

## THE PUBLIC/PRIVATE DIVIDE; AND ITS IMPLICATIONS FOR THE EXTENT OF JUDICIAL INTERVENTION IN CIVIL DISPUTES\*

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The author we know as St Luke tells us in Acts 18, 12-16 that while St Paul was living and teaching in Corinth:

"When Gallio was proconsul of Achaia, the Jews with one accord rose up against Paul and brought him to the judgment seat, saying,  
    'This *fellow* persuades men to worship God contrary to the law.'  
And when Paul was about to open *his* mouth, Gallio said to the Jews,  
    'If it were a matter of wrongdoing or wicked crimes, O Jews, there would be reason why I should bear with you. But if it is a question of words and names and your own law, look to *it* yourselves; for I do not want to be a judge of such *matters*.'  
And he drove them from the judgment seat."

Apart from the characteristically anti-Semitic tone of this pro-Roman author, this passage captures something of the timeless anxiety of the judge as to the proper scope of his or her responsibility to resolve civil disputes. Gallio's anxiety is likely to resonate with lawyers in any liberal democracy which recognises the separation of Church and State, or more generally in a secular state, of public affairs and private matters. Of course, not all societies do recognise that distinction. That is as true of Sharia as it was for the authors of the Books of Leviticus and Deuteronomy.

And as it happens, it was also true of the Athens of Socrates, where lack of piety in private was regarded as a public problem warranting the intervention of the courts. Socrates saw himself as a child of the laws of Athens. He would not have dreamed of defending himself against the charges of impiety brought against him by asserting a private right to liberty of conscience or speech, or by asserting that the polis had no business with whether he or those who voluntarily chose to associate with him believed in the gods.

The public worship of the gods was so intimately associated with the well-being of the Roman state that the emperors appropriated the office and title of the chief priest, the Pontifex Maximus – which literally means "Bridge-builder-in-chief" – the bridge, of course, being the connection between the citizens of Rome and the gods, on whose favour pious citizens thought their safety dependent.

The worship of the appropriate gods was, for the Romans as it was for the Greeks, a matter of public duty for every citizen. Proper worship had practical implications for the economic and social life of the community as we know from undeniably reliable Roman sources.

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Pliny the Younger, appointed as governor of Bithynia in Asia Minor in about 112 AD wrote to the Emperor Trajan for advice as to how to handle difficult local Christians who were boycotting sales of meat previously offered in sacrifice to the gods, thus adversely affecting local trade. A number of Christians had been denounced anonymously by outraged locals, and Pliny tortured the more prominent among those who had been denounced. He formed the view that they were hopelessly deluded, but otherwise harmless.

In response to Pliny's request for advice, Trajan suggested that it was best to ignore anonymous denunciations about anyone. Trajan, to his eternal credit, said that acting on such information set "a very bad example and [was] unworthy of our time."<sup>1</sup>

If St Luke is an accurate historian (and that may be a big "if"), Gallio's rejection of the attempt to make the resolution of a dispute about private beliefs a public problem to be resolved by the organs of the State, rather than by the individuals concerned working it out for themselves, may be one of the earliest practical and official articulations of the insight which, eighteen centuries later, came to prevail as one of the axioms of the Western intellectual tradition. That is, that there are some things which are not required to be rendered, either unto Caesar, or unto God. Gallio was saying, in no uncertain terms, that there are some things that Caesar does not want to be rendered to him. And, indeed, as Trajan's response to Pliny shows, there are times when Caesar would prefer it if we all just played nicely amongst ourselves.

The workings of this tension between the public and the private in relation to issues of freedom of religious belief and worship, and freedom of association generally, have been both creative and destructive. The glories of medieval art, architecture and education were made possible only by the symbiosis of Christian religious belief and the organising power of the political organs of the nascent European states.

On the other hand, the horrors of the religious wars and the Inquisition were driven by the willingness of organs of the State to act upon St Augustine's mandate "impelle intrare": make them come in. On this view, if one loves one's fellow Christian, one does not allow him or her to go his or her own way in error: love requires that the erring soul be brought back, by force if necessary, to the truth. And, unfortunately for large numbers of people in Southern Europe, the Dominicans loved them very much.

I venture to suggest that all of us here today are instinctively in sympathy with Gallio's judgment because of the success in the West of the liberal democratic experiment of the last two hundred or so years. And yet it seems that Gallio's insight does resonate more strongly with some of us than others. The distinction between the public and the private is unstable. And while that very instability is a dynamic intellectual force, much is in the eye of the beholder.

Some judges and academic lawyers, especially in the United States, are concerned that the scale and scope of modern litigation and litigiousness are not only unmanageable, but are also draining civil society of its civility<sup>2</sup>. Judge Learned Hand gave voice to something of this concern,

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<sup>1</sup> MacCulloch, "A History of Christianity", Penguin Books 2009 at 163-164.

<sup>2</sup> Levy, "Judging the Flood of Litigation" (2013) 80 *University of Chicago Law Review* 1007.

saying: "After now some dozen years of experience, I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."<sup>3</sup>

More recently, this scepticism has significantly intensified in the United States. Robert Bork, the eminent conservative American legal academic and judge, lamented in 2002 that "[i]t would have been unthinkable until recently that so many areas of our nation and life would be controlled by judges."<sup>4</sup>

Antonin Scalia, a kindred spirit of Judge Bork, writing extra-judicially has expressed a similar concern at what he described as the "overjudicialisation of the processes of [American] self-governance."<sup>5</sup>

These commentators identify a number of problems with "overjudicialisation". One aspect concerns the expanded role of the State in the modern life. They see the State intruding on private space and limiting the free choices of private individuals: public law is trumping private right. The second aspect of their complaint is that it is the judiciary which is the active arm of government by which the State's intrusion has been effected. It is this second aspect that I wish to discuss.

Lord Sumption has recently offered one answer to those who lament the expansion of the role of the judicial branch of government in the Western democracies. Jonathan Sumption QC (as his Lordship then was) in his F.A. Mann Lecture 2011, "Judicial and Political Decision-Making: The Uncertain Boundary", agreed that "[o]ne of the most significant constitutional changes to occur in Britain since the Second World War has been the rise in the political significance of the judiciary, as a result of the increasingly vigorous exercise of its powers of judicial review."

But he went on to explain that, in the Anglophone democracies at least, the expansion of judicial review of administrative action has been driven by:

"[t]he arrival of a broadly based democracy ... invariably followed by rising public expectations of the state: as the provider of basic standards of public amenity, as the guarantor of minimum levels of security and, increasingly, as a regulator of economic activity and a protector against misfortune of every kind. ... The immense powers exercised by modern governments over their own citizens have arisen almost entirely from the collective aspirations of the population at large, aspirations which depend for their fulfilment on persistent intervention by the state in many areas of our national life, and which no democratic politician can ignore. It is no longer sensible to view this as a power-grab by ambitious ministers and officials, as the opponents of the Crown did in the simpler world of seventeenth century England and some commentators still do. The truth is that a powerful executive is inherent in the democratic character of the modern state."

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<sup>3</sup> Capper, "Maintenance and Champerty in Australia – Litigation in Support of Funding!" (2007) 26 *Civil Justice Quarterly* 288 at 290-291.

<sup>4</sup> Bork, "Adversary Jurisprudence", (2002) 20(9) *New Criterion* 4 at 19.

<sup>5</sup> Scalia, "The Doctrine of Standing as an Essential Element of the Separation of Powers" (1983) 17 *Suffolk University Law Review* 881.

In short, the exercise of a more active role of review by the judiciary ensures the integrity of decision-making by the executive government. Brandeis J embraced that expansive view of the judicial function, saying, with great prescience in 1936, that judicial review ensures "the supremacy of the law"<sup>6</sup>.

More recently in the United States, there has been a clear reaction on the part of the Supreme Court to the expansive view of the role of the courts which characterised the seventy-odd years since the New Deal. Writing in 2006, Andrew Siegel said<sup>7</sup>:

"[T]he Rehnquist ... Court consistently expressed little patience with lower courts that have attempted to carve out for themselves a broader role in resolving disputes and administering justice."

Another academic commentator observed in 2009<sup>8</sup>:

"If any other theme has emerged from the votes of Chief Justice Roberts and Justice Alito, it is an apparent hostility to litigation – continuing the views of their predecessors".

And in 2008, President Bill Clinton's nemesis, Kenneth Starr, commented<sup>9</sup>:

"[T]he Roberts Court, more than any Court in recent memory, is skeptical of the efficacy of large-scale civil litigation."

The reaction within the US judiciary against a more expansive judicial role has tended to march in step with the rise of neo-liberalism as the dominant economic theory of the New Regulatory State. In this perspective, the State should seek to guarantee only security and the efficient functioning of markets, and the outsourcing of what were previously accepted as public functions to private enterprise is positively to be desired in the interests of the primary goal of economic efficiency.

I venture to suggest that, in Australia at least, managerialism and neo-liberalism have had less influence on the judiciary, and the concern about the over-judicialisation of our lives has not exercised anything like the claim on the judicial imagination that has been occurring in the United States.

In Australia, it is, I think, fair to say that since World War II the judiciary has been more welcoming of, indeed encouraging of, an expanding role for itself in resolving civil disputes. And this attitude has manifested itself in a shift in the balance of what I am calling the

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<sup>6</sup> *St Joseph Stock Yards Co v United States* (1936) 298 US 38 at 84.

<sup>7</sup> Siegel, "The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence", (2006) 84 *Texas Law Review* 1097 at 1181.

<sup>8</sup> Greene, "Heller High Water? The Future of Originalism", (2009) 3(2) *Harvard Law and Policy Review* 325 at 342.

<sup>9</sup> Starr, "The Roberts Court at Age Three: A Response", (2008) 54 *Wayne Law Review* 1015 at 1025.

public/private divide. There has been no concerted reaction to the expanding role of the courts in the resolution of civil disputes. Indeed, to the extent that there has been a questioning of the extent of judicial expansionism, it has been largely confined to the role of the courts in respect of commercial arbitration.

### **The Public/Private Divide**

The division between the public and the private manifests itself in a variety of contexts. We speak of public law, as opposed to private law, to distinguish the law which regulates agencies of the State from the law which regulates the rights and liabilities of private persons. We speak of the public to differentiate the collective (the *res publica*, as the Romans called it) from the private, being that part of our lives reserved for private opinion, activity and association.

Not losing sight of our friend Gallio, a further example of the public/private divide, and the example on which I wish to focus this evening, is the extent to which shifts in the claims of the public and the private affect the judicial acceptance of a role in regulating the internal affairs of members of a voluntary association where the resolution of the dispute does not involve the disposition of property. Before I come back to that topic, however, I would like to mention some other areas of civil litigation where the public/private tension can be seen to be a dynamic influence on judicial decision-making.

At the outset, it must be acknowledged that the distinction is elusive. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, Gleeson CJ said<sup>10</sup>:

"There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private."

It should not be surprising that we have difficulties marking out the legal boundary between what is private and what is public. English law developed, for five hundred years, with the incidents of feudal land ownership providing the foundations of constitutional law, and, for nearly a thousand years, without ever developing a separate body of law such as the "*droit administratif*".

The Diceyan orthodoxy was that the organs of the State were subject to the same laws as the subjects, and there were no special rules for public agencies<sup>11</sup>. Administrative law was a judicial, not legislative invention, to ensure that agents of the executive government respected private rights.

It may be, as I think, that it is because the public/private divide is ill-defined, and so has not been reined in, that it has been, and remains, a dynamic force influencing, subliminally perhaps, judicial responses to claims upon the courts to resolve disputes between subjects. That is the theme of the examples that follow.

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<sup>10</sup> (2001) 208 CLR 199 at 226 [42].

<sup>11</sup> Arndt, "The Origins of Dicey's Concept of the 'Rule of Law'" (1957) 31 *Australian Law Journal* 117.

## Standing

One respect in which we can detect a shift towards the privatisation of the public is in the liberalising of standing rules.

In this regard, Antonin Scalia proposed, thirty years ago, that the courts, in order to protect themselves against overweening demands, should adhere to a narrow view that standing "roughly restricts courts to their traditional undemocratic role of protecting ... minorities against impositions of the majority, and [exclude] them from the even more undemocratic role of prescribing how the other two branches [of government] should function in order to serve the interest of the majority itself."<sup>12</sup>

It may fairly be said that the US case law over the subsequent three decades has not seen Scalia's proposition adopted by the US courts<sup>13</sup>; but in Australia the concern which he voiced has hardly affected the jurisprudence.

In Australia, the trend of decisions of the High Court over the last three decades has distinctly been against the need for a would-be litigant to be able to point to an actual or apprehended adverse effect upon private rights of person or property in order to engage judicial power.

The upshot of a series of cases after 1980 was the statement in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited*<sup>14</sup> that the requirement that a moving party have a "material interest" in the observance of the law should be understood as "an enabling, not a restrictive, procedural stipulation"<sup>15</sup>.

This process of liberalisation has meant that judicial power is available to ensure that administrative decision-making, which may not affect the legal rights of individuals, is in conformity with the law<sup>16</sup>. The case law in the High Court has tended towards a preference to rely upon other filters to manage the workload of the judiciary, such as the need for a genuine

<sup>12</sup> Scalia, "The Doctrine of Standing as an Essential Element of the Separation of Powers" (1983) 17 *Suffolk University Law Review* 881 at 894.

<sup>13</sup> Rahdert, "Forks Taken and Roads Not Taken: Standing to Challenge Faith-based Spending" (2010-2011) 32 *Cardozo Law Review* 1009 at 1015: "In developing standing policy, the [Supreme] Court [of the United States] has encountered great difficulty. It has proven unable to move past vague generalities, although it has succeeded in generating a few abstract rules. However, the rules have such open texture that they support sharply divergent perspectives, seldom determine outcomes, and frequently produce inconsistent results – which the Court typically rationalizes by reliance on unstable and often arbitrary distinctions. This inconsistency in turn leads to suspicion that decisions on standing in close cases may be guided more by the courts' instincts toward the merits than by an independent determination of the parties' eligibility to invoke jurisdiction. Over time, standing doctrine has moved in the direction of greater generosity towards litigants, especially in constitutional cases".

<sup>14</sup> (1998) 194 CLR 247 at 267 and see also at 261 and 283-284.

<sup>15</sup> See *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35-36, 66-67; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582; *Croome v Tasmania* (1997) 191 CLR 119 at 126; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 393; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 at 599 [2], 611 [44]-[45], 626-628 [92]-[96], 652-654 [161]-[165], 667-670 [202]-[212].

<sup>16</sup> *Forbes v New South Wales Trotting Club* (1979) 143 CLR 242; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 584-585.

controversy or matter<sup>17</sup> and the "no advisory opinion" rule, rather than a narrow view of standing<sup>18</sup>.

It is, of course, pertinent to observe that this judicial activity has been in step with the policy of the legislature to enlist private citizens in the enforcement of legislation. An obvious example is the provision for private actions under the *Trade Practices Act 1974* (Cth), now the *Competition and Consumer Act 2010* (Cth). The pre-1980 perspective would decry these sorts of statutory provision as apt to make every man his own Attorney-General.

### **Public values in private corporations**

The dynamic tension between the public and the private can also be seen to be driving a trend in the opposite direction, that is, in the publicisation of the private, in the importation of the public law values of democratic legitimacy, transparency and reasonableness in private corporation decision-making.

As Jody Freeman has noted, even in the United States, there has been a marked intrusion of public law ideas, such as transparency, accountability, and stakeholder voice into private law, especially the internal regulation of commercial corporations<sup>19</sup>.

There has even been the adoption of the great public law idea of the separation of powers manifest in structures such as board audit committees, ethics committees, workplace health and safety committees, and independent directors with participation from environmental groups and unions<sup>20</sup>.

These developments reflect a growing appreciation of the public consequences of private decision-making.

### **Publicity of proceedings**

At yet another level, a trend towards the privatising of the public can be seen in the softening of the strong stance taken by the High Court in 1976 in *Russell v Russell*<sup>21</sup> against conducting judicial proceedings in private.

Here, I am not speaking of the establishment of special security courts as has occurred in the United States: they are unequivocally exercising public power, albeit in secret. Rather, I am speaking of the acceptance of demands by those who seek access to the courts on terms that their identities, or aspects of their affairs, will be kept private by in-camera hearings or the deployment of suppression orders.

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<sup>17</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 30-36 [34]-[53], 68-69 [151]-[158], 98-99 [271]-[274], 137-138 [399]-[401].

<sup>18</sup> *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; *Abebe v Commonwealth* (1999) 197 CLR 510 at 570 [164]; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 614-615 [118], 619 [134].

<sup>19</sup> Freeman, "Extending Public Law Norms Through Privatization", (2003) 116 *Harvard Law Review* 1285.

<sup>20</sup> Braithwaite, "Strategic socialism, strategic privatisation and crises", (2013) 28 *Australian Journal of Corporate Law* 35 at fn 10.

<sup>21</sup> (1976) 134 CLR 495 at 506-507, 520-521, 533.

This trend casts the third branch of government in the character of a provider of dispute resolution services, rather than the arm of government the hallmark of the operations of which is the publicity and transparency which attends those operations. The tendency to view the courts as a dispute resolution service has also, perhaps, made it easier to accept developments such as litigation funding<sup>22</sup>.

The trend towards privatised hearings and suppression orders has, it must be said, not commanded universal acceptance. In this regard, the idea that judicial proceedings should not be publicised in order to spare the privacy of litigants provoked reaction in the form of the recent amendments to Federal and State legislation which limit the making of suppression orders<sup>23</sup>.

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<sup>22</sup> *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386 at 432-436 [84]-[95], 482-491 [255]-[273].

<sup>23</sup> The *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) made a series of amendments to the *Family Law Act*, the *Federal Court of Australia Act*, the then *Federal Magistrates Act* and the *Judiciary Act* concerning suppression and non-publication orders. The Amendment Act provided for a substantially identical regime for suppression and non-publication orders in the federal courts. The amendments were largely based upon model provisions developed by the Standing Committee of Attorneys-General in 2010.

In the second reading speech, the responsible Minister adverted to recent criticism of the "volume and breadth" of suppression and non-publication orders granted by some courts, particularly some state courts.

The mirror provisions require a court, when considering whether to make a suppression or non-publication order, to "take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice." A court may make an order only on one of the following grounds, which must be specified:

- the order is necessary to prevent prejudice to the proper administration of justice;
- the order is necessary for security reasons;
- the order is necessary to protect the safety of a person; or
- the order is necessary to avoid causing undue distress or embarrassment to a party or to a witness in criminal proceedings involving an offence of a sexual nature.

Significantly, the provisions allow certain classes of person other than the parties, including "news publishers", to be heard at the application for an order. "News publisher" is defined broadly to mean any "person engaged in the business of publishing news or a public or community broadcasting service engaged in the publishing of news through a public news medium."

Several States have also thought it necessary to reform the law in this area in response to courts making an increasing number of suppression and non-publication orders. New South Wales implemented the model law developed by the Standing Committee through the *Court Suppression and Non-Publication Orders Act 2010* (NSW) and proposed legislation based on the same regime is presently before the Victorian Parliament: *Open Courts Bill 2013* (Vict). In 2006, amendments were introduced to South Australian *Evidence Act* aimed at "easing the number" of suppression and non-publication orders: *Evidence (Suppression Orders) Amendment Act 2006* (SA). The Attorney-General in the second reading speech for the bill lamented that "suppression orders are more prominent in South Australia than anywhere else in the nation."



## **Judicial Review**

The public/private tension has been a dynamic force in the development of judicial review of administrative action. The identification of the exercise of a decision-making power as public in character has been treated as the key to judicial review<sup>24</sup>.

Thus in the seminal English case, *R v Panel on Take-overs and Mergers; ex parte Datafin Plc*<sup>25</sup>, it was held that a decision of the Panel on Take-overs and Mergers in the United Kingdom was subject to judicial review because it operated as part of the governmental framework for the regulation of those activities in the City of London. That body exercised a range of statutory powers, including a power to impose penalties. Because its powers were regarded as public powers it was held to be subject to judicial review to ensure that its powers were exercised judicially.

Sir Anthony Mason noted this aspect of *Datafin*, contrasting it with *R v Disciplinary Committee of the Jockey Club; ex parte Aga Khan*<sup>26</sup> where, because the proceedings of the Jockey Club did not involve the exercise of public power, they were not subject to scrutiny upon judicial review.

At this point it is convenient to say something about *Griffith University v Tang*<sup>27</sup>. When this case was heard at first instance, there was no evidence that Ms Tang's enrolment was governed by any form of contract between her and the university. Ms Tang's lawyers seized upon the absence of an evidentiary basis for any suggestion by the university that Ms Tang's enrolment had been cancelled by virtue of the exercise of any contractual right in the University. Ms Tang's lawyers argued that, because the University had not shown a contractual power to terminate Ms Tang's enrolment, the only possible source of such power was the university's incorporating statute, and hence the University's decision to terminate her enrolment was necessarily made under that enactment<sup>28</sup>.

This was a bold stratagem. Like many other bold stratagems it did not succeed. The reason the stratagem failed was that it was erroneous to assume that the contract exhausted the category of private association so that the association between Ms Tang and the University must necessarily have been a public matter, attracting the remedies of public law.

In the High Court, the fallacy was exposed in the reasons of Gummow, Callinan and Heydon JJ. Their Honours said<sup>29</sup>:

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<sup>24</sup> Mason, "Lecture 3-Australian Administrative Law Compared with Overseas Models of Administrative Law", (2001) 31 AIAL Forum 45 at 54.

<sup>25</sup> [1987] 1 QB 815.

<sup>26</sup> [1993] 1 WLR 909.

<sup>27</sup> (2005) 221 CLR 99 at 107-109 [12], 110 [17].

<sup>28</sup> cf *Australian National University v Burns* (1982) 64 FLR 166 and *Australian National University v Lewins* (1996) 68 FCR 87 where it was held that decisions made in the exercise of a power conferred on the university by contract were not made under the statute which conferred on the university capacity to make contracts.

<sup>29</sup> *Griffith University v Tang* (2005) 221 CLR 99 at 131-132 [91]-[93] (citations footnoted in original).

"[G]iven the manner in which [Ms Tang] had framed her application for judicial review, there had subsisted between the parties no legal rights and obligations under private law which were susceptible of affection by the decisions in question. There was at best a consensual relationship, the continuation of which was dependent upon the presence of mutuality. That mutual consensus had been brought to an end, but there had been no decision made by the University under the University Act. Nor, indeed, would there have been such a decision had the respondent been allowed to continue in the PhD programme.

It may, for the purposes of argument, be accepted that the circumstances had created an expectation in the respondent that any withdrawal from the PhD candidature programme would only follow upon the fair treatment of complaints against her. But such an expectation would create in the respondent no substantive rights under the general law, the affecting of which rendered the decisions she challenged decisions made under the University Act. What was said by Kiefel J<sup>30</sup> and Lehane J<sup>31</sup> on the point in *Lewins*, and subsequently by this Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*<sup>32</sup>, supports that conclusion.

Nor were there any presently subsisting statutory rights of the respondent, or statutory rights the coming into existence of which would be contingent solely upon her re-admission to the PhD candidature programme. The respondent would still have had to satisfy the requirements for award of the degree. Had she done so, a question (which it is unnecessary to decide) may have arisen as to whether she had a statutory or other right to the award."

This reasoning attracted considerable academic disapproval. Professor Aronson commented<sup>33</sup>:

"*Tang's* result was entirely predictable because if *ADJR's* restriction to statutory decision-making is to mean anything, then the odds are that it excludes coverage of government's commercial powers so far as these are truly consensual. *Tang's* fault, though, was in failing to see the realities of public power behind a consensual, non-statutory facade. Consensual power should not be subject to judicial review, not because it is non-statutory, but because it is not public. ... The characterisation of Ms Tang's relationship with her former university as merely consensual is nothing short of breath-taking."

The characterisation of Ms Tang's relationship with the university as "merely consensual" was not "breath-taking". Rather, it was inevitable having regard to the forensic choice by Ms Tang to fight her case on the explicit footing that there was no contractual relationship between her and the university.

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<sup>30</sup> *Lewins* (1996) 68 FCR 87 at 96-97.

<sup>31</sup> *Lewins* (1996) 68 FCR 87 at 103-104.

<sup>32</sup> (2003) 214 CLR 1 at 27-28 [81]-[83], 48 [148].

<sup>33</sup> Aronson, "Private Bodies, Public Power and Soft Law in the High Court", (2007) 35 Federal Law Review 1 at 23 (footnotes omitted).

The academic criticism of *Tang* should be seen in the light of three circumstances: first, that courts decide the issues tendered to them by the parties; second, that Ms Tang deliberately chose not to seek a remedy under private law, as for example, under a contract between the University and herself; and third, there is nothing at all odd about speaking of the bonds of voluntary association between persons as merely consensual and inherently frangible. In civil society, freedom of association generally includes freedom to disassociate without let or hindrance by the organs of the State. That is the view which the common law had taken of the relationship of voluntary association in *Cameron v Hogan*<sup>34</sup>, to which I will turn in a moment.

In *Tang*, the Court was, of course, called upon to interpret the statute, but the process of interpretation occurred in an intellectual milieu in which it was simply not persuasive to say that, because a voluntary association does not qualify as contractual, it follows that the relationship is a creature of public law in the sense that a decision by one party to determine the relationship must be authorised by public law.

The present relevance of *Tang's Case* is that because of the unusual ground on which the case was fought, it stands to make the point that contract does not exhaust the category of private voluntary associations which do not engage the remedy of judicial review which, under the AD(JR) Act and its state analogues in Australia, is concerned with the exercise of public power. Ms Tang and the University stood in a private consensual relationship with each other, and the University's decision to terminate that association did not involve the exercise of any public power conferred on the University, whether by its incorporating statute or otherwise.

### **Arbitration**

In the decision of the High Court in *Westport Insurance Corporation v Gordian Runoff Ltd*<sup>35</sup>, there was some limited acknowledgement that arbitration is rooted in private contractual arrangements, and that the parties' interest in privacy and finality has implications for the intensity of the judicial review to which arbitral decisions are subject.

It is in this area that the most forthright statement that a more modest approach to the scope of judicial power has been forthcoming.

In the 2013 Sir Maurice Byers Lecture, the Hon A M Gleeson AC QC took up this theme, saying<sup>36</sup>:

"There is a tendency on the part of some lawyers, and perhaps even some judges, to regard litigation as the normal method of dispute resolution, and the only method that is capable of giving appropriate recognition to the rule of law. In truth, civil litigation is not the normal method of resolving commercial disputes. The most common method of resolving commercial disputes is by agreement of the parties,

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<sup>34</sup> (1934) 51 CLR 358 at 370-371.

<sup>35</sup> (2011) 244 CLR 239 at 261-262 [18]-[20]; see also Keane, "Judicial support for arbitration in Australia" (2010)

34 Australian Bar Review 1 at 4-6.

<sup>36</sup> New South Wales Bar News, Winter 2013, 33 at 39-41.

without any outside intervention. Such agreements are usually based upon the parties' appreciation of their own interests, and bargaining strengths, which may or may not reflect their strict legal rights and obligations. An agreement to settle a dispute on that basis creates its own rights and obligations, which may replace the original contract in whole or in part. Sometimes a new agreement is reached between the parties with the assistance of outside intervention by a mediator or facilitator or some other third party who may or may not be a lawyer."

### **Cameron v Hogan**

There is one particular area in which the Australian judiciary seem to have been particularly sanguine about exercising an expanded role in resolving what would once have been regarded as domestic or social issues outside of the purview of the courts which I would like to discuss.

About nineteen hundred years after the incident involving Judge Gallio, described by St Luke, the High Court of Australia in *Cameron v Hogan*<sup>37</sup> expressed a similar judicial world-weariness with true believers who seek to have the organs of the State decide between them upon questions of words and names and [their own] internal law.

In ruling as it did, the High Court adhered to the view that disputes internal to voluntary associations of individuals were not the concern of the judicial power of the state.

Since that time, *Cameron v Hogan* has been distinguished by the courts in a number of first instance decisions<sup>38</sup>. It has never been overruled, but the course of subsequent decisions raises a question whether the reasons which underpinned *Cameron v Hogan's* essential holding, ie that those who agree to associate with each other for political, religious, civic or sporting ends remain at liberty to disassociate from each other without attracting the intervention of the courts, still holds good.

One might be tempted to see the fate of *Cameron v Hogan* as of a piece with the shifts in judicial attitude which in former times had kept litigants out of courts; the shift reflecting an acceptance of a more expansive role for the judiciary in the life of the community.

First, let us bring to mind what was decided in *Cameron v Hogan*.

Edmond Hogan, the Labor Premier of Victoria, agreed with the other State and Commonwealth governments to adopt what was known as the "Premiers' Plan" in response to the financial crises of the Great Depression. The Premiers' Plan involved the reduction of government expenditure contrary to the resolution of a special federal conference of the Australian Labor Party that "any member[s] ... openly supporting or assisting in the furtherance of the Premiers' Plan shall cease to be members of the Australian Labor Party"<sup>39</sup>. Hogan was disendorsed by the State executive

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<sup>37</sup> (1934) 51 CLR 358.

<sup>38</sup> *Green v Page* [1957] Tas SR 66; *Harrison v Hearn* (1972) 1 NSWLR 428 (although Helsham J did not specifically refer to *Cameron v Hogan* in his reasons for judgment); *Rendall-Short v Grier* [1980] Qd R 100; *Burton v Murphy* [1983] 2 Qd R 321 at 325; *Ex parte Appleton* [1982] Qd R 107.

<sup>39</sup> (1934) 51 CLR 358 at 361.

of the party as an ALP candidate at the next election and was expelled from the party. He brought proceedings seeking declarations that he was still a member of the party, that his expulsion was wrongful, that his non-endorsement was wrongful, an injunction to restrain his exclusion from the party, and damages.

The High Court held, reversing the decision of the Supreme Court of Victoria, that Hogan had no proprietary right or interest in the property of the party as might entitle him to a declaration or injunction in respect of his exclusion, and that the rules of the party did not operate to create enforceable contractual rights and duties between members or between executive officers and members.

Rich, Dixon, Evatt and McTiernan JJ said<sup>40</sup>:

"Judicial statements of authority are to be found to the effect that, except to enforce or establish some right of a proprietary nature, a member who complains that he has been unjustifiably excluded from a voluntary association, or that some breach of its rules has been committed, cannot maintain any action directly founded upon that complaint. ... One reason which must contribute in a great degree to produce the result is the general character of the voluntary associations which are likely to be formed without property and without giving to their members any civil right of a proprietary nature. They are, for the most part, bodies of persons who have combined to further some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in character, or otherwise stands apart from private gain and material advantage. Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations *inter se*, the rules adopted for their governance would not be treated as amounting to an enforceable contract."

In the same vein, Starke J said<sup>41</sup>:

"Has Hogan ... any redress in a Court of law for such unauthorized act? It may be unlawful in the sense that it is void. But to give him a right of relief at law or in equity, Hogan must establish some breach of contract with him, or some interference with his proprietary rights or interests. As a general rule, the Courts do not interfere in the contentions or quarrels of political parties, or, indeed, in the internal affairs of any voluntary association, society or club."

Rich, Dixon, Evatt and McTiernan JJ went on to say<sup>42</sup>:

"If the action be treated as a proceeding against the members of the central executive who failed to submit the respondent's nomination for ballot, to establish a breach of contract it would be necessary for the respondent to show that the

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<sup>40</sup> (1934) 51 CLR 358 at 370, 371.

<sup>41</sup> (1934) 51 CLR 358 at 383, 384.

<sup>42</sup> (1934) 51 CLR 358 at 376.

appellants, either by accepting office, or by adhering to the rules as members of the Party, engaged with him contractually as a member to perform their duties in relation to nomination in complete accordance with the rules. Neither of these interpretations of the rules appears to be warranted. Hitherto rules made by a political or like organization for the regulation of its affairs and the conduct of its activities have never been understood as imposing contractual duties upon its officers or its members. Such matters are naturally regarded as of domestic concern. The rules are intended to be enforced by the authorities appointed under them. In adopting them, the members ought not to be presumed to contemplate the creation of enforceable legal rights and duties so that every departure exposes the officer or member concerned to a civil sanction."

Their Honours' conclusion that "[t]he policy of the law is against interference in the affairs of voluntary associations which do not confer upon members civil rights susceptible of private enjoyment"<sup>43</sup> might be said to beg the question whether the rules of the association do in truth confer "civil rights" of which the Court will take cognizance.

Forty years later, in *McKinnon v Grogan*<sup>44</sup> ("*McKinnon*"), Wooten J cast doubt on the continued validity of the domestic presumption in *Cameron v Hogan*, which dealt with "an area of human affairs which has changed and continues to change greatly in social significance" (at 297). Wooten J said *obiter* at 297:

"*Cameron v Hogan* was forty years ago, and I suspect that in that period it has been more frequently distinguished or ignored than it has been applied, simply because its application in full rigour has been increasingly out of tune with the felt needs of the time. The High Court has not had occasion to reconsider it squarely, and I venture to suggest that when such an occasion does arise there will at least be some qualification of what was there said. With the greatest respect to the eminent and forward-looking judges who gave the decision, it has tended to justify judicial abdication from areas the orderly regulation of which has become of ever-increasing importance. The resultant categorization in legal analysis of a great political party ... with a group of friends agreeing to meet for a game of tennis, is simply inadequate."<sup>45</sup>

Two points may be made here. The first is that Wooten J explicitly recognised the problem as one concerning the role of the judicial arm of government in mediating what are literally power struggles which had previously been regarded of a private or domestic character. And secondly, his Honour reversed the presumption which had hitherto prevailed as to the private nature of such disputes for reasons which had no discernible legal, as opposed to sociological, basis.

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<sup>43</sup> (1934) 51 CLR 358 at 378.

<sup>44</sup> [1974] 1 NSWLR 295.

<sup>45</sup> In New Zealand and England, views similar to those of Wooten J were expressed: *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159; *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 per Lord Denning.

In *Rendall-Short v Grier*<sup>46</sup>, Lucas J referred, rather caustically, to *McKinnon* as a case in which, though it purported to distinguish *Cameron v Hogan*, "the judgment does not appear to reveal any hint of the basis upon which this was done, except perhaps that it was a decision which was 40 years old."

Lucas J himself distinguished *Cameron v Hogan* on the orthodox basis that the case before him involved a dispute as to title to property.

In *Baldwin v Everingham* ("*Baldwin*")<sup>47</sup>, Dowsett J concluded that internal disputes of political parties were subject to judicial review in light of their recognition by the Commonwealth Parliament in the *Commonwealth Electoral Act 1918* (Cth). *Baldwin* concerned a dispute between an executive of the Queensland Liberal Party and one of its members over party pre-selection irregularities.

It may be noted that, in *Baldwin*<sup>48</sup>, Dowsett J agreed with what Wooten J had said in *McKinnon*, "as a matter of sentiment"; but Dowsett J said:

"On general principles, where an albeit voluntary association fulfils a substantial public function in our society, it may appear indefensible that questions of construction concerning its constitution should be beyond judicial resolution. It is one thing to say that a small, voluntary association with limited assets, existing solely to serve the personal needs of members should be treated as beyond such supervision; it is another thing to say that a major national organisation with substantial assets, playing a critical role in the determination of the affairs of the country should be so immune."

Dowsett J went on to hold, however, that this "sentiment" did not justify a refusal to follow *Cameron v Hogan*. The legitimacy of such a course was a matter for the High Court itself.

*Baldwin* was later followed by the South Australian Supreme Court decision in *Clarke v Australian Labor Party (SA Branch)*<sup>49</sup> ("*Clarke*").

One commentator has suggested that the significance of *Clarke* is that it "may indicate a trend for courts to imply and uphold minimum standards of intra-party democracy, particularly when this objective is espoused in the party's constitution"<sup>50</sup>. The notion that *Clarke* is to be understood as facilitating participatory democracy internally where participatory democracy is an objective of the association, is perhaps not very compelling. That individuals join together to pursue changes in society does not mean that they can be taken to intend that their internal demands of each other under the rules of the association should be regulated by the judicial arm of the State.

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<sup>46</sup> [1980] Qd R 100 at 109.

<sup>47</sup> [1993] 1 Qd R 10.

<sup>48</sup> [1993] 1 Qd R 10 at 17.

<sup>49</sup> (1999) 74 SASR 109 per Mulligan J.

<sup>50</sup> Gauja, "From Hogan to Hanson: The regulation and changing legal status of Australian political parties" (2006) 17 *Public Law Review* 282, 296.

*Cameron v Hogan* has, on occasion, been virtually ignored<sup>51</sup>; but it has never been overruled. It was referred to in the High Court in *Stevens v Keogh*<sup>52</sup> by Latham CJ and Williams J, but not by Starke, Dixon or McTiernan JJ, and *Buckley v Tutty*<sup>53</sup> without disapproval; but also without much in the way of discussion, rather like an eccentric uncle at a wedding.

In *Buckley v Tutty*<sup>54</sup> there is a strong statement that, quite apart from whether the rules of a sporting club are accepted as intending to affect legal relations between the members, the liberty to engage in one's trade or to seek employment has never been seen to be a matter of purely private concern. That liberty has been an abiding value in the common law. It was celebrated by Adam Smith's comment in the "Wealth of Nations"<sup>55</sup>:

"The property which every man has in his own labour as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbour, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper."

This consideration offers a convincing basis for reconciling the High Court's earlier decision in *Macqueen v Frackelton*<sup>56</sup> with the decision in *Cameron v Hogan*.

In *Scandrett v Dowling*<sup>57</sup> decided in the Supreme Court of New South Wales in 1992 it was suggested that where church rules are embodied in legislation, an intention to create legal relations is to be inferred. Sonya Gorman, in her article "Legislative Recognition of Churches and the Implications for Judicial Review"<sup>58</sup>, argued that the reasoning in *Scandrett v Dowling* is persuasive:

"By reproducing the rules of a domestic body, such as a church, in a public Act, Parliament is endorsing those rules with the authority of the State. Whether or not the church could have exercised those powers without the aid of legislation is irrelevant. Nor is it relevant that there are other private sources (such as the consensual compact) conferring powers on the church. Public and private powers may coexist. However, the supremacy of Parliament necessarily means that statutory powers have greater force than those powers conferred by the consensual compact. That force or 'bindingness', as Priestley JA described it in *Scandrett v*

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<sup>51</sup> See, for example, *Rush v WA Amateur Football League (Inc)* (2007) 35 WAR 101 at [37] per Pullin JA.

<sup>52</sup> (1946) 72 CLR 1 at 11, 34.

<sup>53</sup> (1971) 125 CLR 353 at 374-375.

<sup>54</sup> (1971) 125 CLR 353 at 380.

<sup>55</sup> Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, 2nd ed, 1778 at 151.

<sup>56</sup> (1909) 8 CLR 673 at 691, 724.

<sup>57</sup> 27 NSWLR 483.

<sup>58</sup> (2002) 9 *Australian Journal of Administrative Law* 84 at 98-99.



*Dowling*, comes from the fact that, by being enshrined in legislation, the powers assume a public character."

Gorman noted, in light of this decision, that<sup>59</sup>:

"it appears that the intention to make church rules contained in statute legally enforceable will only be inferred by the courts where a power contained in the rules of the church could not have been conferred without legislative intervention. On this view, the availability of judicial review depends on whether the church power required statutory authorisation."

It may be argued that the replication of the rules of an unincorporated association in legislation obviates the need for the court to be satisfied of an intention on the part of the members of the association to create legal relations between themselves because the legislature has put that issue beyond argument. But the fact remains that the ultimate source of their compulsive power is the private consensual compact of the members of the association. There must be some question as to whether an exercise of an internal power originating in a consensual compact, should attract judicial review as if it were an exercise of public power. And in any event, the reasoning in *Scandrett v Dowling* does not provide an answer to the problem where the association's rules are not given legislative force.

It is tempting to adopt the explanation of Wooten J in *McKinnon* for the isolation of *Cameron v Hogan* in terms of the realist perspective of Oliver Wendell Holmes. In 1881 Oliver Wendell Holmes in *The Common Law*<sup>60</sup> famously spoke of "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

The realist approach to judicial decision-making became rather more respectable in Australia, particularly in the context of constitutional interpretation, by virtue of the judgment of Sir Victor Windeyer in *Victoria v The Commonwealth*<sup>61</sup>.

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<sup>59</sup> Gorman, "Legislative Recognition of Churches and the Implications for Judicial Review" (2002) *Australian Journal of Administrative Law* 84 at 94.

<sup>60</sup> Holmes, *The Common Law*, (1881) at 5.

<sup>61</sup> (1971) 122 CLR 353 at 396-397: "I have never thought it right to regard the discarding of the doctrine of the implied immunity of the States and other results of the *Engineers' Case* ((1920) 28 CLR 129) as the correction of antecedent errors or as the uprooting of heresy. To return today to the discarded theories would indeed be an error and the adoption of a heresy. But that is because in 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs. For lawyers the abandonment of old interpretations of the limits of constitutional powers was readily acceptable. It meant only insistence on rules of statutory interpretation to which they were well accustomed. But reading the instrument in this light does not to my mind mean that the original judges of the High Court were wrong in their understanding of what at the time of federation was believed to be the effect of the Constitution and in reading it accordingly. As I see it the *Engineers' Case* ... looked at as an event in legal and constitutional history, was a consequence of developments that had occurred outside the law courts as well as a cause of further developments there. That is not surprising for the Constitution is not an ordinary statute: it is a fundamental law. In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution

But the realist explanation was rejected by Dowsett J in *Baldwin*; and there was good reason for that rejection. If a decision of the High Court is taken to be superseded as a matter of "sentiment", then it becomes difficult to sustain the understanding – to which I suspect many in this room subscribe – of the law as a more or less coherent intellectual system. The realist explanation has little attraction for those of us who work within the system and owe our first loyalty to the application of legal doctrine.

In an essay written in 1998, John Langbein wrote of the "terrible toll that the realist movement has inflicted on doctrinal study in post-Second World War USA"<sup>62</sup>.

Few of us would readily accept that we lawyers are not the masters in our own house, that the discipline which truly explains what we do is not jurisprudence, but sociology, psychology, economics or even anthropology. For largely the same reason, one is reluctant to accept that the answer to our problem must be a matter of instinctive and untutored impression rather than principled analysis.

*Cameron v Hogan*, and its subsequent treatment, may help us to appreciate the usefulness of the concept of intention to create legal relations in functional terms. The concept functions as a judicially imposed filter on cases with which the judicial power of the State is thought by the judges to have no business<sup>63</sup>. But the concept of intention to create legal relations is, in truth, of limited utility as a tool of analysis. Rather, it is an expression of the conclusion that the parties have chosen to found their association on the footing that none may invoke the judicial power of the State. The necessary analysis needs to identify the good reasons why citizens associate without dependence on the organs of the State, while at the same time recognising that the internal exercise of power may have ramifications which are unacceptable in terms of identified aspects of the public interest.

## **CONCLUSION**

As we have seen, the distinction between the public and the private is unstable; but it is this very instability which makes it such a dynamic force in the development of the law.

The spectre of excessive judicial intervention in civil disputes raised by Bork and Scalia, and their concern that excessive litigation and litigiousness will have an adverse effect on the republican virtues of civility, self-reliance and freedom of association should cause the judiciary to close our doors to attempts to correct the abuse of power which adversely affects our community. The workings of the power relationships which operate within voluntary associations may (as the angry butchers of Bithynia remind us) have such consequences for the

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may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries: or that they may do so."

<sup>62</sup> Langbein, "The Later History of Restitution" in W R Cornish et al, *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (1998) at 61.

<sup>63</sup> In *Rose and Frank Co v J R Crompton and Bros Ltd*, Scrutton LJ was clear that an intention that an agreement should not give rise to legal relations is "readily implied" in "social and family relations" ([1923] 2 KB 261 at 288).

peace and welfare of the general community, or even for the members, "inter se", that intervention by the judicial arm of the State in the internal affairs of those whose association is purely voluntary may be justified.

On the other hand, the free choice of individuals to associate with others on the footing that they will not be hauled into the courts must be respected. The judicial arm of government provides the public option for the quelling of controversies; but, as the Honourable Murray Gleeson has observed, one should not assume that a judicial determination is the only worthwhile method of civil dispute resolution or conclude that only decision-making of a judicial standard meets the requirements of those who have bargained for private arbitration.

And finally, as the history of *Cameron v Hogan* and its aftermath shows, putting to one side cases involving the disposition of property, or the right to carry on one's occupation, we still have some way to go to develop a principled analysis which might enable us to improve on Gallio's intuitive response to questions of the words and names by which we choose to associate with each other.