

THE RULE OF LAW AND THE TINKERBELL EFFECT: THEORETICAL CONSIDERATIONS, CRITICISMS AND JUSTIFICATIONS FOR THE RULE OF LAW

CAMERON STEWART*

‘If you believe’, he shouted to them, ‘clap your hands; don’t let Tink die.’
Some clapped.
Some didn’t.
A few little beasts hissed.
The clapping stopped suddenly....but already Tink was saved... (*Peter Pan* by JM Barrie (first published in 1911, by Hodder & Stoughton)).

I INTRODUCTION

Peter Pan was able to save Tinkerbell from poisoning, using the healing power of imagination. According to the laws of Barrie’s tale, fairies cannot exist unless we believe in them. Even if we believe in them at first, but come to doubt them later, they will die.

The rule of law concept is much like Tinkerbell. In the words of Neil MacCormick, ‘[t]he very idea of the “rule of law” or *Rechtsstaat* is that of a state in which determinate and pre-determined rules govern and restrict the exercise of power and regulate the affairs of citizens.’¹ Primarily, the rule of law principle requires that the legal system comply with minimum standards of certainty, generality and equality. The rule of law is a fundamental ideological principle of modern Western democracies, and as such, we are often asked to believe in it with unquestioning acceptance, even though Western states often honour the principle in the breach.

Unfortunately, the modern history of Western democracies has shown that the rule of law was not able to prevent some of the worst behaviour of states or individuals within states. It is not surprising that critics of modern Western democracies have taken the rule of law as a key target. For Marxists it is a legitimating ideology

* Senior Lecturer in Law, Macquarie University. My thanks to Chris Birch, Andrew Lynch, Margaret Kelly, Tom Campbell and Bruce Kercher for their helpful discussions with me on these topics over the last few years. I am also extremely grateful to the Editor. Any errors and misdescriptions are mine.

¹ Neil MacCormick, *Legal Reasoning and Legal Theory* (1995) xi.

which disguises the class-based hegemonising function of law. For feminists, its talk of equality and generality merely serves to continue the 'maleness' of law and the disregard of law for the oppression of women in the private sphere. For critical legal studies movements, the rule of law paints over the fundamental contradictions of modern life, including the tension between the need to be free and the desire to live in community.

Perhaps the most devastating criticism of the rule of law is the sociological criticism that it has become politically and socially outdated. The essence of the criticism is that the modern rule of law doctrine is the creature of the nineteenth century, one based on a *laissez faire* economy, run by the market of individuals and where government was necessary only for the tasks of protection and the provision of services which could not be provided by the market. That society has disappeared, although its ghost chains may occasionally be rattled by conservatives. The conclusion then reached is that the rule of law ideal has lost both its descriptive and prescriptive force. It does not correctly represent the reality of the post-modern state nor does it provide a model for assessing its performance.

This article deals at length with these criticisms and attempts to prove that the rule of law concept remains an essential element of modern society, even in the face of these radical changes in the function of modern law. In effect, I will try to persuade you to clap for the rule of law, because if we stop believing in it, the ideals that it represents will cease to exist and the practical effects would be disastrous.

The article is set out as follows. Part II begins with a survey of the rule of law concept and the basic themes of liberal philosophy that run through it. The primary importance of the rule of law in the liberal tradition is the emphasis it places on certainty, generality and equality in the legal system, and on an underlying idea of reciprocity between the state and citizen. Part III examines how this liberal concept took juridical form in the classic formulation of British constitutionalism set out by A V Dicey. This is a well-trodden path but in doing this I will briefly describe the current attempts to employ the Diceyan rule of law as the basis of common law constitutionalism. Common law constitutionalism states that the rule of law, and not parliamentary sovereignty, is the supreme authority of law, placing real limits on the exercise of legislative and executive power. The difficulty with these attempts is that the rule of law (unlike parliamentary sovereignty) is not easily formulated as a juristic principle. This article will not deal in depth with these issues: it has a different purpose. The purpose of this article is to show that even if we take the efforts to raise the juristic strength of the rule of law seriously, the rule of law remains vulnerable to a number of criticisms from outside liberal philosophy.

Part IV examines these criticisms. They come from a variety of sources but all aim at dismantling the key claims that the liberal rule of law makes in relation to providing certainty, generality and equality. I will concentrate on criticisms drawn primarily from the Left, namely from Marxism, feminism and critical legal studies. I will also summarise the primarily sociological criticism of the rule of law which

states that it is an outmoded principle that no longer reflects the reality of modern legal systems.

In Part V I attempt to justify a continued adherence to the rule of law. I defend the rule of law concept by reference to its ethical and normative ideological function, and argue that the rule of law necessarily retains a relationship of reciprocity between the state and the subject that has a proven value. I conclude with some observations on future directions for the rule of law and a possible program of reformulation of the principle.

II THE RULE OF LAW AND LIBERAL CONSTITUTIONALISM

A *Basic Themes in 'Rule of Law' Theory*

Raz defined the essence of the rule of law as relating to two features:

- that all people (including the government) should be ruled by the law and obey it; and
- that the law should be such that people should be able to be guided by it.²

From these two features it is possible to gauge some basic principles that are central to the concept. One of these is the value of *certainty*, which requires that all law should be prospective, open, clear and stable so as to maximise the autonomy of the individual.³ Another principle is that of *generality* which requires that in addressing the control of the conduct of people from different classes, law must be impersonal and non-particularised.⁴ *Equality* is the final principle.⁵ It embodies the idea that all people should be equally subject to the law. Traditionally this has been seen to encompass a formal conception of equality, meaning that everyone will be treated the same regardless of the differences between them. It requires that all have the same negative liberties (freedoms from interference). It also requires that these liberties should be protected in the same manner. However, the rule of law has also been said to encompass a wider notion of equality, such as equality of concern and respect.⁶ Viewed in this fashion legal equality requires that not only should like cases be treated alike but that different cases should be treated differently.

² Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195, 198.

³ Ibid 198.

⁴ Cheryl Saunders and Katherine Le Roy, 'Perspectives on the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (2003) 5.

⁵ Murray Gleeson, *The Rule of Law and The Constitution* (2000) 62.

⁶ Ronald Dworkin, *Law's Empire* (1986).

B *Rule-book and Rights-based Theories of the Rule of Law*

In defining the rule of law, liberals have often relied on two different conceptions of law, one procedural and rule-based, the other more substantive and rights-based.⁷ These theories differ in the way that they emphasise particular principles of the rule of law over others, such as generality over equality or vice versa.

Lon Fuller's formulation of the rule of law is a good example of a rule-book conception of the rule of law.⁸ Fuller found that there are eight 'desiderata' that comprise a procedural morality of law. They are: that law is sufficiently general (there must be rules); it is publicly promulgated; prospective; clear and intelligible; it is free of contradictions; sufficiently constant to enable people to order their relations; not impossible to obey; and it must be administered in a way sufficiently congruent with the wording of its written rules so that people can abide by them. These desiderata meant for Fuller that there was a minimum set of standards that law had to follow and that if the proposed law substantially failed to satisfy the standards it would lose its status as a law.

Joseph Raz and HLA Hart have argued that Fuller's rule book conception is primarily focused on the prerequisites for an efficient legal order. Their claim is that a system of racial segregation, sexual inequality and religious intolerance is compatible with his conception of law as the desiderata say nothing about the actual content of the legal rules.⁹

In contrast, rights-based theories are more concerned with the recognition and formulation of the rule of law as a form of political morality. According to Ronald Dworkin, a rights-based conception of the rule of law:

assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions. ... The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights.¹⁰

Dworkin's model of integrity is characteristic of such a rights-based theory. It requires that judges not only follow and apply rules in their judgments but expand upon them so that they are adjusted in accordance with their purposes to show the

⁷ Ronald Dworkin, *A Matter of Principle* (1985) 11. Craig describes these as 'formal' and 'substantive' conceptions of the rule of law: Paul Craig 'Formal and Substantive Conceptions of the Rule of Law' (1997) *Public Law* 467.

⁸ Lon Fuller, *The Morality of Law* (1969) Ch 2.

⁹ Raz, above n 2, 196; HLA Hart, 'Book Review of *The Morality of Law*' (1965) 78 *Harvard Law Review* 1281, 1285-6.

¹⁰ Dworkin, above n 7, 11-12 (emphasis in the original).

practice of interpretation in its 'best light'.¹¹ This model of integrity is driven by the moral force of equality.¹² The place of the rule of law in this context is in the first stage of judicial interpretation. According to Dworkin:

The most abstract and fundamental point of legal practice is to guide and constrain power of government ... law insists that force not be used or withheld ... except as licensed or required by individual rights and responsibilities flowing from past decisions. This characterization of the concept of law sets out, in suitably airy form, what is sometimes called the 'rule of law'.¹³

C The Underlying Value of Reciprocity

Whilst it is possible for liberals to disagree over the form of their rule of law definitions, behind both styles of rule of law concept is the value of reciprocity between the law-giver and the law-maker. Reciprocity is the foundation of both rule-based and rights-based concepts and, as will be argued below, the value of reciprocity makes it possible for the rule of law to work as a normative value.

The presence of reciprocity is clearest in Fuller's work. Fuller defines reciprocity broadly as a rephrasing of the concept of the Golden Rule: 'So soon as I have received from you assurance that you will treat me as you yourself would wish to be treated, then I shall be ready in turn to accord a like treatment to you.'¹⁴ Fuller sees such a relationship as existing between law-makers and law-followers. Thus when speaking of the rule of law, Fuller commented:

Surely the very essence of the Rule of Law is that in acting upon the citizen (by putting him in jail, for example, or declaring invalid a deed under which he claims title to property) a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing. Applying rules faithfully implies, in turn, that rules will take the form of general declarations ...¹⁵

This notion of reciprocity is also apparent in Dworkin's rights-based approach. Dworkin's model of interpretation requires judges to interpret the law in the light of the political morality of the community. Dworkin sees our modern societies as forms of community which are based on 'associative obligations'. Associative obligations are said to exist in communities that are typically fraternal such as families. The obligations arise when four conditions are met. The members must regard the group as having obligations that hold uniquely to the group; they must accept that these duties bind member to member; they must perceive that these responsibilities are linked to a concern for the wellbeing of each of the members;

¹¹ Dworkin, above n 6, 66.

¹² Ibid ch 8.

¹³ Ibid 93.

¹⁴ Fuller, above n 8, 20.

¹⁵ Ibid 209-10.

and the members must believe that the practices of the group show equal concern and respect for each of them.¹⁶

The underlying value of associative obligations is reciprocity. The duty to honour associative obligations exists 'only when the other conditions are met. Reciprocity is prominent amongst these other commitments'.¹⁷ When people belong to a social group and the social group no longer extends to them the benefits of belonging to that group then associative obligations can be ignored.¹⁸ In terms of a political community, a breakdown of reciprocity signals a breakdown of the validity of law. Hercules, Dworkin's example of the super-judge, must interpret law in light of the political morality of the community and the validity of the reciprocal arrangements between the law-maker and the law-giver.

The principle of reciprocity is therefore integral to the rule of law concept in both rule-book theories and in rights-based theories. Whether the analysis of the rule of law is limited to the consideration of its procedural aspects or is widened to include the consideration of political morality, reciprocity has a part to play. Below I will show how even non-liberal analysis of the rule of law has revealed the importance of reciprocity to the rule of law. But now I will proceed to examine the juridical principle of the rule of law.

D *Dicey's Rule of Law and its Inherent Contradiction*

A V Dicey's works were central in giving definition to the idea of a British state built on universal and general law. It is his vision of the rule of law that was accepted in English (and Australian) legal discourse as authoritative and it remains so today. To what extent does Dicey's legal formulation of the rule of law accord with the liberal principles explained above?

Dicey's rule of law formula consists of three classic tenets. The first is that the regular law is supreme over arbitrary and discretionary powers. '[N]o man is punishable ... except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land.'¹⁹

The second tenet is that of the idea of legal equality – all classes are equally subject to the ordinary law as administered by the ordinary courts.²⁰ The rule of law excludes the exemption of government officials from obedience to the law and it denies the validity of the creation of a separate body of law to deal with such breaches (such as the French *droit administratif*).

¹⁶ Dworkin, above n 6, 199-201.

¹⁷ Ibid 193.

¹⁸ Ibid 196.

¹⁹ A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 188.

²⁰ Ibid 193.

Finally, the rule of law and the rights it protects are the products of the traditions and customs of the ordinary law, not a written constitutional document. The English Constitution bears ‘the fruit of contests carried on in the courts on behalf of the rights of individuals’.²¹ The Constitution was ‘judge-grown’, in the rich soil of countless years of English common law, reflecting an English ‘legal spirit’.²²

Dicey’s rule of law principles were very much the product of his time and consequently, his definition of the rule of law needs to be read against the background of his beliefs and the existing political canvas. The primary influence is nineteenth century *laissez faire* individualism.²³ All government power, bar that deemed necessary to enhance the market, is seen as coercive in Dicey’s constitutional model.²⁴ The second major influence is a faith in the common law process to effectively map out the roles and boundaries between the state and the individual. The rule of the common law marked out the sphere of private autonomy that was free of governmental interference.

Dicey’s vision of the rule of law has an inherent ambiguity because of its liberal origins.²⁵ Because Dicey was a Whig and a positivist by nature he recognised the principle of parliamentary sovereignty in addition to the rule of law. Dicey defined parliamentary sovereignty as parliament’s ‘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’.²⁶ The principles of the rule of law and parliamentary sovereignty seem incompatible and their combination is incongruous. As Walker states, ‘If parliament ... can change any law at any moment ... then the rule of law is nothing more than a bad joke.’²⁷

Dicey attempted to overcome their logical antagonism in two ways. The first was that even though Parliament was omniscient, it was the task of judges to determine the meaning of law. This meant that statutes could be interpreted so as to not clash with the traditions of the common law.²⁸ Dicey saw this fact as greatly increasing the authority of the common law judges.²⁹

²¹ Ibid 196.

²² Ibid 195-6.

²³ B Hibbits, ‘The Politics of Principle: Albert Venn Dicey and the Rule of Law’ (1994) 25 *Anglo-American Law Review* 1, 3.

²⁴ ‘The greater the intervention of government the less becomes the freedom of each individual citizen’: Dicey, quoted in Hibbits, *ibid* 9.

²⁵ Franz Neumann, *The Rule of Law, Political Theory and the Legal System in Modern Society* (1986) 39.

²⁶ Dicey, *above n* 19, 39-40.

²⁷ Geoffrey de Q Walker, *The Rule of Law* (1988) 159.

²⁸ T R S Allan, ‘The Limits of Parliamentary Sovereignty’ (1985) *Public Law* 614, 616; Leighton MacDonald, ‘The Denizens of Democracy – The High Court and the “Free Speech” Cases’ (1994) 5 *Public Law Review* 160, 167. See *Balog v Independent Commission against Corruption* (1990) 169 CLR 625; *R v Bolton*; *Ex parte Beane* (1987) 162 CLR 514; *Ex parte Walsh and Johnson*; *In re Yates* (1925) 37 CLR 36; *R v MacFarlane*; *Ex parte O’Flanagan and O’Kelly* (1923) 32 CLR 518; *Melbourne Corporation v Barry* (1922) 31 CLR 174.

²⁹ Dicey, *above n* 19, 407.

The second solution to the antagonism between parliamentary sovereignty and the rule of law lay in Dicey's model of representative democracy. Dicey had clearly inherited the Whiggish faith in the partnership between the parliament and the courts and his theory echoes the widespread belief among common lawyers that 'Parliament would leave the central features of the common law largely untouched so that the common law ... would continue to guarantee individual liberty, liberty of discussion, freedom of assembly and rights of property'.³⁰

The notion of democracy is therefore 'self-correcting' in Dicey's model.³¹ According to Dicey the clear logical antagonism between the rule of law and parliamentary sovereignty was one solved by the conservative democracy of the English. English parliamentarians would never dream of creating legislation that the people would find abhorrent, and even if they did, the voting public would soon remove them from power.³²

E Problems for Dicey's Model of British Constitutionalism

Dicey's solutions to the conflict between the rule of law and parliamentary sovereignty were flawed. Dicey underestimated the deference that judges would pay to the 'tenor'³³ of legislation and the extent to which legislatures would 'legislate in ways that judges, if under the thralling logic of parliamentary supremacy, cannot misinterpret'.³⁴ The rule of law is brought to bear, not by examining the compliance of legislation with fundamental principles, but by a strict judicial interpretation which reads down the effects of legislation, but which cannot, ultimately, find it void. As Sir Owen Dixon said:

[T]he qualification upon the doctrine of the parliamentary supremacy of the law concerns the identification of the source of a purported enactment with the body established by law as the supreme legislature and the fulfilment of the conditions prescribed by the law for the time being in force for the authentic expression of the supreme will. If the qualification be law these are matters upon which the validity of a purported enactment may depend and they may accordingly be examinable in the courts.³⁵

Similarly, Dicey drastically misconceived the nature of the developing democracy and he failed to predict the extent to which governmental power would expand into

³⁰ Ian Harden and Norman Lewis, *The Noble Lie: British Constitutionalism and the Rule of Law* (1986) 38.

³¹ C Dike, 'Unitary, Self-correcting Democracy and Public Law' (1990) 106 *Law Quarterly Review* 105.

³² They were 'externally' controlled by public opinion and 'internally' controlled by their upbringing as proper English gentlemen. See Dicey, above n 19, 83.

³³ 'It is a proposition of the common law that a court may not question the validity of a statute but, once having construed it, must give effect to it according to its tenor.': Owen Dixon, *Jesting Pilate* (1965) 206.

³⁴ MacDonald, above n 28, 167.

³⁵ Dixon, above n 33, 211.

the private sphere. Furthermore, Dicey's simplistic model of effective representative government does not provide Anglo-Australian law with sufficient safeguards for individual liberty, primarily because it no longer describes the reality of responsible government, which is more properly described as responsible party government.³⁶ His theory of external and internal limitations and the political sovereignty of the people cannot explain how a minority would be effectively protected from discriminatory legislation. The cumulative effect of the defects is that the rule of law runs a very slow second to parliamentary sovereignty.

Another problem with Dicey's theory is that it was based on a nightwatchman state, that had very limited regulatory functions. That state has now disappeared. Dicey's theories could not accommodate the expansion of state functions, characterised by Friedmann as the state as provider, regulator, entrepreneur and umpire.³⁷ The welfare state (which was coming into existence at the time of his writings) was weakening the authority of judges and expanding the scope of discretionary executive power. Dicey's famous rejection of a system of administrative law is illustrative of his failure to properly predict the trend of state development, and the need for legal regulation of growing state functions.

Finally, Dicey's chain of legal reasoning for justifying parliamentary supremacy has been highly criticised. It is based on eclectic quotes from Blackstone, Coke, various Acts, and examples of Parliament's exercise of power over private rights.³⁸ But Dicey 'could not cite a single case in support of the doctrine, nor could he point to any reference to it in any statute or constitutional instrument'.³⁹ Simpson has stated that 'Dicey announced that it was the law that Parliament was omniscient, explained what this meant, and never devoted so much as a line to fulfilling the promise he made to demonstrate that this was so'.⁴⁰

F *The Current Debate: Common Law Constitutionalism?*

Regardless of its defects, the phenomenal popularity of Dicey's theory ensured that the principle of parliamentary sovereignty has been given prominence in the Anglo-Australian legal tradition.⁴¹ The primacy accorded to parliamentary supremacy has meant that judicial review of legislation based on common law rights has not been available. Winterton has stated that:

³⁶ Brian Galligan, 'Parliamentary Responsible Government and the Protection of Rights' (1993) 4 *Public Law Review* 100.

³⁷ Wolfgang Friedmann, *The State and The Rule of Law in a Mixed Economy* (1971) 3. See also Wolfgang Friedmann, *Law in a Changing Society* (2nd ed, 1972) Ch 15.

³⁸ Dike, above n 31, 106; Geoffrey de Q Walker, 'Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion' (1985) 59 *Australian Law Journal* 276, 276.

³⁹ De Q Walker, *ibid*.

⁴⁰ A W B Simpson, 'The Common Law and Legal Theory' in A W B Simpson (ed), *Oxford Essays in Jurisprudence, second series* (1973) 96.

⁴¹ Arguably the most complete and intellectually sound defence of parliamentary sovereignty is found in Jeffrey Goldworthy, *The Sovereignty of Parliament: History and Philosophy* (1999).

[T]he doctrine of 'fundamental law' was so completely defunct in Anglo-Australian jurisprudence at the time that the Commonwealth was established that its resuscitation would contravene both the separation of powers and s 128 of the Commonwealth Constitution.⁴²

Winterton's statement is based on the fact that, whilst other countries can read their constitutions against a background of fundamental human rights

the Commonwealth Constitution, unlike those of other jurisdictions which have employed natural law concepts of fundamental rights, provides no textual support whatever for invalidating legislation which contravenes such rights.⁴³

Parliamentary sovereignty reduces the rule of law to a constitutional posture rather than a hard-edged legal principle.

However, in the last ten years this version of parliamentary sovereignty has undergone serious challenge. There have been a number of attempts to reformulate Dicey's constitutional theory, effectively raising the juristic status of the rule of law vis a vis parliamentary sovereignty.⁴⁴ One attempt has been to attack the *ultra vires* doctrine and *Wednesbury* unreasonableness in administrative law so as to free judges from solely considering the formal legality of enactments, and to allow them to review the substantive justice or fairness of administrative decisions.⁴⁵

⁴² George Winterton, 'Extra-Constitutional Notions in Australian Constitutional Law' (1986) 16 *Federal Law Review* 223, 231.

⁴³ Ibid 232.

⁴⁴ See generally, Karen Grau, 'Parliamentary Sovereignty: New Zealand – New Millennium' (2002) 33 *Victoria University of Wellington Law Review* 351-377; Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 217-237; N W Barber, 'Sovereignty Re-examined: The Courts, Parliament, and Statutes' (2000) 20 *Oxford Journal of Legal Studies* 131-154. See also, Sir John Laws, 'The Constitution: Morals and Rights' (1996) *Public Law* 622; Walker, above n 27; Geoffrey de Q Walker, 'The Unwritten Constitution' (2002) 27 *Australian Journal of Legal Philosophy* 144; Geoffrey de Q Walker, 'Rule of Law and the Democratic World Order' in Suri Ratnapala and Gabriel Moens (eds), *The Jurisprudence of Liberty* (1996). For a critique of Walker's theory see Francis Mootz III, 'Is the Rule of Law Possible in a Postmodern State?' (1993) 68 *Washington Law Review* 249.

⁴⁵ Courts in the United Kingdom can now review decisions on substantive fairness grounds: *R v North & East Devon Health Authority; ex p Coughlan* [2000] 2 WLR 622. Australian courts do not: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6. For why Australian courts should not, see Cameron Stewart, 'Substantive Fairness: A New Species of Abuse of Power?' (2001) 28 *Federal Law Review* 617. On the *ultra vires* debate, see David Dyzenhaus, 'Formalism's Hollow Victory' (2002) *New Zealand Law Review* 525; Paul Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 *Cambridge Law Journal* 63. On *Wednesbury* reasonableness see Dawn Oliver, 'The Underlying Values of Public and Private Law' in Michael Taggart (ed), *The Province of Administrative Law* (1997), 217; Dawn Oliver, *Common Values and the Public-Private Divide* (1999); Jeffrey Jowell 'Beyond the Rule of Law: Towards Constitutional Judicial Review' (2000) *Public Law* 671. See also the discussion in T R S Allan, 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23 *Oxford Journal of Legal Studies* 563, where Allan is wary of any attempt to remove the doctrine of *ultra vires* altogether, and the response to these arguments in

Other recent attempts have focused on setting the rule of law as the foundational principle of judicial review, which, when breached, would allow judges to strike down legislative and administrative action. For example, T R S Allan is prominent amongst jurists for his attempt to have the rule of law principle seen as a constitutional doctrine of equal strength to parliamentary supremacy.⁴⁶ Originally, Allan argued that the judge's task of interpretation could be strengthened by an understanding of the rule of law as a 'juridical principle', which required legislation to be interpreted in accordance with the common law and the underlying political morality of society.⁴⁷ However, this theory did little to add to the powers of interpretation already granted to judges in Dicey's theory. More recently, Allan has stated that:

The distinction which I formerly drew so sharply, between the interpretation of statutes, on the one hand, and a refusal to apply them in cases of serious injustice, on the other, was probably mistaken. If political morality justifies a restrictive interpretation of legislation infringing basic rights, I believe it must also justify its disapplication in cases of sufficient gravity. The limits on the power of a democratic majority to achieve its legislative will are ultimately to be found in the common law; and the common law is too subtle to tolerate the absurdity - even the constitutional contradiction - of wholly unlimited legislative power.⁴⁸

Allan's theory therefore seeks to revive a concept of fundamental common law, which is an idealised form of non-political values, whereby the role of the law is to prevent the citizen from being subject to the arbitrary power of the state. Allan argues that:

[L]egal validity ultimately depends in compliance with basic constitutional values or assumptions: for it is these values, reflecting considerations of justice and propriety ... that account for the consensus, at least among officials, on which the survival of any system of government depends.⁴⁹

One of the most effective criticisms levelled at Allan and his contemporaries is that any attempt to upgrade the rule of law 'masks an attempt by judges and their

Paul Craig, 'The Common Law, Shared Power and Judicial Review' (2004) 24 *Oxford Journal of Legal Studies* 237.

⁴⁶ T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001); T R S Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 *Law Quarterly Review* 221; T R S Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (1993). For a discussion of Allan's theories, see Dyzenhaus, above n 45; Thomas Poole, 'Dogmatic Liberalism? T R S Allan and the Common Law Constitution' (2002) 65 *Modern Law Review* 463.

⁴⁷ T R S Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) *Cambridge Law Journal* 111.

⁴⁸ T R S Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' (paper presented at 'The Mason Court and Beyond' Conference, 8-10 September 1995, published in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court and Beyond* (1996) 156.

⁴⁹ Allan (2001), above n 46, 219.

ideological allies to establish their rule over democracy, judicial rule instead of the rule by the people of themselves'.⁵⁰

Perhaps more harmful to Allan's arguments (in the Australian context) is that higher courts have continually refused to examine whether there are fundamental rights based on the rule of law that parliament cannot override. Justice Murphy is the only modern day Australian judge who believed that such common law rights existed, and his 'Implied Bill of Rights' theory of the Australian Constitution⁵¹ has never found favour.⁵² The High Court raised the possibility of such rights in *Union Steamship Co of Australia v King*,⁵³ which concerned a question of whether legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law.⁵⁴ However, the High Court failed to answer this question in that case and has continued to do so ever since. For example, in *Kartinyeri v The Commonwealth*⁵⁵ Gummow and Hayne JJ stated the occasion had yet to arise where the High Court could examine the role of the rule of law in the Australian Constitution. Only Kirby J commented on fundamental norms, his comment being directed to the use of international human rights norms in statutory interpretation, not with fundamental common law rights.⁵⁶ The majority of the High Court in *Kable v Director of Public Prosecutions for New South Wales*⁵⁷ decided not to use notions of fundamental common law rights in their decision to overturn a statute which allowed for the indefinite incarceration of a

⁵⁰ David Dyzenhaus, 'The Justice of the Common Law: Judges, Democracy and the Limits of the Rule of Law' in Saunders and Le Roy (eds), above n 4. See also Richard Etkins, 'Judicial Supremacy and the Rule of Law' (2003) 119 *Law Quarterly Review* 127.

⁵¹ Justice Murphy believed that it was possible to derive rights to freedom of speech, assembly, communication and travel throughout the Commonwealth, freedom from slavery, serfdom, cruel and unusual punishment, and arbitrary discrimination on the grounds of sex, from the Constitution. See *Ex parte Henry* (1975) 133 CLR 369, 388; *Buck v Barone* (1976) 135 CLR 110, 137; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 87-88; *Seaman's Union of Australia v Utah Development Co* (1978) 144 CLR 120, 157; *McGraw-Hinds (Australia) Pty Ltd v Smith* (1979) 144 CLR 633; *Ansett Transport Industries (Operations) v Wardley* (1980) 142 CLR 237, 267; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 311-312; *Sillery v R* (1981) 35 ALR 227, 233-234; *Miller v TCN Chanel Nine Pty Ltd* (1986) 67 ALR 321, 336-338.

⁵² Even today, when implied rights of political speech have been found to be part of the Constitution: *Australian Capital Territory Television v Commonwealth* (1992) 177 CLR 106 and *Nationwide News v Wills* (1992) 177 CLR 106. For consideration of Murphy J's dicta, see Winterton, above n 42.

⁵³ (1988) 166 CLR 1, 10.

⁵⁴ The question had been answered in the affirmative by Cooke P of the New Zealand Court of Appeal in *Drivers v Road Carriers* [1982] 1 NZLR 374, 390, *Frazer v State Services Commission* [1984] 1 NZLR 116, 121, and *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398.

⁵⁵ (1998) 195 CLR 337, 380-1.

⁵⁶ *Ibid* 417-9.

⁵⁷ (1996) 138 ALR 577. Both minority judges, Brennan CJ and Dawson J, found that there were no fundamental common law rights that could justify overriding parliamentary sovereignty. *Kable* was distinguished by a majority of the Queensland Court of Appeal in *A-G (Qld) v Fardon* [2003] QCA 416, where a general statutory scheme for detention on the basis of community protection was upheld on the basis that it did not offend the role of the judiciary.

prisoner beyond his original sentence. Similarly, the High Court has refused to invalidate state based legislation for the confiscation of property, in cases where the State seeks to compulsorily acquire property without just terms,⁵⁸ and where the property is acquired on grounds that it belonged to a person charged with a serious offence.⁵⁹ Arguments in favour of a doctrine of fundamental legal equality have also been unsuccessful.⁶⁰ To the extent that the courts in Australia have accepted the rule of law it has been to the limited extent recognised by Dicey: judges will interpret legislation in accordance with certainty, generality and equality, but only to the extent that the legislation allows such an interpretation.⁶¹

The failure of the rule of law to take hold as a juridical principle of equal strength to parliamentary sovereignty proves Ivor Jennings' claim that the rule of law is an 'unruly horse' which is hard to express and 'essentially imprecise'.⁶² While a fully fledged discussion of the debate between supporters of parliamentary sovereignty and the rule of law is beyond this work,⁶³ this part has shown that the current debate is based firmly within liberalism. I will now turn to a critical examination of those liberal underpinnings.

III CRITICISING THE RULE OF LAW

Part One has illustrated the liberal underpinnings of the rule of law and the current role it is playing in debates about common law constitutionalism. In this Part, I will summarise the criticisms that have been levelled at legal systems relying on the liberal rule of law. These criticisms go to the heart of the current liberal debates. Perhaps more distressingly, the current debates have not taken these criticisms seriously and there has been no systematic examination of whether the liberal positions can withstand these criticisms.

Generally, the criticisms take six main forms:

A *The Construction of the Legal Person and the Logic of Identity*

It has been argued that the rule of law relies at its heart on a particular conception of the legal subject. Marxism and feminist movements have been particularly critical

⁵⁸ *Durham Holdings Pty Ltd v State of New South Wales* (2001) 205 CLR 399.

⁵⁹ *Silbert v Director of Public Prosecutions for Western Australia* [2004] HCA 9.

⁶⁰ *Leeth v Commonwealth of Australia* (1992) 174 CLR 455. See also the discussion of *Leeth* in *Kruger v Commonwealth of Australia* (1997) 190 CLR 1, particularly the judgments of Toohey, Gaudron and Gummow JJ. Dawson J felt that any assertion of legal equality would offend principles of parliamentary sovereignty. See also *Putland v R* [2004] HCA 8, where the High Court affirmed its decision that there was no fundamental doctrine of equality.

⁶¹ See *Moran Hospitals Pty Ltd v King* [1997] 1045 FCA; *Herald and Weekly Times Ltd v Correctional Services Commissioner* [2001] VSC 329, following the decision of Lord Steyn in *R v Home Secretary; Ex parte Pierson* [1997] 3 WLR 492.

⁶² Sir Ivor Jennings, *The Law and the Constitution* (5th ed, 1959) 60.

⁶³ Goldsworthy is perhaps Allan's greatest critic, and supporter of parliamentary sovereignty: Goldsworthy, above n 41; Jeffrey Goldsworthy, 'Homogenizing Constitutions' (2003) 23 *Oxford Journal of Legal Studies* 483.

of this conception, and attempt to show how it is not a natural product but rather the outcome of particular social forces. This naturalisation of the legal person has been said to involve a logic of identity, that being, an ideology of sameness.⁶⁴

Marxism's criticism of the 'legal person' is based on the way that the philosophy of the rule of law, with its values of free and autonomous legal individuality, mirrors and makes possible commodity relations.⁶⁵ The law of free and equal individuals reflects the logic of the economic market and through this correspondence arises the notions of 'equality before the law' and the neutrality/generality of its contents. Marxism, with its emphasis on historical materialism, believes that legal relations are merely expressions of the relations of production.⁶⁶ This is made possible by the fetishism of commodities where the commodity form dominates life to the extent that even social relationships come to be viewed as things or property. As such people relate to each other as property owners in a market which requires them to have equal status (but not equal material status). The real social and material characteristics of the relationships are concealed by this notion of the legal person.⁶⁷

Soviet jurist Evgeny Pashukanis argued that the essence of capitalistic law is found in the rights and duties of legal individuals, equal before the law.⁶⁸ The function of the vindication of rights was to facilitate a system of recognition of the ownership of property. Without such a system of recognition the market for commodities would not function. The rule of law and the constructed legal individual are therefore the direct fulfillment of the commodity form of relations.

Feminist movements have also criticised the way the legal person is constructed, but with a concentration on the sex-gender aspects of the construction.⁶⁹ Rule of law principles presuppose a constructed individual or 'every-person' on which to focus protection from unwanted intrusion. The aim of feminist jurisprudence has been to show how this 'every-person' is a man. The construction of the legal person relies on the notion of a separate, autonomous and rational being who approximates a man capable of employing rights aggressively and assertively and in ways that follow rules.⁷⁰ By virtue of the underlying nature of the legal person, the experience of women is silenced and unknowable in law. The formal law cannot see the way women are tied to a private sphere in which they are disempowered. To the extent that the rule of law describes ways of protecting individuals from public powers, it

⁶⁴ Iris Young, *Justice and The Politics of Difference* (1990).

⁶⁵ Mandel, 'Marxism and the Rule of Law' (1986) 35 *University of New Brunswick Law Journal* 7, 9.

⁶⁶ Ibid 8-9.

⁶⁷ Sol Picciotto, 'The Theory of the State, Class struggle and the Rule of Law' in Bob Fine et al (eds), *Capitalism and the rule of law : from deviancy theory to Marxism* (1979) 169.

⁶⁸ Evgeny Pashukanis, *Law and Marxism; A General Theory* (1978); Picciotto, *ibid* 169-170; Steve Redhead, 'Marxist Theory, The Rule of Law and Socialism' in Piers Beirne and Richard Quinney (eds), *Marxism and Law* (1982).

⁶⁹ Radhika Coomaraswamy, 'Broken Glass: Women , Violence and the Rule of Law' in Saunders and Le Roy (eds), *ibid* n 4, 163.

⁷⁰ Katherine O'Donovan, 'Engendering justice – Women's Perspectives and the Rule of Law' (1989) 39 *University of Toronto Law Journal* 127, 131.

ignores the manifest exercise of private powers. If the rule of law only concerns the public exercise of power, it does little to address the iniquities and power hierarchies of women's subordination. Women are therefore rendered 'marginal to the operation of law by virtue of assignation to the private sphere ...'⁷¹

B *Anti-formalism, Indeterminacy and Contradictions*

The critical legal studies movement ('CLS') has attacked the rule of law using a critical appraisal of formalism in legal reasoning. Formalism is central to the rule of law as it purports to limit judicial creativity via the process of legal reasoning. Without it, judges would decide as they wish, without direction or limitation. Formalism, in this way, preserves the difference between politics and law.

Some members of CLS deny

the idea that there is an autonomous and neutral mode of 'legal' reasoning and rationality through which legal specialists apply doctrine in concrete cases to reach results that are independent of the specialist's ethical ideals and political purposes.⁷²

Critical legal scholars ('crits') aim to dispose of formalism in two ways; one being internal critique of the inconsistency and contradictory nature of legal rules; the other is an external appeal to the historical and social forces which lie behind the juxtaposition of legal doctrines.⁷³

The definition of 'formalism' in some CLS works is extremely broad.⁷⁴ It is sometimes understood to be a claim that there is a type of reasoning which provides answers to legal problems.⁷⁵ Formalism expresses a belief in the possibility of a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary'.⁷⁶

Crits see formalism as a manifestation of ideology which perpetuates the myth that rules are applied according to a rational, neutral and objective method.⁷⁷ Neither

⁷¹ Margaret Thornton, 'Feminist Jurisprudence: Illusion or Reality?' (1986) 3 *Australian Journal of Law and Society* 5, 7.

⁷² David Trubek, 'Where the Action is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Review* 575, 578.

⁷³ J Oetken, 'Form and Substance in Critical Legal Studies' (1991) 100 *Yale Law Journal* 2209, 2211.

⁷⁴ Peter Drahos and Stephen Parker, 'The Indeterminacy Paradox in Law' (1991) 21 *University of Western Australian Law Review* 305, 308.

⁷⁵ Mark Tushnet, 'Perspectives on Critical Legal Studies: Introduction' (1984) 52 *George Washington Law Review* 239.

⁷⁶ Roberto Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 563, 564.

⁷⁷ Oetken, above note 73, 2211; David Kairys, 'Legal Reasoning' in David Kairys (ed), *The Politics of Law* (1982) 13.

judges nor the law that they apply, are neutral.⁷⁸ The semantic emptiness of legal rules allows the interpreting judge to be imbued with power. The critics argue that choices made in judgments cannot be made from within the law but need to be made with reference to the politics and history of ideology. As a result of this overwhelming subjectivity there can be no possibility of such a thing as pure legal reasoning. Indeed, legal doctrine is merely an empty vessel into which the value choices of the judge are poured.⁷⁹

The liberal basis of the rule of law is also said to be subject to fundamental and irreconcilable contradictions. Liberalism is seen as

viewing the world in terms of a series of contradictory dualities and values such as reason and desire; freedom and necessity; individualism and altruism; autonomy and community; and subjectivity and objectivity. These contradictory values are reflected in virtually all our common law and statutory concepts and rights.⁸⁰

The necessary outcome of a contradictory liberal philosophy and a subjective legal reasoning is that law is indeterminate at its core, in its very inception, not just in its applications. Law as both an ideology and a technique cannot generate a single, non-contradictory set of outcomes. There are degrees to which this idea is accepted. Some critics believe that a determinate answer can never be given, others believe rules at least provide guidance but not assurance of outcome. Either way, the CLS approach towards indeterminacy has opened up the possibility of the infinite manipulation of legal principle and the consequent collapse of the rule of law.

C The Values of Formal Equality, Generality and Neutrality create Substantive Inequality and Injustice

Once the concept of the legal person has been undermined and the possibility of a neutral style of legal reasoning denied, it is a short step to the position of proclaiming the falsity of the rule of law's normative principles, those being, that laws should be cast and interpreted in forms based on equality, generality and neutrality.

Marxism was always critical of bourgeois *formal* equality and the associated values of general law being applied neutrally. In class instrumentalist versions of Marxism the rule of law is seen as a form of dominant ideology created and molded by a dominant class, in whose interests the law ultimately serves. Marx argued that the bourgeoisie actually rules through the law but makes it independent of the personal arbitrariness of each individual. Bourgeois rule is the *average* rule where:

⁷⁸ J Stuart Russell, 'The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy' (1986) 18 *Ottawa Law Review* 1, 13.

⁷⁹ Andrew Altman, *Critical Legal Studies, A Liberal Critique* (1990) 91.

⁸⁰ Russell, above n 78, 10.

Their personal power is based on conditions of life which as they develop are common to many individuals, and the continuance of which they, as ruling individuals, have to maintain against others, and, at the same time, to maintain that they hold good for everybody.⁸¹

The expression of their common interests is made through law and so the rule of law becomes the form in which the bourgeoisie can formulate and impose something which approaches a class will.⁸²

The beneficiaries of this system of universal legal personalities are obviously going to be the capitalists whose conditions of life are worth maintaining. The rule of law, with its reliance on the abstract legal individual, is a 'coded denial of experience'.⁸³ The material reality of those who are not bourgeois does not survive the process of the law. The rule of law defines rights and equities that are separate from the actual lived experience of most individuals. The very universality and formality of the rule of law, its impersonal nature, is what furthers the interests of the bourgeoisie and what dominates those who fall outside its boundaries. Furthermore the bourgeoisie play an instrumental role in the creation and operation of this law.

This is *not* to presume that the law is somehow controlled by the bourgeoisie. Indeed, the rule of law, as bourgeois law exists, in a form beyond individual manipulation. This is why it is useful to the bourgeoisie. The appeal of the rule of law to the bourgeois is its valuelessness. The ideology of the rule of law comes to be the natural fulfillment of a legal system of equal legal subjects. The domination caused by the rule of law is not its special preference for bourgeois interests but its refusal to provide special protection for the powerless and special control of the powerful. As such its existence is not part of a conspiracy but it still remains as a form of domination.

In feminism, the neutrality and objectivity of the rule of law once again become questionable once the hierarchies within the private sphere are recognised. The rule of law primarily ignores women's private vulnerability but then applies to women the standard of a legal person which is, in essence, male.⁸⁴ Of course that is not to accept blindly that the rule of law is not involved with the private sphere. Indeed, there are ways in which the rule of law positively constructs the family and the place of women within it.⁸⁵ The state under the rule of law may appear reluctant to interfere directly with family forms, but when the inevitable happens and the law and the family intersect, nothing in the rule of law prevents the construction of a particular family form.⁸⁶ Indeed, when this occurs the law imposes a mirror image of the legal man, that of the 'good woman' and the nuclear family.

⁸¹ Marx, quoted in Philip Corrigan and Derek Sayer, 'How the Law Rules: Variations on Some Themes in Karl Marx' in Bob Fryer et al (eds), *Law, State and Society* (1981) 29.

⁸² Corrigan and Sayer, *ibid* 29.

⁸³ *Ibid* 33 (emphasis in original).

⁸⁴ See the discussion in Coomaraswamy, above n 69, 143-171.

⁸⁵ Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (1990) 70.

⁸⁶ *Ibid* 70.

The good woman is the female counterpart of the legal man.⁸⁷ Her role is defined by the sexual division of labour. As wife and mother she performs the invisible tasks of the private sphere that prop up her husband's public activities. The legal man can appear detached and autonomous because he can afford to be. His private sphere is in order. Therefore behind the ideology of the market and the legal man lies the accepted ideology of maternalism and the legal woman.

Feminist approaches have therefore rejected rule of law principles because the principles fundamentally accept an ideology of public/private spheres, the sexual division of labour and a constructed legal man. Consequently, the idea of equality in its formal sense (as used in the rule of law and liberal feminism) is clearly inadequate. Similarly, the more substantive concepts of equality as employed by Dworkin and others also continue to be inadequate as the masculinist ideologies still remain firmly entrenched. In conjunction with the failure of equality is the collapse of the generality of law and its supposedly neutral and universal standpoint. The exclusion of gender from the public sphere has meant an exclusion of its different experience from 'the universal'.⁸⁸ The rule of law must eventually collapse as its partiality and value-laden doctrines are exposed.⁸⁹

D *Law as Politics*

In all three critical movements there is a recognition of the arbitrary political nature of law. Because of the failure of legal reasoning, the liberal claim that law is separate from politics is considered by CLS to be a falsehood.⁹⁰ Law is merely a form of legitimised domination that results from the conflict of political groups, the market and bureaucratic organisations.⁹¹ At every level of law, politics forms the basis of decision and, hence, law is politics all the way down.⁹²

There are similarities between this approach and that of the Marxist critique of law as being the embodiment of market relationships. Feminist approaches also help to illustrate the political nature of law, highlighting the deeply wrought forms of discrimination within legal concepts and legal techniques such as in rape trials. If law is simply politics then the rule of law is no longer distinguishable from the 'rule of men'.

⁸⁷ Ibid.

⁸⁸ Thornton, above n 71, 12.

⁸⁹ Naffine, above n 85, 51; Catherine MacKinnon, 'Difference and Dominance' in Katharine Bartlett and Rosanne Kennedy, *Feminist Legal Theory: Readings in Law and Gender* (1991) 82.

⁹⁰ Altman, above n 79, 14.

⁹¹ Russell, above n 78, 9-10.

⁹² Oetken, above n 77, 2212; Tushnet, above n 75, 1539.

E *The Rule of Law as a form of Dominating Ideology*

Both Marxism and CLS have categorised the rule of law as a form of ideology and seek to deny its validity on this ground.

What is ideology? In Marx's works the term 'ideology' is used in different ways. The first concept sees ideology as a general term referring to human knowledge, or 'consciousness' as refracted through our separate existences.⁹³ Knowledge is therefore understood as ideological because it is a product of social reality. This leads Marx to the logical conclusion that if ideology is a social product it is already a constituent element of social reality. Hence ideology as a consciousness presents social relations 'as what they are'.⁹⁴

We can understand the rule of law as a form of social consciousness developed in correspondence to a particular material form of life and, therefore, it is an ideological construct. To that extent, the term 'ideological' does not refer to the falsity or untruth of the rule of law, it merely accepts the rule of law as a way of understanding law in Western society that is contingent on the history, politics, and production of that society. As Fine states, 'There is an objective basis for bourgeois legal "right" and the "freedom" and "equality" posited within it.'⁹⁵ To the extent that the rule of law is objective its ideology, as a form of consciousness, is *neutral*. Neutral ideology refers to systems of thought that attempt a complete understanding of ideas.⁹⁶ But the neutrality of its ideology cannot disguise its contingency and dependence on the material history and fallibility of human ideas.

The second way that the term 'ideology' has been used in Marxism is the manner in which it creates contradictions in social experience.⁹⁷ Ideology is 'a solution in the mind to contradictions which cannot be solved in practice, it is the necessary projection in consciousness of man's practical inabilities'.⁹⁸ Ideology helps to smooth over contradiction and it gives legitimacy to ways of understanding in the face of contradictory reality.⁹⁹ This type of legitimising ideology is tied to the dominant class. The class which dominates social relations has a primary role in dissemination of a dominant ideological viewpoint.

The form that this type of ideology takes is *universal*. The dominant class has to present its ideas as the only rational, universally valid ones.¹⁰⁰ The rule of law can therefore be understood in this way as a legitimating ideology that white-washes over the material contradictions that exist (in Marxist terms), between the interests

⁹³ Tim Dant, *Knowledge, Ideology and Discourse, A Sociological Perspective* (1991) 5.

⁹⁴ Karl Marx, *Capital: A Critique of Political Economy Vol* (1976) 166; Iain Stewart, 'Closure and the Legal Norm' (1987) 50 *Modern Law Review* 908, 913.

⁹⁵ Bob Fine, 'Law and Class' in Fine et al, above n 67, 43-44.

⁹⁶ Valerie Kerruish, *Jurisprudence as Ideology* (1991) 11-22.

⁹⁷ Jorge Larrain, *The Concept of Ideology* (1979) 45; Dant, above n 93, 65-68.

⁹⁸ Larrain, *ibid* 46.

⁹⁹ Dant, above n 93, 66.

¹⁰⁰ Marx and Engels, above n 74, 66.

of capital and labour. When viewed in this manner, the rule of law can be seen as *negatively* ideological, in the way that it justifies or renders invisible, materially unequal social relations.¹⁰¹ The negativity of this ideology creates a *closure*, a silencing of thought that opposes the dominant ideology. The closure of a negative ideology forces it to stagnate and it reproduces alienated and repressive social relations.¹⁰²

These ideas of contradiction and incoherence are also central to the CLS critique of the rule of law. The CLS critique begins with examinations of the incoherence of legal doctrine and continues the critique to discover conflicting ideals within the liberal legal system.¹⁰³ The rule of law, as understood by some CLS writers, is an ideology which attempts to cover over these fundamental contradictions, acting like a Freudian denial, 'a way to deal with perceived contradictions that are too painful for us to hold in consciousness'.¹⁰⁴ The rule of law with its techniques of neutrality, generality and equality is merely a mask, behind which lie the doctrinal incoherencies of liberalism.

The third alternative reading of ideology within Marxism is that of the false consciousness. The categorisation of belief in the rule of law as false consciousness pervades most of the CLS works. It primarily arises out of the 'rule of law as a mask' analogy that is very common to the crits and it is furthered by a tendency of the crits to want to 'transform the world'.¹⁰⁵ Because CLS aims at this transformation, it has to smash the 'illegitimate' hierarchies of power and the 'false' discourses that support them. The task of CLS is to reveal 'the underlying truths of the legal system ...'¹⁰⁶ and in doing so, to make known to all the falsity and illegitimacy of existing social relations. Crits achieve this aim by the technique of 'trashing', which aims at exposing 'possibilities more truly expressing reality ... by freeing oneself from the mystified delusions embedded in our consciousness by the liberal legal worldview ...'.¹⁰⁷

F *The Liberal Obsession with Generality is Outmoded and Fails to Deal with the Modern Role of the State as Umpire, Regulator and Manager*

A number of sociological theories, based primarily on Weber's use of ideal types, have traced the development of the rule of law concept and have concluded that it is

¹⁰¹ Kerruish, above n 96, 12.

¹⁰² Ibid 13.

¹⁰³ Christopher Kutz, 'Just Disagreement: Indeterminacy and Rationality in the Rule of Law' (1994) 103 *Yale Law Journal* 997, 1023.

¹⁰⁴ David Trubeck, 'Where the Action is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Review* 575, 607; Russell, above n 78, 17.

¹⁰⁵ Russell, above n 78, 11.

¹⁰⁶ Ibid 15.

¹⁰⁷ Alan Freeman, 'Truth and Mystification in Legal Scholarship' (1981) 90 *Yale Law Journal* 1229, 1230-31.

now obsolete.¹⁰⁸ I will concentrate on four approaches which have attempted to systematically set out the development and decline of the liberal rule of law: Weber's analysis of the emergence of legal domination¹⁰⁹, Unger's theory of the 'Legal Order',¹¹⁰ Kamenka and Tay's model of *Gemeinschaft*, *Gesellschaft* and administrative-bureaucratic trends within law¹¹¹, and Nonet and Selznick's theory of the emergence of Responsive Law.¹¹² To a large extent all four theories are compatible owing most probably to their explicit and implicit origins in Weberian sociology.¹¹³ These theories all argue that there has been a major shift in the normative order of society away from a classical liberal form based on the rule of law towards a bureaucratic and administrative society. Each society is characterised by a dominant form of *legitimation* and type of *legal rationality*, and each has particular characteristics and internal contradictions that mark it as a separate type of order.¹¹⁴

The classic formulation of the rule of law in the liberal societies of the 19th century was an example in Weberian terms of a movement towards a system of 'formally rational law' or *legal domination*.¹¹⁵ This societal ideal type has been described as a *legal order* which has the rule of law and *Rechtsstaat* notions at its heart.¹¹⁶ Legitimate political power comes from the existence of a 'system of rationally made legal rules which designates powers of command exercisable in accordance with the rules'.¹¹⁷ Legitimacy of the rules is not connected to the content of the rules

¹⁰⁸ I rely, for the purposes of this article, on Alan Hunt's definition of 'ideal type': 'The ideal type is a heuristic device which is drawn from reality by means of an accentuation of selected features, but which does not purport to describe reality, it is held up as a hypothesis against which the empirical world may be explored'. See Alan Hunt, *The Sociological Movement in Law* (1978) 101.

¹⁰⁹ Max Weber, *Max Weber on Law in Economy and Society* (Max Rheinstein trans, 1966) 47.

¹¹⁰ Roberto Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (1976).

¹¹¹ Originally presented in Eugene Kamenka and Alice Tay, 'Beyond Bourgeois Individualism: the Contemporary Crisis in Law and Legal Ideology' in Eugene Kamenka and RS Neale (eds), *Feudalism, Capitalism and Beyond* (1975).

¹¹² Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (1978) 17.

¹¹³ Fortunately, each adds a particular richness in separate areas of their subject, so what follows is an attempt to offer a broad summary of the best of the theories and their conclusions.

¹¹⁴ Anthony Kronman, *Max Weber* (1983) 73-75. In these analyses the terms 'legitimation' and 'legal rationality' have a key role. Weberian sociology of law focused on the formation of legal texts and the development, form and application of rules. It employed two polar typologies for this task: formal/substantive and rational/irrational. The formal/substantive typologies refer to the way the legal systems depend on criteria within and without the legal system itself for the normative decision-making. Formal systems reference themselves and norms generated within the legal system, whilst substantive legal systems look outside themselves for criteria for the solution of normative conflicts. The irrational/rational typologies refer to the manner in which decisions are made, whether by reference to systematic inquiry according to rules and principles (hence exhibiting a rationality) or whether decisions are made without such a system of inquiry (and hence irrational).

¹¹⁵ Hunt, above n 108, 109.

¹¹⁶ Unger, above n 110, 52.

¹¹⁷ Roger Cotterrell, 'Legitimacy and Political Legitimacy in The Sociology of Max Weber' in David Sugarman (ed), *Legality, Ideology and the State* (1983) 70.

themselves, nor with the status or personality of those creating and enforcing them, but with the status of the rules *as rules of the system*. Hence the law takes the form of logically formal rational rules, characterised by a *formalistic impersonality*, which is in turn a feature of the generality created by the rule of law.¹¹⁸

These societies and their legal systems are marked by individualism and market orientation. Hence they have been classed by Kamenka and Tay as *Gesellschaften*.¹¹⁹ The development of the sovereignty of law in both England and Germany arises out of the success of *Gesellschaft* forms of law and legal regulation. The sovereignty of law is the foundation and crown of a society 'made up of atomic individuals and private interests, each in principle equivalent to the other, capable of agreeing on common means while maintaining their diverse ends'.¹²⁰

The success of the *Gesellschaft* form of law and the legitimating ideology of the rule of law secures for the legal system a high degree of autonomy.¹²¹ Law is functionally and ideologically separated from political spheres and influences. The focus on rules helps to minimise official discretion and a corresponding preoccupation with procedure overcomes concerns for substantive justice. Additionally, the legal system is further rationalised by the influx of trained lawyers, who are schooled in the analysis of legal forms.¹²² The rise and renewal of the legal profession is therefore central to the further rationalisation of law.

But as capitalism began to mature and the reality of social inequality asserted itself over the ideology of the free market, there is an increasing disenchantment with formal legal rationality. Essentially, '[t]he liberal (bourgeois) *Rechtsstaat* as a type of constitution, as it had emerged from the original concept, was incapable, on the basis of its principles, of answering the social question that it had itself helped to raise'.¹²³ In the words of Kamenka and Tay:

Law in the Western world – both at the level of the judicial process and at the level of legislation – is asked to overcome its abstraction and its underlying individualism, to take into account extra-legal powers and social inequalities.¹²⁴

¹¹⁸ Weber, above n 109, 225.

¹¹⁹ Kamenka and Tay, above n 111.

¹²⁰ Ibid 137.

¹²¹ Nonet and Selznick, above n 112; Unger, above n 110, 52.

¹²² Of course in England there was professional training instead of schooling, which is one factor amongst others which lead to Weber's mixed feelings about the common law and its level of rationality.

¹²³ Franz Neumann, 'The Change in the Function of Law in Modern Society' in Herbert Marcuse (ed), *The Democratic and the Authoritarian State* (1957) at 60. See also Erich Fechner, 'Future Prospects of the *Sozialer Rechtsstaat*' in FC Hutley, Eugene Kamenka and Alice Erh-Soon Tay, *Law and the Future of Society* (1979) 146: 'The [liberal state's] inefficiency lies primarily in the one-sidedness of the individual's legal position, a position exclusively of claims No claim can exist without obligation, no legal rights can be upheld without at least the acceptance of a duty not to abuse those rights'.

¹²⁴ Kamenka and Tay, above n 111, 130.

Growing demands for equality lead to an expansion in the role of the state. Antiformal tendencies in legal terms grow as do open-ended legal categories, for example, ‘unconscionability’ and ‘misleading and deceptive conduct’. Furthermore the traditional distinction between the public and private spheres that characterised the bourgeois formal law breaks down so that the state comes to interfere even in the heart of private law (contract).¹²⁵ As problems of the lack of social freedom become increasingly visible, there is a need for a state that goes beyond the mere liberal functions of aided self-fulfilment, to the functions of distributing wealth, such as providing health care, education and other social needs.

What was needed was a state that would actively counter social inequality; otherwise the individual freedom and equality before the law that were the object of the *Rechtsstaat*’s guarantees would become empty phrases for an ever-increasing number of citizens.¹²⁶

The bureaucratic-administrative trend expands the scope of the resource allocation function¹²⁷ of the state with a subsequent increase in the number of interactions between the state and the economic base. Friedmann¹²⁸ has summarised some of these as:

- Provision of welfare and social benefits and other types of social insurance;
- Public controls over private contractual and property relations, for example, unjust contract review, rent and land tribunals, planning and regulation of buildings and developments;
- Increasing proportion of economic transactions take place between government and large corporations, or are regulated by semi-government bodies;
- Increasing importance of economic regulation in the licensing of activities and transactions, divided into (a) occupational licenses, and (b) licensed economic activity, eg over imports and exports and foreign exchange controls;
- Regulation of restrictive trade practices, eg antitrust legislation; and
- Regulation of the labour market.

The combination of these factors suggests that the legal systems of the Western world are undergoing a profound crisis leading to a dismantling of the rule of law concept.¹²⁹ The ideals of generality are not compatible with the managerial responsibilities of the state, and so the rule of law, and the generality it espouses become increasingly abandoned.

¹²⁵ Ibid 137.

¹²⁶ Neumann, above n 123, 61.

¹²⁷ Eugene Kamenka and Alice Tay, ‘Social traditions, legal traditions’ in Eugene Kamenka and Alice Tay (eds), *Law and Social Control* (1980).

¹²⁸ Friedmann (1977), above n 37, 495-512.

¹²⁹ Kamenka and Tay, above n 111; Weber, above n 109; Nonet and Solnick, above n 112, 4-5.

IV THE ETHICAL FUNCTION OF THE RULE OF LAW AND ITS PERMANENCE

If the current theories which support the rule of law are liberal, and if those liberal theories cannot deal with the above criticisms, what is left of the rule of law to salvage? If the notions of the rule of law and the *Rechtsstaat* are ones born out of early capitalism, can they survive societies' entry into late capitalism? How can the sovereignty of law survive in a society where formally rational law is on the decline? And, more importantly, *why* should it?

The answers to these questions become apparent if one examines the rule of law's function in securing a relationship of reciprocity between the state and citizen. The above criticisms all focus on the failure of the rule of law's ability to secure effective certainty, generality and equality. But what they fail to acknowledge is the way that reciprocity is secured as an ideological foundation of the legal system. In the above criticisms, the relationship between the ruler or law-giver and the ruled/law-follower is treated strictly one way (the rule of law is dominant ideology/male construct/false consciousness). The rule-follower appears to be the passive recipient of domination in these theories. However, the relationship between state and citizen as envisioned in the rule of law is not so one-dimensional. Indeed it is possible to argue that the rule of law provides a normative standard with which law-followers can measure the performance of the law-givers.

The rule of law therefore has a *normative* or *ethical function*.¹³⁰ The ethical function of generality is to guarantee a minimum of personal freedom and integrity. As Fuller's work makes clear, the rule of law concept is a statement about the two-way relationship between the law giver and the follower.¹³¹

A commitment to reciprocity, secured by the rule of law, also entails a commitment to rationality in law

which is not based on the source of law but on its material content. Not every measure of the sovereign, and not only the measures of the sovereign, are law. Law is here a norm which is intelligible and contains an ethical postulate which is frequently that of equality. Law, then, is *ratio* and not necessarily *voluntas* [the will of the sovereign] at the same time.¹³²

How does general and rational law secure reciprocity? It does this by maintaining an openness or transparency of legal language. Assume, for example, that the primary function of the legal system is to process normative conflicts that arise in everyday life. Most of these conflicts are solved at the level of the everyday, but those that cannot be so solved eventually find their way into the legal system.

¹³⁰ Gleeson CJ has said something similar in relation to equality: '[M]ost Australians share a belief that all people are equal and they are right. This is because the proposition that people are equal is not a statement about a fact; it is an expression of an ethical principle. It reflects a value, not an observation': Gleeson, above n 5, 62.

¹³¹ Fuller, above n 8, 209-10.

¹³² Neumann, above n 123, 26.

Ideally, the legal system should be able to solve the conflict and lay down a norm which can be fed back into the life of the community, in effect so as to be absorbed into the life-plans of social actors. General laws help to maintain this function by creating a minimum standard of transparency in legal language, a minimum of accessible rationality, which allows claims to be made and processed by the legal system. Any legal system which does not have a minimum transparency will prevent some types of people from having their normative claims decided or, alternatively, where the principle of equality is abandoned, the capacity of the legal system to listen to the normative claims of those considered as minorities or outsiders is removed altogether.

This concept is supported historically by E P Thompson's Marxist analysis of law in the 18th century. While Thompson's studies proved that law was the product of particular class interests, he still classified the rule of law as an 'unqualified human good' in the last ten pages of *Whigs and Hunters*, his study of the circumstances surrounding the *Black Acts*.¹³³ Thompson's assertion was that, when the rule of law notion was created, a side effect of its ideology was to actually enforce the criteria of 'equity' that it proclaimed. This logic of equity included the rule of law ideology, the civil liberties which developed in popular judicial institutions such as trial-by-jury, and the idea of the rights of 'free-born Englishmen'. While the original purpose behind the law may have been to further the production process and the rights of property holders, the promises of certainty, generality and equality began to take hold in popular consciousness. The normative force of the rule of law began to be counter-productive to hegemonising forces. Liberal promises were an 'essential precondition for the effectiveness of law' and they required that the law not only appear to be free of gross manipulation, but also, on occasion actually be just.¹³⁴

Thompson argued that the potential of rule of law ideology was not that it was purely a mask for class power, but that it was a mask that was made available to lower classes for the first time.¹³⁵ The side effect of the rule of law ideology forced those who proclaimed the law to give in to their own rhetoric or risk a collapse of legitimacy. The working classes were not stupid. They could recognise perversions of justice. A legal system which promised justice could not operate in total contradiction. Because law was formed within the ideology of the rule of law, that ideology 'could turn necessity to advantage' and the working class could use rule of law principles against unjust law.¹³⁶ The rule of law had the capacity to strike root 'in a soil, however shallow, of actuality'.¹³⁷ The rule of law is therefore a promise, one that may not necessarily be kept, but a promise nonetheless.

¹³³ Redhead, above n 67, 329.

¹³⁴ E P Thompson, *Whigs and Hunters* (1975) 263-4. See, generally for a review of Thompson work on the rule of law: Robert Fine, 'The Rule of Law and Muggletonian Marxism: The Perplexities of Edward Thompson' (1994) 21 *Journal of Law and Society* 193.

¹³⁵ Thompson, above n 134, 264.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

The effectiveness of any concept of the rule of law must then rest on its ability to work as a normative principle for the legal system itself. The legal system must justify itself according to its own rule of law ideology. As Dyzenhaus puts it, a 'culture of justification builds into the structure of legal order the normative constraints suggested by the argument having legal order at all'.¹³⁸ The law must be able to solve normative claims in ways that can satisfy the substantive requirements of justice, but it must retain a dimension of openness which is only possible via the normative force of general laws, applied equally and consistently. If people are raised to believe in the notion of the rule of law, they will hold the legal system up to scrutiny when it fails to act in accordance with it. The equality of the rule of law, to paraphrase Martha Minow, is essentially an 'equality of *attention*', a promise that complaints will be heard in accordance with rule of law values.¹³⁹

V RETAINING THE RULE OF LAW? WHICH ONE?

I have argued that the rule of law's inbuilt concept of reciprocity is what makes it worth keeping, even if one accepts the criticisms levelled at it that I have outlined above. But if the rule of law is to be retained, should the liberal form of state from which it originates also be retained or should the rule of law be restructured to deal with the changes in state forms?

There are three basic directions in state form that might be chosen:

A Return to Classical Liberal Forms of Government

The first is to retain a classical liberal position which attempts to return the state to its traditional minimalist, nightwatchman form. Chief protagonist of this view was Friedrich Hayek, who saw the way towards a free future in an idealised and romanticised version of the *laissez faire* past.¹⁴⁰ For Hayek the rule of law was the core of his idea of a spontaneously generating order, a society built on *nomos*, or the law of liberty. Judge-made *nomos* was built on custom according to neutral political principles. It maximised freedom of activity according to a set of basic politically neutral conditions which allowed individuals to coordinate their behaviour. This idea of law is *non-purposeful* because it is not a means to any strict end 'but merely a condition for the successful pursuit of most purposes'.¹⁴¹ The conclusion of Hayek's theory was that modern government should not aim to achieve any direct social goals, nor actively manage economies, but should instead concentrate on providing the basic structure within which society could generate itself.

¹³⁸ Dyzenhaus, above n 50, 42.

¹³⁹ Martha Minow, *Making All the Difference* (1990) 297 (emphasis in original).

¹⁴⁰ Primarily in three works: Friedrich Hayek, *The Road to Serfdom* (1956); Friedrich Hayek, *The Constitution of Liberty* (1960); Friedrich Hayek, *Law, Legislation and Liberty* (1993).

¹⁴¹ Hayek (1993) *ibid*, 113.

Hayek's theory has had enormous influence on conservative practices and policies of the Western states during the late 20th century, which implemented widespread winding back of the state. However, while his theories had an impact on the political posturing of conservative politics, a return to a system of *nomos* would not appear to be on the cards. Governments are still involved in every aspect of our lives, even though the justifications for that interference may have shifted from welfarism to managerialism.

B *Abandon General Laws in favour of Flexibility and Discretion*

A second approach may be to finally surrender the rule of law altogether and go with new state forms on the basis that formal and general law is no longer necessary. But this essay has argued against such an approach given that it necessarily involves the surrender of the principle of reciprocity. This can be best illustrated by the example of Nazi Germany, which, when faced with this decision, opted for abandoning formal law altogether. German jurists, led by Carl Schmitt, endorsed the wholesale demolition of *Rechtsstaat* models of general law in favour of a particularistic law which could equip decision makers with powers granted in vague terms (eg 'in good faith') so as to allow flexibility.¹⁴² Schmitt's anti-rule of law stance criticised any compromised liberal state:

Liberalism seeks to make the state into a compromise and the arrangements and concerns of the state into a 'safety valve'. This cannot be termed either a form of government or a theory of government, even though it usually refers to itself as a theory of the '*Rechtsstaat*'.¹⁴³

The Nazis were counselled by jurists like Schmitt to adopt discretionary legal forms because it would allow them to deal directly with the problems facing the volk. Of course the Nazi experience and the reaction against it shows us that the abandonment of rule of law principles altogether leads to disastrous consequences.¹⁴⁴

¹⁴² For a detailed analysis of the role of jurists in rationalising the Nazi attacks on the *Rechtsstaat* see A Kaufmann, 'National Socialism and German Jurisprudence from 1933 to 1945' (1988) 9 *Cardozo Law Review* 1629. See also William Scheuerman, *Between the Norm and the Exception, the Frankfurt School and the Rule of Law* (1994).

¹⁴³ Carl Schmitt, *Der Begriff des Politischen* (1927) quoted in Rune Slagstad, 'Liberal Constitutionalism and its Critics: Carl Schmitt and Max Weber' in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (1988) 111.

¹⁴⁴ For example, section 2 of the German Penal Code of 28 June 1935, 'One who performs an act which the statute declares to be punishable or which is deserving of punishment according to the healthy racial feeling shall be punished.' For numerous stomach-churning examples of the implementation of such laws see Richard Miller, *Nazi Justiz: Law of the Holocaust* (1995), especially Chapter 2, and Ingo Muller, *Hitler's Justice* (1991). Schmitt's words perfectly illustrate the Nazi approach to these types of laws: 'All vague concepts, all so-called omnibus clauses, are to be made absolute and unconditional in accordance with National Socialism ... The phrases "common decency", "good faith" the "sense of justice of all decent, just and fair-minded men", the "prevailing Weltanschauungen of the time and people", and many other phrases besides, are, without exception, to be applied and set forth in all case opinions in the spirit of National Socialism, guided by the clauses of National Socialist party doctrine': Carl

C A New Rule of Law for this Century – the Sozial Rechtsstaat

The third approach is the social democratic approach, best illustrated in the works of Franz Neumann.¹⁴⁵ This approach aims to continue with projects concerned with economic management and social equality but is one which also preserves guarantees of formal and general law – that is, a system of *Sozial Rechtsstaat*.

Foremost on the agenda should be the reconciliation of the welfare/managerial state with the demand for cogent, general laws. We need to recognise the necessity of the goal of social equality, but we also need to recognise that doing away with the minimal protection of the rule of law will not aid this project. As Scheuerman states,

[o]nly a state organised legal regulation of social life can generate the autonomy essential to modern democratic politics, but the state must restrain itself by organizing its many, and generally absolutely necessary, activities in such a way as not to counteract the very political and social autonomy it seeks to preserve and expand.¹⁴⁶

Vague and unarticulated administrative regulations may, on the surface, appear to offer a flexibility to the bureaucratic and administrative order, but in reality they often lead to incalculable and arbitrary patterns of behaviour, which bear little resemblance to the desired outcomes of social policy. What is therefore needed is a defensible concept of the rule of law which can ‘function to protect political and social independence while recognising the absolute necessity for extensive state action’.¹⁴⁷

This means overcoming the Hayekian obsession with the evils of the welfare state and recognising that social welfare and management can also function effectively under the rule of law. Lowi has shown how a deformed body of welfare state law resulted not in achievement of improvements of social conditions but created parcelised conclaves of power, with the effect of paralysing democratic decision-making.¹⁴⁸ KC Davis’s work also went a long way towards arguing for greater structure and predictability in administration, even whilst recognising the necessity of some forms of discretion.¹⁴⁹

Furthermore, the new rights that arise under welfare law should be considered

Schmitt, ‘Nationalsozialismus und Rechtsstaat’ (1934) 63 *Juristische Wochenschrift* 714, translated and quoted by Kaufmann, above n 142, 1645.

¹⁴⁵ Neumann, above n 25; Neumann, above n 124; Franz Neumann, *Behemoth: The Structure and Practice of National Socialism 1933-1944* (1942); William Scheuerman (ed), *The Rule of Law Under Siege, Selected Essays of Franz L Neumann and Otto Kirchheimer* (1996).

¹⁴⁶ Scheuerman, above n 142, 54.

¹⁴⁷ *Ibid.*

¹⁴⁸ Theodore Lowi, ‘The Welfare State, the New Regulation and the Rule of Law’ in Allan Hutchison and Patrick Monahan (eds), *The Rule of Law, Ideal or Ideology* (1987) 17.

¹⁴⁹ Kenneth Davis, *Discretionary Justice: A Preliminary Inquiry* (1969), especially Ch II.

not as privileges to be dispensed of unequally or by arbitrary fiat of government officials but as substantial rights in the assertion of which the claimant is entitled to an effective remedy, a fair procedure, and a reasonable decision. Anything short of this leaves one man subject ... to the arbitrary will of another man who happens to partake of public power: and that kind of unequal and demeaning encounter is repugnant to every sense of the rule of law.¹⁵⁰

If the task of the managerial state is to exercise its power to relieve social inequality, then it will be the task of the rule of law 'to see to it that the multiple and diverse encounters are as fair, as just, and as free from arbitrariness as are the familiar encounters of the right-asserting private citizens with the judicial officers of the traditional law'.¹⁵¹

To some extent we can see this already in the ways that the numerous, non-judicial bodies have openly adopted rule of law principles in their operations, primarily through administrative law principles:

The bodies established in recent years to hear complaints of unfair dismissal or of racial and other discrimination may have been established, as courts originally were, by legislative-administrative action and they may have been denied the title and status of courts. Nevertheless, in the English-speaking world, these panels, commissions, tribunals, dealing with complaints that an individual has been dealt with unjustly, are not simply or always bureaucratic-administrative bodies: they do consciously apply and seek to apply principles of *Gesellschaft* law oriented toward protecting the rights of the individuals before them.¹⁵²

Second on the agenda should be a re-examination of the role of rationality in law and its importance for the rule of law and our understanding of the state. This should arguably include a re-evaluation of the role of natural law in our understandings of democracy and legal obligation, for it was from natural law that we gained the original requirements of rationality in law. Furthermore if natural law is the result of 'the tension between formal law and substantive justice'¹⁵³ then in current times it would seem to have a new currency.

Finally we need a method of overcoming the traditional antipathy between equality and democracy, on the one hand, and freedom and the rule of law, on the other. The problem with which this article has been concerned is the continual conflict between liberalism and democracy, embodied in a private conception of rights and the identification of democracy with legitimised state coercion. '[W]e are told that we must choose *political freedom* (the rule of law) or *equality* (the welfare state).'¹⁵⁴

¹⁵⁰ H W Jones, 'The Rule of Law and the Welfare State' (1958) 58 *Columbia Law Review* 143.

¹⁵¹ Ibid 156.

¹⁵² Eugene Kamenka and Alice Tay, "'Transforming" the law, "steering" society' in Kamenka and Tay (eds), above n 128.

¹⁵³ Weber, quoted in Hunt, above n 109, 112.

¹⁵⁴ William Scheuerman, 'The Rule of Law and the Welfare State: Towards a New Synthesis' (1994) 22 *Politics and Society* 195, 200.

Such a juxtaposition is undoubtedly the product of the historical origins of the rule of law, that being, its identification as the child of the liberal bourgeoisie, and it is illustrated most clearly in the separation of the rule of law and parliamentary sovereignty.

VI CONCLUSION: CLAP FOR TINK

This essay has looked at the liberal origins of the rule of law and the critiques of that concept. It has argued that there remains something worthwhile in the rule of law, something worth preserving. Like Tinkerbell, the rule of law does not exist now. It is the product of the legal imagination. If we do not believe in the rule of law, it is certain to never exist. However, I have argued that we should try to believe in it because like Tinkerbell, if we believe enough it might become real.

What is needed in current thinking is a bridge over the divide between the rule of law (the recognition of basic legal processes) and democracy (rational political decision-making). Rights only make sense in the context of a community awareness of them. Any theory that understands rights outside the context of the community that gives them life will be blind to the meaning that those rights have and to implementing them in ways that can be effectively integrated into the everyday lives of people. The notion of democracy assumes the potential for the creation of consensus. However, conceptually prior to that is the notion of respect for difference. Any theory that assumes that democratic politics rests on the notion of friend/foe and of social homogeneity, without a respect for difference at its core, must devolve into totalitarianism. These are our choices: an individualistic life without community; a democracy without individual safety; or a modern state, founded on respect for difference but fashioned in accordance with a consensus that is based on rationality. The third way will only be possible if we can create a public law which brings together the hitherto conflicting notions of liberalism and democracy. Understanding the rule of law as a normative concept is an essential step in that process.