what point does a court's inquiry into constitutional

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[52] *Australian Communist Party v Commonwealth*, *supra* note 49 at 187.

[53] *Ibid* at 200.

[54] *Castlemaine Toohey's Ltd v South Australia* (1990) 169 CLR 436 per McHugh and Gaudron JJ at 478.

validity end? Assistance in determining the boundaries can be gained from overseas jurisprudence on the matter.

4. Canadian and US constitutional conceptions of equality

Australian constitutional developments on equality can be usefully informed by US and Canadian constitutional experience. The equal protection clause (the Fourteenth Amendment) under the US Constitution was introduced after the Civil War and has a jurisprudence stretching over a century. Canada's equal protection provision, Section 15 of the Charter, gained effect in 1982, after some twenty years of the operation of a statutory (ie non-constitutional) bill of rights provision guaranteeing equality. Canadian jurisprudence is more apposite to Australia because of our shared experience as British colonies and because neither made the revolutionary break from Britain as did the US. Also both Australia and Canada are seeking reconciliation with their indigenous people, who form roughly the same proportion of the overall population of the respective countries. Canada, however, provides a broad express constitutional guarantee of equality protection, which the Australian Constitution does not.

We will first turn to the US experience. The Fourteenth Amendment was aimed at providing emancipated blacks full and equal status after the Civil War. The Supreme Court's interpretation of the provision initially did not remove racially discriminatory laws. In *Plessy v Ferguson*[55] the Court upheld a Louisiana statute which required blacks to ride in separate train carriages on the basis that the train facilities were separate but equal. This principle was not overturned until the landmark decision of *Brown v Board of Education*[56] in which

[55] 163 US 537 (1896).

[56] 347 US 483 (1954).

Warren CJ found that the requirement that children be taught in segregated schools, even with equal physical facilities, "generates a feeling of inferiority [amongst blacks] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone".[57]

The decision did not lead the Supreme Court to subsequently overrule statutes that made distinctions amongst people leading to different legal treatment. Indeed it was recognised that there are perfectly fair and rational grounds for treating categories of citizens differently.[58] For example, refusing to allow under 16 year olds to apply for a driver's licence may be fairly done to protect road users. Under the US Constitution legislation can fairly classify people for unequal treatment if the categorisation is rational, relevant to achieving a legitimate end and made to achieve a legitimate legislative purpose.[59] Legislation should be rational in the sense that like groups should usually be treated alike; relevant in that the categorisation must be necessary for achieving the legislative purpose; and the purpose is required to be legitimate in that it must be for the public interest or deal with an issue the legislature is permitted to pursue.[60] The Supreme Court uses a two tiered scrutiny test: strict and minimal. Of interest for present purposes is that the Court considers legislative categorisation on the basis of race, religion and nationality as inherently suspect, requiring strict scrutiny.[61] The Court considers that blacks and whites have no inherent differences and therefore presumes that legislation that employs racial categories is likely to be making racial distinctions

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[57] *Ibid* at 494.

[58] L Tribe *American Constitutional Law* 2nd ed (Foundation Press, Mineola, NY 1988) at pp.1465-88.

[59] See R West "Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment" (1990) 42 Florida Law Rev 45 at 53.

[60] *Ibid.*

[61] *City of Richmond v JA Croson Co* 109 SCt 706 (1989) at pp.720-23.

for irrational purposes which do not further legitimate legislative ends.[62] Legislation that categorises groups on an economic and social basis is not inherently suspect, however, and is therefore subjected to minimal scrutiny. Here the onus is on the challenger to prove that the classification of a group for discriminatory treatment lacks a rational relationship to the legislative object.[63]

Concern about racial categorisation in legislation also arose in Canada. Prior to the introduction of the 1982 constitutional Charter of Rights and Freedoms, the Federal Government enacted in 1960 the Canadian Bill of Rights, which was an ordinary statute. Section 1 of the statute stated:

> It is hereby recognised and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,. .
>
> (b)the right of the individual to equality before the law and the protection of the law; . . .

The Supreme Court dealt with race in *Drybones*[64] and *Lavell*[65]. *Drybones* involved a statute that prohibited Indians from being intoxicated off a reserve. The Court ruled that it breached the Canadian Bill of Rights. In *Lavell* the Court held that a provision which stated that an Indian woman who married a non-Indian loses her Indian band membership did not contravene the Bill of Rights. In *Lavell* Ritchie J distinguished *Drybones* by implying that a distinction existed between a provision requiring equality *before the law* and one requiring equal

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[62] R West, *supra* note 59 at 55.

[63] *McGowan v Maryland* 366 US 420 (1961); see also WS Tarnopolsky "The Equality Rights" in WS Tarnopolsky and G Beaudoin (eds) *The Canadian Charter of Rights and Freedoms: Commentary*, (Carswell, Toronto 1982) at 403.

[64] *R v Drybones* [1970] SCR 282.

[65] *AG Canada v Lavell* [1974] SCR 1349.

treatment *under the law*.[66] This somewhat pedantic distinction was compounded in the non-racial case of *Bliss*[67] which involved a statute that provided pregnancy benefits to women on an allegedly discriminatory basis when compared to employment insurance benefits provided to others. The Court found that this did not breach the Bill of Rights. Again it distinguished *Drybones,* only this time on the basis that the racial penalty in that case failed to provide *equal protection* of the law, whereas the discrimination regarding benefits was a failure to provide *equal benefit* of the law.[68]

The pre-Charter case law and Bill of Rights effectively created four categories of equality rights: equality before the law, equal protection of the law, equality under the law and equal benefit of the law. The Supreme Court ruled that the first two categories could not be breached but that breaches of the latter two did not invalidate a statute. When the Canadian Charter of Rights and Freedoms was drafted, there was obviously a desire to have equality protection cover all four categories. Thus section 15 of the Charter states that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(2) specifically allows programs or activities that have the object of ameliorating disadvantage.

The equality before the law clause has a substantial common law jurisprudence, and the equal protection of the law clause owes its heritage to the US Fourteenth Amendment. But the equality *under* the

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[66] WS Tarnopolsky *supra note* 63 at 421.

[67] *Bliss v Attorney-General of Canada* (1978) 92 DLR (3rd) 417.

[68] *Ibid* at 423.

law and equal *benefit* clauses are novel. The doctrine of equality before the law essentially restates the procedural equality doctrine and owes its modern common law heritage to Dicey who proposed it as a fundamental principle of the British constitution, which he described as the rule of law. According to Dicey it "excludes the idea of any exemption of officials or others from the duty of obedience to the law", or "from the jurisdiction of the ordinary tribunals".[69] The essential idea of equality before the law is that like cases be treated alike and that no distinctions be made on the basis of class, wealth, race or religion in relation to the right to sue or be sued or to prosecute or be prosecuted.

The present tests for section 15 were decided in a trilogy of 1995 Supreme Court cases: *Miron v Trudel*,[70] *Egan v Canada*[71] and *Thibaudeau v Canada*[72]. It was decided in these cases that the analysis under section 15(1) involves two steps. First the complainant must show a denial of equal protection or benefit of the law compared to other people. That is, whether a legislative distinction "has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed on others or of withholding or limiting access to benefits or advantages which are available to others".[73] Second, the challenged legislation must be shown to be discriminatory by denying one of the equality grounds mentioned in section 15 and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. The second component of the test applies considerations similar to those applied by the US Supreme Court by requiring the purpose of legislation to be identified and the relevance of

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[69] AV Dicey *Introduction to the law of the Constitution* 10th ed by ECS Wade (Macmillan, London 1959) at pp. 202-3.

[70] [1995] 2 SCR 418.

[71] [1995] 2 SCR 513.

[72] [1995] 2 SCR 627.

[73] *Benner v Canada (Secretary of State)* Supreme Court of Canada file no 23811, delivered 27 February 1997, unreported per Iacobucci J at para 61.

the categorisation for achieving the purpose examined. Legislation will be valid if the legislative purpose is valid and the legislative categorisation of groups of people is relevant for achieving the purpose.[74]

The final question to be asked for determining a breach of s 15 is whether the legislation in a substantive sense advances or undermines the purpose of s 15 by remedying or further entrenching such ills as prejudice, stereotyping, and historical disadvantage? Iacobucci J summarised the purpose of s 15:

> In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[75]

The Canadian *Charter* jurisprudence offers a useful basis for developing the Australian jurisprudence on the implied equality doctrine. If the doctrine is understood to require both procedural and substantive equality, the Canadian and US jurisprudence offers assistance in defining the scope of substantive equality in order to reduce judicial trespass into political evaluations of equality.

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[74] Ibid at para 64. Note however that legislation that violates section 15 can be valid if, under section 1 of the Charter, the violation is demonstrably justifiable in a free and democratic society, that is the objective of the legislation is pressing and substantial and the means chosen to attain the legislative end must be reasonable and demonstrably justified in a free and democratic society. See *R v Oakes* [1986] 1 SCR 103.

[75] Law, *supra* note 116 at para 88.

5. Indigenous right to equality in Australia

Let us assume for present purposes that the High Court accepts the proposition that procedural and substantive equality together form an implied equality doctrine under the Australian Constitution. What potential impact would this have on indigenous rights? To begin with, the doctrine would not require equality of treatment in the sense that legislation must always treat indigenous people in the same way as non-indigenous people. Parliament, for example, could validly introduce measures that favour indigenous groups that are suffering economic and social disadvantage so as to bring them up to more or less the same economic and social status as non-indigenous people (ie positive discrimination measures).[76] Parliament might also legitimately enact legislation which it considers is necessary for the unique needs of indigenous people. As an example, legislation might be enacted that recognises or protects native title rights. The equality doctrine would not prohibit legislation of this nature despite the fact that the rights being protected or advanced are not capable of equal enjoyment by all members of the community.

Assuming the equality doctrine does not necessarily prohibit legislation protecting or advancing indigenous rights, is the doctrine capable of positively protecting indigenous rights from arbitrary removal by Parliament? More specifically, could the doctrine protect native title from arbitrary extinguishment? The capacity of government to adversely affect native title rights has an obvious relation to the issue of equality. Indeed the 1998 amendments to the *Native Title Act 1993* by the federal legislature was criticised by the United Nations Committee on the Elimination of Racial Discrimination as being a breach of the Racial Discrimination Convention. The Committee said that:

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[76] See *Kartinyeri v Commonwealth* (1998) 195 CLR 337 per Kirby J at paras 124-131.

> While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for Governments and third parties at the expense of indigenous title.[77]

Lokan argues that it can, although I suspect that it cannot, at least in the direct sense.[78] Native title itself, I argue, can be protected under the equality doctrine, but not for the reasons given by Lokan and others. A problem that arises with applying the equality doctrine to protect native title against arbitrary extinguishment is that native title is not a right that all in the community are equally capable of holding. Only a particular "racial" group can hold those rights, namely indigenous people. Instead I argue, along the lines of the argument of the majority in *Mabo (No.1),* that indigenous people cannot be singled out as a group to be arbitrarily deprived of the rights they hold.[79] Thus the right not to be subjected to arbitrary treatment is an entitlement equally held by all, regardless of the unique nature of the underlying right a person holds.

Lokan argues that in relation to indigenous land claims there are at least three interrelated rationales for recognising the claims: (i) rights flow from the claimant's "first possession" of the lands they occupy; (ii) their right to equality; and (iii) the implicit right to assert, preserve and maintain their cultural identity.[80] He adds that each of these raises

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[77] Committee on the Elimination of Racial Discrimination, 54th Session Decision 2 (54) on Australia : Australia. 18/03/99. A/54/18, para.21(2).

[78] A Lokan "From Recognition to Reconciliation: The functions of Aboriginal Rights Law" (1999) 23 MULR 65.

[79] *Mabo (No.1) v Queensland* (1988) 166 CLR 186.

[80] A Lokan, *supra* note 78 at 71.

distinctive countervailing values, with corresponding implications for the law's reconciliation function. Each rationale will now be considered in turn.[81] The first rationale (ie the right flowing from first possession) is both a political and legal claim. As a legal claim it relates to the common law entitlement recognised in *Mabo (No.2)* to peaceful possession, which was discussed in chapter 2. Care needs to be taken with this rationale at both the legal and political levels because it risks privileging the rights of "traditional" indigenous people over those of "non-traditional" indigenous people. Care needs also to be taken on the same grounds with Lokan's third rationale (ie the right to assert, preserve and maintain cultural identity). The issue of privileging traditional indigenous rights is discussed further below in Part 6.

The difficulty with Lokan's second proposition (the right to equality) is that native title is not an equal right, in fact it is unique to indigenous people. Lokan deals with this problem with his argument by claiming that that the concept of equality relied on in *Mabo (No.1)* and *Western Australia v Commonwealth* "is not a strictly formal one".[82] He explains this proposition by saying that

> for the concept of equality to have any relevance to the case for recognition of native title, it must be a substantive one. On this approach, native title must in some contexts be regarded as equivalent to non-native title, but in other contexts it must be conceded that it is different. For example, while a failure to recognise native title in circumstances where non-native title would have been recognised amounts to a denial of racial equality (an appeal to the 'sameness' of native title), in order for native title to be meaningful it must be treated as sui generis for other purposes, such as its communal basis, or the need to relax evidentiary rules

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[81] *Ibid.*

[82] *Ibid* at 80.

> and requirements of proof to make establishing native title a realistic possibility (an appeal to the 'difference' of native title).[83]

Lokan's test for determining whether inequality arises involves asking whether there is a failure to recognise native title in circumstances where non-native title would have been recognised. The underlying fallacy of this test is that it assumes that the starting legal position of native and non-native title claimants is more or less the same. That is that native title claimant A and non-native title claimant B have roughly (or exactly) the same legal rights and interests. Under the test if the law recognises B's rights but refuses to recognise A's rights, it is treating A unequally (because the law has failed to recognise A's rights in circumstances where it has recognised B's rights). This test assumes that the law is failing to treat like cases alike. In reality A and B's rights are not alike. B (the non-indigenous claimant) can only claim title to land if she can establish she has a statutory grant of that title to land or that she is in possession of land, in which case she would have good title against all but the true legal titleholder. On the other hand, A (the native title claimant) claims title based on rights that are unique to native people. On the face of it, the test could be flipped so that it could be argued that if the law recognises A's right to the land and not B's, it is treating B unequally. But Lokan clearly does not object to native title being a right unique to indigenous people. So his starting assumption (that A and B have approximately equal rights to land) is false, even on his own assumptions. So, the fact that the law will recognise B's title is not very helpful in deciding whether or not the law should recognise A's title.[84] Lokan's test suggests that if the law is prepared to recognise B's title to land, then *ipso facto* it is treating A's rights to the land unequally. This might be so, but the result must be

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[83] *Ibid* at 81.

[84] Ironically, if the law recognises B has a grant of title under a statute the probabilities are that A's native title rights have been extinguished.

that *all* non-native statutory grants are unequal if there is a competing native title claim, and therefore presumably unconstitutional. But this proposition is cancelled out by the fact that all native grants of title are *ipso facto* unequal because they do not treat non-native title claims equally, and are therefore unconstitutional. Lokan appears to attempt to overcome this problem by stating that for some purposes native title needs to be regarded as *sui generis*. But he offers no basis for determining when the right is to be treated as the same as non-native title and when it is to be treated as *sui generis*, nor is it clear how the *sui generis* right relates to the equality principle.

Another proposal Lokan offers is that the law take an "instrumentalist approach" to equality for indigenous people. This would require the courts to have regard to the present unequal conditions in Aboriginal communities in terms of health, education, income and opportunity.[85] These conditions he sees partly arise from a "racially-based denial of civil rights, denial of employment and education opportunities, forced removal from parents and communities, and racially-motivated dispossession and persecution".[86] He is therefore effectively advocating a positive discrimination policy to make up for the present unequal circumstances. In support of this proposition Lokan summarises Kymlicka as saying that "fair treatment of national minorities requires that the state recognise and support their institutions and culture to the point where members of those minorities experience life on terms that are substantively equal to those enjoyed by members of the majority culture".[87] But note that he paraphrases Kymlicka as saying that it is for the state (presumably its legislature and administration) to achieve substantive equality, and not for the courts to use judicial review to implement a program for enforcing

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[85] Lokan, *supra* note 78 at 81.

[86] *Ibid* at 82.

[87] *Ibid* at 85.

positive discrimination. So although positive discrimination is a laudable political program, it is difficult to see how it can be applied to protect native title by, say, prohibiting Parliament from extinguishing native title.

The third right mentioned by Lokan is the implicit right to assert, preserve and maintain the cultural identity of indigenous people. This right is consistent with the view of some authors that the rule of law offers the benefit of providing not merely a constraint on power, but a "way of *realizing* certain values, among them 'respect for the dignity, integrity, and moral equality of persons and groups'".[88] This interpretation of the rule of law, Krygier admits, is (to use his understatement) "not universally upheld".[89] Krygier also admits that most commentators (and judges for that matter) prefer "a more austere, formal conception" of the relationship between the rule of law and those underlying values.[90] Thus, the possibility of the High Court using the rule of law or the equality doctrine to determine the validity of legislation based on whether or not it promotes and maintains the cultural identity of indigenous people appears at this stage to be remote. Applying the rule of law or equality doctrine in this way would, as Krygier suggests, involve "presupposing an institutional fabric which is not known everywhere".[91] The positive application of the doctrine is more likely to be seen to be a political imperative than a justiciable constitutional right. Admittedly, if the courts were to make the "several and intimate"[92] connections between values of dignity, integrity and

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[88] M Krygier, "The Grammar of Colonial Legality: Subjects, Objects, and the Australian Rule Of Law" in *Australia Reshaped. Essays on Two Hundred Years of Institutional Transformation,* (Cambridge UP, 2002, forthcoming) (G.Brennan and F.Castles, eds) at 10.

[89] *Ibid* at 9.

[90] *Ibid* at pp.9 and 10.

[91] *Ibid* at 10.

[92] *Ibid.*

moral equality of persons and groups and the rule of law and the equality doctrine it would greatly advance the ambitions of the reconciliation project.

I argue that native title interests can be protected against arbitrary extinguishment by using more conventional approaches to the equality doctrine. This can be done by adapting the arguments of the majority in *Mabo (No.1).*[93] That case involved a challenge to the *Queensland Coast Islands Declaratory Act 1985* (Qld) which purported to vest all land in the Torres Strait in the Crown free from all other rights. The Act also stated that no compensation was payable as a result of the operation of the Act. The Act was challenged for breaching the *Racial Discrimination Act 1976 (Cwlth)* ("RDA"). As we saw in chapter 1, section 10 of the RDA requires that no person shall be deprived of enjoying a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race etc. In a strictly formal sense the *Coast Islands Declaratory Act* did not deprive Torres Strait Islanders from an entitlement to property enjoyed by non-Torres Strait Islanders. The land title that Torres Strait Islanders were seeking to protect from extinguishment was native title, which was a form of title that non-Torres Strait Islanders were incapable of holding. So in that sense they were not being deprived of a right enjoyed by persons of another race. Arguably, then they were not being discriminated against. The High Court, however, rejected this proposition in *Mabo (No.1).* The Court found that the *Act* was inconsistent with the federal *Racial Discrimination Act* ("RDA"), and therefore invalid. As we saw in chapter 1, the *Queensland Coast Islands Declaratory Act* was not invalid simply because it extinguished native title *per se*, its invalidity arose from its arbitrariness. The arbitrariness arose from the purported wholesale

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[93] *Mabo (No.1) supra*, note 79.

abolition without compensation of a right held by a particular racial group.

Brennan, Toohey and Gaudron JJ found in *Mabo (No.1)* that the source or history of the legal rights being affected (eg native title rights) was irrelevant. Rather, it is the existence of the right to own property that is relevant. Thus, the fact that only indigenous people can hold native rights is irrelevant. What is relevant is the fact that it is a right to property, and the right to hold property is a right that most in the community possess. What the *Queensland Coast Islands Declaratory Act* purported to do was to arbitrarily deprive a group of their right to possess property, and that group were singled out on the basis of their race. Thus, the "relevant human right is immunity from arbitrary deprivation of legal rights", not the right to land which can only be enjoyed by native people.[94] Arbitrariness arises where the legislature acts unjustly.[95] Thus, inequality arises in relation to the extinguishment of native title if the legislature enacts legislation that either procedurally or substantively deals with that title in an arbitrary way, which includes dealing with the title in an unjust way. Such arbitrariness would be unconstitutional because it undermines the equality doctrine. In practical effect, the powers of the States and Territories would be much the same even if the RDA was repealed or amended. The powers of the Federal Government would also be restrained because of the doctrine of equality, the rule of law, the race power (s 51 (xxvi)) and the just terms provision (section 51(xxxi)).

6. A proposed test for constitutionality

Given the outlined national and international setting, there is value in proposing a test for determining the constitutionality of legislation with

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[94] *Ibid* at 218.

[95] See *Mabo (No.1) ibid* per Brennan, Toohey and Gaudron JJ at 217.

respect to the equality right in Australia on the assumption that the High Court eventually accepts an equality doctrine that is both procedural and substantive in operation. As we have seen, the majority appear to have accepted only an implied doctrine of procedural equality in *Leeth* and *Kruger*. Deane and Toohey JJ found that an implied equality doctrine had a broader operation than the one understood by the majority. They said that the Constitution was underpinned by an equality theory which requires that "people be treated equally under the law and before the courts".[96] This appears to more or less align with the broad definition of equality found in section 15 of the Canadian Charter of Rights and Freedoms 1982. Recall the discussion in the Part 4 about the Canadian jurisprudence developed under the Bill of Rights Act 1960 which permitted legislation that was contrary to the doctrine of equality *under* the law, but did not permit legislation to undermine equality *before* the law. This position changed with the introduction of section 15 of the Charter, which does not permit legislation to deny equality under the law or before the law. This approach is consistent with Deane and Toohey JJ's view that the Australian equality doctrine requires equality before and under the law. It should be noted, however, that they made no mention of the Canadian jurisprudence. Despite that, it would appear that they understood the Australian equality doctrine to extend beyond mere procedural equality to substantive equality, and that given their use of terms familiar to the Canadian jurisprudence it may be referred to in order to inform the development of the Australian jurisprudence.

Suggestions will be made here for the staking out the border lines that demark the scope of the equality theory. Recall the claim made earlier in this chapter that, although Deane and Toohey JJ had rightly extended the equality principle beyond mere procedural equality to include substantive equality, they had insufficiently defined its

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[96] *Leeth supra* note 6 per Deane and Toohey JJ at pp.485-486.

parameters. The danger of an unbounded substantive equality theory is that it invites the courts into the political arena. Deane and Toohey JJ, having raised the possibility (admittedly in dissent) of substantive equality, left its borders unmapped. The demarcation suggested below will at best only amount to a preliminary flagging of possibilities. The more complete project is a substantial one, even if it is informed by overseas experience. It also requires a far more mature development of the jurisprudence by the courts and commentators than can be offered here. Also, it will ultimately require the High Court to depart from its "commitment to text and a limited kind of structural implication" and to refer instead to "values or ideas that are not, at least under the High Court's avowed interpretive method, readily identifiable in the Constitution".[97]

Deane and Toohey JJ did offer a starting point for mapping the borders of the equality doctrine. They claimed that the doctrine, as they perceived it, has a number of limits. They said that some limits are imposed by provisions of the Constitution (for example, section 51(xxvi) which allows discrimination on the basis of race) and others by the application of the rationality test. According to Deane and Toohey JJ

> The doctrine of legal equality is not infringed by a law which discriminates between people on grounds which are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment.[98]

Although they offered no further clarification of the test, it hints at the tests applied by the Canadian and US Supreme Courts regarding equality. So by tying in Australian processes for determining constitutional validity with overseas tests it is possible to formulate the

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[97] A Stone "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication" (1999) 23 MULR 668. Note that Stone makes her suggestion in the context of developing constitutional principles for freedom of political speech.

steps set out below for deciding the constitutionality of legislation that potentially breaches the equality doctrine.

According to Stone, the Canadian and European concepts of proportionality require a law to be (1) directed to a legitimate end; (2) employ the least restrictive means practicable to achieve the end; and (3) directed towards an end which is worth the cost or restriction imposed to achieve it.[99] The first two approaches of the so called "proportionality test" have been applied by the High Court.[100] It is proposed here that these approaches be adapted for the purposes of the equality doctrine. It should be noted from the outset that although the test set out below encourages a systemic analysis of competing interests, it remains essentially ad hoc. The test is contextual in that "it must be done by reference to the particular circumstances, to the particular interests at stake in any given case and without reference to preconceived notions as to the resolution of those conflicts".[101] But the test does not give any guidance as to how the competing interests should be weighed, and therefore is not determinative of the outcome.[102] In other words there is plenty of scope for the Court to reach differing outcomes despite using the same analytical tools.

The proposal here is for the adaptation of the proportionality test to the equality doctrine. The suggestion is for the following sequence of questions to be asked for determining the validity of legislation affecting equality rights and interests:

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[98] *Leeth, supra* note 6 at pp. 488-89.

[99] Stone, *supra* note 97 at 681.

[100] According to Stone, *supra* note 97 at 681, the first two steps form part of the High Court's inquiry, and were applied for example in *Levy* (1997) 189 CLR 579 per Toohey and Gummow JJ at pp. 614-15, McHugh J at 627, Kirby J at pp. 647-48.

[101] Stone, *supra* note 97 at 692.

[102] *Ibid* at 692.

1. Putting the equality doctrine aside for the moment, does the Act have a valid constitutional purpose, and if so what is it?
2. If the legislation has a valid purpose under question 1, does the legislation (whether in a procedural or substantive way) single out groups within society for differential treatment?
3. If so, does the legislative purpose require that groups be singled out for differential treatment? If so, is the purpose for singling them out rational?
4. Taking the legislative mechanisms for implementing the legislative purpose–
    (i) is there a rational connection between the legislative purpose and the legislative mechanisms for achieving that purpose; and
    (ii) do the legislative mechanisms cause the minimum necessary impairment to the equality right to achieve the legislative purpose?

These questions will now be elaborated upon.

(a) Question 1: Does the Act have a valid constitutional purpose?

The first question involves deciding whether the challenged legislation is valid (absent, at this stage, the application of the equality doctrine), and identifying the legislation's purpose.[103] As mentioned in chapter 3, determining validity of federal legislation involves a two stepped process: first, identifying the scope of the Constitutional provision relied on for the power grant; and second, identifying the character of the challenged statute to decide whether its subject-matter falls within the

[103] See J Kirk "Constitutional Guarantees, Characterisation and the Concept of Proportionality" (1997) 21 MULR 1 at 24 where he says "applying a balancing test requires that the legislation be made pursuant to a legitimate government end. Thus, first level proportionality objectively tests the purposes of the law."

scope of the power grant.[104] Essentially this involves laying the Constitutional provision being invoked beside the statute which is challenged to decide whether the latter squares with the former.[105] In addition, as we saw in the previous chapter, the legislative purpose must not be contrary to the rule of law.

If the legislation is found to be constitutionally valid, its legislative purpose should be identified for the purposes of answering questions 3 and 4 below. It should be noted, however, that determining validity and identifying the legislative purpose are not mutually exclusive steps because identifying the legislation's character will in part often involve identifying its purpose. The legislative purpose may sometimes be expressly stated in the legislation itself, although these statements cannot be simply taken at face value. It is necessary to make an inquiry of substance as to what the legislation is aiming to do. The legislative purpose is distinct from the mechanisms set out in the legislation for giving effect to the purpose. Thus, for example, legislation may have the purpose of reducing road fatalities and injuries and use various mechanisms for achieving this purpose, including compulsory random breath testing. Of course the legislative purpose must itself be constitutionally valid.

In more recent times the High Court has applied the proportionality test for deciding whether legislation is within the scope of a constitutional power grant. In *ACTV*, for example, Brennan J said that if a law limited a constitutional power it would be invalid, unless the limitation "is merely incidental to the achievement of a legitimate (that is, non-infringing) purpose or object and the provisions of the law are reasonably appropriate and adapted (proportionate) to that end".[106] Kirk argues that the proportionality test would be a lot simpler if it were

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[104] See chapter 3 Part 3.

[105] *United States v Butler* 297 US 1 (1936) per Roberts J at 62.

not used when deciding whether legislation is within the scope of the power grant.[107] He proposes that if, however, it is seen necessary to retain the test in deciding whether legislation is within power, the question posed should be whether the chosen legislative means is "of such a *clear, gross or overwhelming nature* as to prevent the measure reasonably being characterised as having been made with respect to the claimed legitimate purpose".[108] Kirk's first suggestion, however, is preferable because it reduces the potential for confusion in the application of the proportionality test. Thus the first step should involve determining whether the challenged legislation is within the scope of the power grant, without at this stage applying the proportionality test.

The second step involves (for the purpose of answering the questions that follow) identifying the legislative purpose. The purpose might be expressly stated in the legislation's objects clauses, or may be discerned from a general contextual reading of the legislation. The inquiry must however, be one of substance and not mere form. The question is, what is the legislation attempting to achieve in practice? This is not a novel process. In *Levy*, for example, the Court identified the legislative purpose as one aimed at providing for protester safety.[109] The legislative purpose is distinct from the mechanisms used in the legislation to achieve the purpose.

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[106] *ACTV* (1992) 177 CLR 106 at 157.

[107] J Kirk "Constitutional Guarantees, Characterisation and the Concept of Proportionality" (1997) 21 MULR 1 at 41.

[108] *Ibid.*

[109] See Stone, *supra* note 97 at 681.

(b) Question 2: Does the legislation single out groups for differential treatment?

If the challenged legislation is found to be within the scope of the power grant after asking question 1 and the legislative purpose is identified, it may be appropriate to ask whether the legislation singles out groups within Australian society for differential treatment. In determining whether this is the case it is useful to adapt the Canadian *Charter* jurisprudence regarding section 15 to Australian circumstances. There are three approaches proposed by the Canadian Supreme Court for section 15, which tend to vary in the strictness of their application rather than fundamentally differ in principle. The first approach adopted by the majority in *Brenner* for determining whether there is differential treatment involves a two stepped process:

> *1st step* – the complainant must show that the challenged law "has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed on others or of withholding or limiting access to benefits or advantages which are available to others".[110]
>
> *2nd* step - the unequal treatment must be shown to be based on a stereotypical application of presumed group or personal characteristics.

A second approach is one proposed by L'Heureux-Dube J in *Miron v Trudel*,[111] *Egan v Canada*[112] and *Thibaudeau v Canada*,[113] and requires asking whether the (allegedly discriminatory) categorisation "is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of

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[110] *Benner v Canada (Secretary of State) Supreme Court of Canada* file no 23811, delivered 27 February 1997, unreported per Iacobucci J at para 61.

[111] [1995] 2 SCR 418.

[112] [1995] 2 SCR 513.

[113] [1995] 2 SCR 627.

recognition or value as a human being or as a member of…society, equally deserving of concern, respect, and consideration".[114] According to Iacobucci J, making this distinction requires

> consideration of both the group adversely affected by the distinction and the nature of the interest adversely affected by it. The interaction of the group's social vulnerability, in light of the social and historical context, and the constitutional and societal significance of the interest will determine whether the impact of the distinction constitutes discrimination.[115]

Thus, the mere fact of categorising groups of people for unequal treatment may be valid if relevant for achieving a valid legislative purpose. It is unlikely, however, that categorisation on the basis of race will be relevant for allowing a valid purpose, unless for ameliorating disadvantage.

A third approach was proposed by Iacobucci J in *Law v Canada (Minister of Employment and Immigration).* [116] His approach is more wide reaching than the other two approaches. Possibly because of its potential scope, Iacobucci J proposed that his approach not be applied strictly, but that it be used for points of reference to decide a matter. The first of his steps for deciding whether legislation singles out groups for different treatment requires deciding whether it (a) it draws draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fails to take into account the claimant's already disadvantaged position within society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics. Under the second step the claimant bears the onus of establishing an infringement of his

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[114] *Ibid* at para 66 per Iacobucci J.

[115] *Ibid.*

[116] [1999] 1 SCR 496. See also *M v H* [1999] 2 SCR 3.

or her equality rights, however the claimant will generally not carry the onus if there is an apparent infringement on one or more of the grounds specifically mentioned in s 15, namely where there is differentiation on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is worth pausing here to consider how stereotyping might occur in relation to legislation affecting indigenous people. Negative stereotyping may, ironically, arise in legislation designed to benefit indigenous people. Legislation that, for example, singles out "traditional" indigenous people for legislative benefit may need close scrutiny to ensure that it does not stereotype "traditional" indigenes as being more worthy than "non-traditional" indigenes. There may be a risk, for example, that buried in the legislative assumptions is the belief that indigenous people can be neatly divided into the categories of traditional and non-traditional people. The privileging of one class of indigenous people over another may carry the not so faint echoes of the classification of indigenous people into racial and sub-racial categories, such as full-bloods, half castes, quarter-castes etc which was popular for at least the early part of the 20th century. As we saw in the discussion in chapter 4,[117] racial categorisations lack a scientific or objective base, and tend to reflect socially determined classifications. Now days legislation rarely if ever classifies indigenous people along the lines of racial groups, other than in the very broad sense of categories such as Aborigines or Torres Strait Islanders. Legislation is now more likely to effectively create sub-categories of "traditional" indigenous and "non-traditional" indigenous communities. What we find here is the categorisation along the lines of community or social groupings rather than explicit racial sub-categorisation. That is not to suggest that there is anything necessarily pernicious about the existence of socially

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[117] Chapter 4, Part 2.

determined groups or communities, indeed they promote diversity and difference within society.

But what do we mean here by "community"? In answer, its meaning is contentious. Broadly speaking communities are organic and multiple. They are organic because their membership changes by members entering and leaving them. Members enter by birth or the choice of the individual and the community. They leave by dying, choice or being excluded. Communities may define themselves on a number of bases including clan or other social groupings and geography. The crucial factor is that the community is self-defined. Generally speaking, an imposed categorisation of community will ultimately fail because its members will not consider it to be legitimate and therefore will not accept its imposed leaders. The legitimacy of leadership is also a crucial requirement for a functioning community, and for authority to be effective it must be meaningful "from within the shared framework of concepts" of the group.[118] If the compelled notion of "community" makes no sense to the group it is unlikely to have the shared framework of concepts necessary to function as a community.[119]

A difficulty often presented to indigenous communities is the western pre-notions about them. There is a strong degree of nostalgia in western society about the death of an imagined past community, one that has given way to the dictates of modern industrial and post-industrial society. Numerous writers have referred to a past when community had value. Some like T S Eliot and William Morris have referred to it as a reference point of values which have been lost; others like Rousseau and Marx have used it as an attempt to make coherent

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[118] R Plant *Community and Ideology* (Routledge & Kegan, London 1974) at 56.

[119] It is interesting to note that although a community must be self defined, it may have derived from imposed circumstances. A prison community, for example, may result from imposed circumstances.

the idea of a common culture as egalitarian.[120] Westerners often, either consciously or unconsciously, only recognise indigenous communities that resemble their lost community. Consequently, "non-traditional" indigenous communities are seen not to be legitimate and therefore not entitled to recognition as indigenous communities. One result of this is the restriction of indigenous land title to those who can establish long held traditional title to their land, the title to which has not been extinguished. This sets the requirements at a level that is extremely high and fails to recognise the impact of colonisation on the rights and interests of many indigenous communities.

It is possible therefore that traditional/non-traditional categorisations reflect western concepts of their lost community rather than the reality of the indigenous experience of community and the impact on it of colonisation. Western demands for indigenous people to establish the "traditional" nature of their community and their traditional association with their lands can, in other contexts, be seen as distasteful. Caution should therefore be taken to avoid the supposition that only traditional communities rooted to the soil are legitimate and all other indigenous communities are by definition illegitimate, or not so legitimate as to be entitled to the same degree of recognition as traditional communities. This narrow construction of community has parallels with that made by Sombart and Spendler early in the 20th century. As Raymond Plant observes, they

> formulated the idea of a *Volksgemeinschaft* - the community of the racial people living on the historic, folkish soil of the race. In the slogans of this way of thinking, blood and soil are brought together in an emotive and chilling manner in a view of community which stresses kinship ties, racial ties and the rootedness in a particular locality. To mix the racial people and to be removed from the

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[120] See R Plant, *supra*, note 118 at pp.25-30.

> historic land of the people would therefore be to destroy community.[121]

It needs to be emphasised at this point that an indigenous community that has a traditional association with its land can be seen to be, by its own definition, to be a "legitimate" community. The point is "traditional" indigenous communities that have been removed from their land are also legitimate indigenous communities, as are "non-traditional" indigenous communities. There is nothing inappropriate, then, about the recognition of traditional title, or native title, to land. Indeed the High Court in *Mabo (No.2)* found that the common law could recognise native title. This was an appropriate conclusion given that the Court was asked to make a ruling about a community that had maintained a long association with its land according to its customs. Care should be taken, however, not to preference "traditional" communities over "non-traditional" communities in a way that necessarily discriminates against them. Care needs also to be taken not to draw sharp distinctions that reflect western notions of an imagined lost community rather than the real colonial and post-colonial experiences of indigenous people.

(c) Question 3: Does the legislative purpose rationally require that groups be singled out for differential treatment?

Once the legislative purpose is identified (under question 1 above), it may be necessary to decide whether it involves singling out groups in society for differential treatment. The methods outlined in question 2 can be applied to decide this point. So, for example, a legislative purpose might be to reduce terrorism. This may expressly or impliedly assume that certain groups within society are more likely to commit terrorist acts than others, and therefore the legislation may aim to treat

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[121] *Ibid* at p 45.

those groups differently from other members of society. In some cases the legislative purpose may have a meta-purpose and an ordinary purpose. The meta-purpose might be to reduce terrorism, the ordinary purpose might be to reduce the capacity of certain groups (who are assumed to be likely to engage in terrorism) from engaging in terrorism.

If the legislative purpose expressly or impliedly aims to treat certain groups differently from the rest of the population, the question then arises as to whether there is a rational legislative basis for treating those groups differently. The starting point in the US is for the courts to presume that government decisions are constitutional and only require a "rational basis" to be sustained. Originally the US Supreme Court found that legislation was valid unless "purely arbitrary".[122] More recently the question asked is whether the legislature had a rational basis for enacting the legislation.[123] According to Rich the Australian proportionality test has parallels to the US rational basis, but that in practice rarely succeeds as a basis for invalidating legislation.[124] Using the example of the terrorist legislation, the question that might be asked is whether there is a rational connection between the meta-purpose (eg to reduce terrorism) and the ordinary purpose (eg to single out Muslims). In the example, the question becomes whether Parliament had a rational basis for assuming that all Muslims residing in Australia are more likely to commit terrorists acts than non-Muslims.

A further way of responding to the task of determining rationality is to adapt the Canadian approach, which will validate legislation under section 1 of the *Charter*, even if the legislation undermines the other

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[122] *Lindsley v Natural Carbonic Gas Co* 220 U.S. 61, 78 (1911).

[123] *Chapman v United States* 500 U.S. 453 (1991).

[124] W Rich "Constitutional Law in the United States and Australia: Finding Common Ground" (1995) 35 Washburn Law Journal 1 at 16. Although in *Allegheny Pittsburgh Coal v. Webster County* 124 488 U.S. 336 (1989) the Court found there was no rational basis for state legislation that failed to revalue properties, leading to gross disparities in tax assessments.

provisions of the *Charter*. Legislation that undermines fundamental rights may nevertheless be valid if the government can establish that the legislation is "demonstrably justified in a free and democratic society". In a sense this approach frames legislative rationality within the bounds of conduct that is justifiable in a free and democratic society. Indeed, as Dickson CJ identified in *Oakes*, the founding value and principle upon which the Canadian Constitution is built is that Canadian society is to be free and democratic.[125] These values and principles are therefore "the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified".[126] As we saw in the previous chapter, these same values and principles underlie the Australian Constitution, even if the more extensive list of fundamental rights and freedoms which appears in the Canadian *Charter* does not appear in the Australian Constitution.

The *Oakes* test for deciding whether legislation is demonstrably justified is two-fold: (1) whether the purpose for intruding on a fundamental freedom or right is legitimate and of sufficient importance to justifying limiting a right; and (2) whether the means chosen are proportional to the purpose. The first question is of interest for present purposes. According to Dickson CJ in *Oakes* it is necessary, at a minimum, "that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important".[127]

So, to return to our example, the legislative purpose of singling out Muslims for differential treatment for reducing terrorism is pressing and substantial in a free and democratic society. Although the test states that it is for the legislature to demonstrate the rationality of the

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[125] *R v Oakes* [1986] 1 SCR 103 at 136.

[126] *Ibid* at 136.

legislative purpose, in practice it does not take much for Parliament to make out its case because of the (quite proper) tendency of the courts to defer to the legislature's judgements on these quasi-political/quasi-constitutional issues. That is, the courts are very cautious about entering into the political arena and substituting their political judgement for those of the legislature. As an example of this deference, Mason CJ, Brennan, Deane, Dawson and Toohey JJ said in *Castlemaine Tooheys* that

> If we accept, as we must, that the legislature had rational and legitimate grounds for apprehending that the sale of beer in non-refillable bottles generates or contributes to the litter problem and decreases the State's finite energy resources, legislative measures which are appropriate and adapted to the resolution of those problems would be consistent with s 92 so long as any burden imposed on interstate trade was incidental and not disproportionate to their achievement.[128]

In the Canadian case of *R v Keegstra*,[129] for example, all of the members of the Supreme Court agreed that the purpose of the challenged legislation was to prevent the promotion of group hatred and that this was a sufficiently legitimate and important purpose to justify the infringement of rights. The Court was divided, however, on the question as to whether the means for achieving the purpose were proportional.

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[127] *Ibid* at 138.

[128] (1989) 169 CLR 436 at 473.

[129] [1990] 3 SCR 697.

(d) Question 4: Are the legislative mechanisms rational and proportionate?

The final question to be considered is whether the legislative and administrative mechanisms employed to achieve the legitimate legislative objective are rational and proportionate. This is to be judged in terms of the actual or likely substantive impact the measures have or will have on the group singled out for differential treatment. A number of cases have emphasised the need for a rational and proportionate connection between the legislative purpose and the means adopted in the legislation to achieve that purpose. In The *Tasmanian Dam Case* Deane J required that there be reasonable proportionality between the purpose and the means which the law embodies for achieving or procuring it.[130] In *Cunliff* Mason CJ said that the conclusion that a legislative provision is appropriate and adapted to the end in view implies that "reasonable proportionality must exist between the designated object or purpose and the means selected by the law for achieving that object or purpose"[131] This view is consistent with the Canadian jurisprudence which also requires that the means chosen are proportional to the purpose. Determining whether there is a "proportionate" response requires asking three further questions in Canada: (i) are the legislative mechanisms rationally connected to the objective; (ii) do they impair the protected rights as little as possible; and (iii) are the effects of the measure protected generally proportional to the objective.[132] The third criteria could probably be usefully dispensed with as it repeats the question being answered by asking questions (i) and (ii). In any event, there a few if any Canadian cases

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[130] (1983), 158 CLR, at p 260, cited with approval by Gaudron J in *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1 at 94.

[131] (1994) 182 CLR 272 at pp.296-297.

[132] See *R v Oakes* [1986] 1 SCR 103 at 139.

that have turned on the third question. It is proposed therefore that the following two questions be asked:

(i) is there a rational connection between the legislative purpose and the legislative mechanism for achieving that purpose; and

(ii) do the legislative mechanisms cause the minimum necessary impairment to the equality right to achieve the legislative purpose?

Rational connection

The High Court has made numerous references to rationality but has been somewhat coy in defining what precisely they understand it to mean. In *Leeth*, for example, Deane and Toohey JJ said that equality is not infringed by a discriminatory law that has a rational and relevant basis for the discriminatory treatment,[133] and in *Kartinyeri* Gaudron J confirmed that "a law which deals differently with the people of a particular race and which is not reasonably capable of being viewed as appropriate and adapted to a difference of the kind indicated has no rational basis and is, thus, a 'manifest abuse of the races power'".[134] In each of these cases no test was offered for deciding whether legislation in fact acted on a rational basis. It seems the legislative means are assumed to be rational unless they are patently irrational. In the US it appears to be relatively easy for the legislature to establish it had adopted rational means, given the judicial deference to the legislature's superior political capacity to judge the appropriate means for achieving a legislative end.[135] Despite that there are incidences where the US Supreme Court has found a lack of rational means. In *City of Cleburne*

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[133] *Leeth, supra* note 6 at pp. 488-89.

[134] *Kartinyeri, supra* note 2 at para 42.

[135] See Rich, *supra* note 124 at 15.

v Cleburne Living Ctr Inc, for example, the Court invalidated a law which had denied a zoning permit for a proposed home for the mentally retarded.[136] The Court found that the local authority's decision was demonstrably based on either ignorance or prejudice towards that group and therefore lacked a rational basis. In the Canadian case of *R v Keegstra* the Court found that there was a rational connection between a statute's objective of protecting target group members from racist attacks and of fostering harmonious social relations in a community dedicated to equality and multiculturalism and the chosen legislative means which involved criminalizing hate propaganda.[137] McLachlin J, asserted in a dissenting judgment, however, that there was no rational connection between the legislative purpose and the means adopted to achieve the purpose because prosecutions would provide publicity to racists and generate sympathy for them.[138]

In summary then, it seems that the courts tend to defer to the legislative judgement about the appropriate means for achieving a legislative end, and therefore not apply strict logic in deciding whether there is a rational connection between ends and means. In *Australian Capital Television* Brennan J emphasised Parliament's primary role in choosing the means to achieve a legitimate end, and described this as allowing Parliament a "margin of appreciation" in making these judgements.[139] However, if the ends chosen are driven by ignorance and prejudice or populist irrationality, then it is probable that no rational connection exists between ends and means. Irrationality was anticipated by one of the founding fathers, O'Connor, when he warned of circumstances where the "community, seized with a sort of madness

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[136] 473 US 432 (1985).

[137] [1990] 3 SCR 697 at per Dickson CJ at pp.745-46.

[138] *Supra* note 137 at pp.852-53.

[139] (1992) 177 CLR 106 at pp.158-9; 161-2; see also Cunliffe (1994) 182 CLR 272 at 325.

with regard to particular offences" will set aside all principles of justice.[140] When legislation reflects this sort of madness, and irrationality takes hold, the court is entitled to find the legislation to be unconstitutional.

Minimum impairment

The minimum impairment test is not novel. Commentators have proposed the test for the purposes of deciding constitutionality in Australia. Kirk proposes, for example, that the proportionality test require that the courts assess, to some extent, the "necessity, desirability, justice or fairness of the measure in question", and that this assessment involves deciding "whether or not an alternative means less restrictive of some particular interest should have been adopted, or whether that interest has been affected adversely to an unjustified extent".[141] He suggests that the test requires asking "whether availability of less restrictive means, or the imbalance [of benefits and harms], was of such an overwhelming nature as to make it clear that the law could not reasonably be characterized as having been made with respect to the claimed legitimate purpose".[142] Stone proposes that the proportionality test include the examining "the availability of alternative, less drastic means by which that same end could be achieved".[143]

The Canadian Supreme Court in *Oakes* seemed at first to set a strict standard by requiring the legislature to use the "least restrictive alternative" mechanisms for achieving the legislative purpose. This was criticised for setting an unduly limited scope for the legislature to

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[140] Constitutional Convention Debates, Melbourne 8 February 1898, at 689.

[141] Kirk, *supra* note 103 at 35.

[142] *Ibid*.

[143] *Supra*, note 97 at 677.

determine the appropriate means for achieving legislative ends.[144] A year after *Oakes* the Court clarified that the test as being whether the legislature had impaired freedoms as little as reasonably possible.[145] Implied in these tests is the differential approach adopted by the courts towards the legislature's superior position in judging the appropriate mechanisms for achieving legislative ends.

In summary, the test seeks to ensure that the least possible damage is done to fundamental rights, including the equality right, to achieve a legitimate legislative purpose. The legislature is often required to balance competing social objectives to achieve a particular end, and this may require adversely impacting on fundamental rights. However, the underlying policy of the minimal impairment test is to require that the minimal amount of harm be done to those fundamental rights, including the equality right, to achieve that social objective.

7. Conclusion

The equality doctrine is of central concern to the reconciliation project in so far as it relates to the constitutional rights of indigenous people. For much of the period since the commencement of colonisation the occasionally convenient assertion was made that indigenous people were equal. Under the guise of protectionist policies many were routinely and systematically stripped of their fundamental rights. One of the most essential of these fundamental rights was their right to equality. Although since the 1967 referendum there has been a marked shift towards respecting the equal rights of indigenous people, the 1998 amendments to the *Native Title Act* 1993 make it evident that equal

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[144] See D Stuart, *Charter Justice In Canadian Criminal Law* (Carswell, Scarborough, Ontario 1996) 2nd ed pp. 18-19, and J Cameron, "The Past, Present, and Future of Expressive Freedom Under the Charter", (1997) 35 Osgoode Hall L J 1 at 55 and 67. See also PA Chapman "The Politics of Judging: Section 1 of the Charter of Rights and Freedoms" (1987) 24 Osgoode Hall LJ 867 at pp. 886, 889-90.

rights remain under threat. It has been argued in this chapter that the implied equality doctrine under the Constitution is to be understood as requiring both procedural and substantive equality. There is a persistent danger that the substantive equality test will invite the judiciary to trespass into the field of political decision-making. For that reason the courts are required to pay due deference to the legislature's decision-making authority. In addition, overseas jurisprudence, particularly of the US and Canada, offer a means for limiting the potential for this temptation.

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[145] *R v Edward Books and Art, Ltd* [1986] 2 SCR 713 at 772.

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